



**Republic v Ndala & another (Criminal Case 3 of 2020)
[2025] KEHC 3541 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 3 OF 2020
AC MRIMA, J
MARCH 24, 2025**

BETWEEN

REPUBLIC STATE

AND

RICHARD WAFULA NDALA 1ST ACCUSED

ALFRED WEKESA WAFULA 2ND ACCUSED

JUDGMENT

Introduction:

1. Richard Wafula Ndala and Fred Wekesa Wafula, the 1st and 2nd Accused herein were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the 9th day of January 2020 at Sango A village within Kiminini Sub-county in Trans-Nzoia County jointly murdered Erick Juma Wanyonyi [hereinafter referred to as ‘the deceased’].
2. The accused pleaded not guilty and were tried, hence, this judgment.

The Prosecution’s case:

3. The prosecution called 4 witnesses in a bid to prove its case. Their evidence was taken by Hon. Kimaru, J (as he then was) and the accused were found to have a case to answer. The defence case was taken before yours truly.
4. Joseph Wanyonyi was PW1. It was his evidence that the deceased was his son. On 9th January 2020 at around 8.00pm, the deceased went to his home but did not come back. The following morning, he got a call from the deceased’s wife at about 4.00pm that the deceased was in a certain house, had taken alcohol and had fought with some people. PW1 stated that the deceased’s mother, Beatrice Chemutai and the deceased’s sister, Mercy, went to look for the deceased. They found the accused but not the



deceased. He stated that the owner of the house, one Stephen, said that the deceased was okay. They went to the house of the deceased but did not find him. His house was locked. PW1 further stated that on their way back from the deceased's house, they found Fred, the 2nd accused herein. He was wearing the deceased's jacket. The deceased's mother and sister then went to the 2nd accused's house to find out if the deceased was there at around 9pm and the 2nd accused advised them to rest for the night and continue with the search the following day.

5. On the following day, PW1 saw the 2nd accused and accompanied him to Stephen's home. He was informed the deceased left his gumboots and two mobile phones and a jacket. The 2nd accused further said that he saw the deceased throw down his jacket and that he picked it up. PW1 also learnt that the deceased had fought with Richard, the 1st accused herein, outside the house and then went back in to drink. Stephen further informed him that the 1st accused was the last person who left with the deceased. PW1 then decided to look for the 1st accused and found him. The 1st accused showed PW1 where he last left the deceased. The 1st accused told PW1 that he waited for him to emerge from the bush but he did not. He then left.
6. It was PW1's evidence that her daughter, Mary Naliaka, who lives in Nairobi arrived. She reported the incident to Kiminini Police Station. The Police arrested the 1st accused and asked him to show them where the deceased was. He stated further that they went to Stephen's house and recorded statements. PW1 further testified that when he arrived home, he was called by one Cero who informed him that the deceased had been found but was not well. Shortly, the people searching for him in the bush started screaming. He went there and saw him. He was dead, lying on his stomach. He noted that there was no sign of struggle at the scene. The police then arrived at the scene and commenced investigations whereafter the accused were arrested and subsequently charged.
7. PW1 further testified that the police took away the deceased's body and he was invited to identify it during the postmortem exercise. PW1 realized that the deceased's neck was broken. PW1 also identified some deceased's property namely two phones, new gumboots and a red jacket.
8. On being cross-examined, PW1 stated that on 9th January 2020, the deceased left his home at 8.00PM and not at 10.00pm. He admitted that the deceased used to drink chang'aa. It was his case that when the deceased called him that night, he had reached home. However, the deceased's wife called him the following day at about 4pm stating that the deceased had not reached home and that he tried to call him in vain. He affirmed that he was informed by Stephen that the deceased fought with the 1st accused over money and that it was the 1st accused who showed him where he parted ways with the deceased. It was near a bush where he had gone to answer a call of nature.
9. Pius Wafula testified as PW2. It was his evidence that he is a casual labourer and that he knew the deceased as a friend and an in-law. He also knew both the accused as a mason and a labourer respectively. He stated that on 8th January 2020, he was supposed to go to work with the 1st accused, but the 1st accused informed him that there was no work on that day as he had taken his child to school. PW2 later found the deceased drinking in the house of Musa. They had their drinks together, but the deceased complained that he was hungry. He was advised to buy food at the centre, but continued to drink. PW2 testified that when the 1st accused came in at the drinking place, the deceased was excited to see him and they continued drinking. The deceased and the 1st accused then left to look for food. PW2 later went to Stephen's place to drink and after a short while, the deceased and 1st accused came to Stephen's house. They had quarreled on whether they should go and eat first or return to the drinking den. The deceased prevailed and they continued drinking.



10. It was PW1's further testimony that after a while, he realized that he was getting drunk and decided to take a motorbike home. The following day, he went to work with the 1st accused and that is when the deceased's father, PW1, came to ask them the whereabouts of the deceased. They looked for him for the whole day and finally they were informed that he was found in the farm belonging to Eugene Wamalwa. On visiting the place, they found the deceased in the bush lying on his stomach. He had removed his trousers and had not pulled it up. He had bruises caused by the bushes and there was no sign of struggle.
11. On cross-examination, PW2 stated that the accused were his brothers. He also confirmed that the deceased left with the 1st accused and denied that the two fought. He stated that the two just teased each other in a drunken fashion and not more. He also posited that the two left at around 6.00pm while very drunk. The deceased could not walk steadily. On the following day, when PW1 came to see PW2 over the whereabouts of the deceased, PW2 stated that he accompanied PW1 and the 1st accused to look for the deceased. They later found the deceased where he had relieved himself and had fallen down. He stated that the injuries he saw were the ones one could sustain if they walked through the bush.
12. Alex Barasa was PW3. He was a Senior Medical Officer at Mount Elgon County Hospital, having graduated in Bachelor of Medicine and Surgery (MBChB). He conducted the post mortem over the deceased's body. He noted that the deceased's neck was floppy, had cyanosed nails and multiple bruises on the face, neck, upper limbs, posterior right knee, dislocated left hip and supra pubic region. The deceased also had haemo-peritorium with ruptured spleen, a fractured odontoid process of the axis (spinal column) with injured cervical spinal. He concluded that the cause of death was spinal injury by blunt object secondary to assault. He produced the Post-Mortem Report as an exhibit.
13. On cross- examination, PW3 stated that the bruises which were all over the body could have been caused by someone walking into a bush. He admitted that any cause of injury could lead to dislocation. He stated that he was not able to know if the deceased was drunk since the bowel was empty and there was no evidence of alcohol. He also stated that the spinal injury could be from a fall and a blunt object. He classified the spinal injury as the primary cause of death.
14. No. 260048, PC Douglas Nyaura was PW4. He was the investigating officer. It was his evidence that on 10th January 2020, there was reported on the OB of a missing person and that the matter was marked to him for investigations. On commencing investigations, he interrogated several witnesses and also went to the last place where the deceased was seen, that was at the Burundi Farm. He established that the deceased had drunk illicit alcohol the whole day starting from Moses's house at 8.00am then to Stephen's house where he drunk with 1st and 2nd accused till into the night.
15. PW4 also stated that he learnt that at about 11pm, there was a fight between the 1st accused and the deceased over a Kshs. 200/- debt. He stated that the fight took place outside the house and that when they stopped fighting, they were joined by Stephen and his wife. Stephen searched the 1st accused pockets and did not find the money, consequently they went back into the house. It was PW4's further testimony that at 2am the deceased claimed he was going home and the wife to Stephen kept his phone and gumboots. The deceased then left with the two accused and after sometime, the 1st accused went back.
16. According to PW4, the deceased's body was discovered at about 7pm and that he concluded that the two people to be last seen with the deceased were the accused herein. He produced the deceased's Jacket, gumboots and two phones as exhibits. On cross-examination, it was his case that he was not at the scene when the body of the deceased was recovered since he took over the case when the body had already been recovered.



17. It was his position that he was unable to tell if the accused assaulted the deceased.
18. It was on the basis of the above evidence that the accused were found to have a case to answer.

The Defence:

19. Both the accused gave unsworn evidence and call no witnesses. The 1st accused stated that he was a mason and that on 9th January 2020, he left home for a drinking spree where met his friend and in-law, the deceased herein. The deceased was already drunk at 10am and that they continued drinking up to about 3pm when he left with the deceased to look for food. The deceased, the 1st accused claimed, was so drunk that he rested under a tree where he left him there and walked home. The following morning, the 1st accused went to work and was later called by his father-in-law that he wanted to see him. He met with him and he was asked about the whereabouts of the deceased. He explained what had happened the day before. His father-in-law informed him that the deceased did not return home. He stated that they started looking for the deceased and made the first stop where they had drinks the previous night. They were informed that the deceased had returned to the place after they left and continued drinking.
20. It was his evidence that they searched all areas that the deceased would drink in vain. They decided to report the case but just before they did that, they received information that the deceased had been found. He went there where her found him dead.
21. The 2nd accused stated that he was a casual labourer. That on 9th January 2020, he finished work at midday and as he headed home, he met his in-law, the deceased herein who was drunk. He went his way to drink alcohol. At about 1pm, the deceased went to the place he was. The deceased asked for water. As the deceased drunk the water, the 2nd accused stated that he was sent to fetch water using a jerrycan by the household owner. He obliged. Upon returning, the deceased was not there. He continued drinking and at about 6pm, the deceased's mother came inquiring about him. He was requested to find out if the deceased was in his house, but he was not in.
22. He testified that he was asked to go and sleep but to go look for the deceased the following morning. He did so, but could not find him. It is then that they organized a big search party and at around 4pm, they found him dead.
23. The accused closed their respective cases.

The Submissions:

24. The Prosecution filed written submissions dated 12th July 2022. It was its case that the fact of death was proved and that the cause of death was firmly proved by the medical doctor. On the question as to whether the accused caused the deceased's death, it was submitted that PW1's evidence was to the effect that the deceased was in a chang'aa den and was informed by the deceased's wife that he had been beaten. The prosecution implored the Court to base its finding on the fact that the 1st accused was the last person to be seen with the deceased and had been quarrelling over money.
25. Regarding the 2nd accused, the prosecution pegged his guilt on circumstantial evidence. It was its case that he was found with the accused's items including keys and jacket and as such had to explain how he came into such possession. The decision in Ahmad Abolfathi Mohammed & Another -vs- Republic was referred to where the Court observed that the guilt of an accused can either be proved by direct or circumstantial evidence. It was submitted that the entire case majorly rests of circumstantial evidence and that the threshold was met to secure a conviction.



26. As regards the ingredient of malice aforethought, it was submitted that the case of Tubere -vs- Republic (1945) would suffice where the principles upon which a Court can draw an inference were discussed. To that end, it was submitted that the use of a blunt object on the spine was indicative of mens-rea.
27. The prosecution further stated that the accused persons had common intention of murdering the deceased. The case of MCA Uheffe & MCU life (1995) 183 CLR 108 was relied upon to buttress the claim that the accused persons acted in common criminal enterprise.
28. The accused filed their joint written submissions dated 20th June 2024 where they submitted that there was no direct witness who saw the incident of assault that allegedly caused the death of the deceased.
29. They argued that the ingredients of murder as highlighted by the Court in Criminal Appeal No. 27 of 2010, Republic -vs- Albert Tirima were not established. To that end, it was their case that there were no direct witnesses, that there was failure to avail crucial witnesses who were mentioned by PW1 and that the evidence of the medical doctor revealed that the death could have been caused by a fall. It was their case that the doctor's finding that there was not alcohol despite the deceased having drunk the whole day was an indication of inconclusive post-mortem.
30. Finally, it was their submission, as was observed in the case of Joseph Kimani Njau -vs- Republic (2014) eKLR, that the elements of mens rea and actus reus were not established to the required standard.

Analysis:

31. Having elaborately reproduced the parties' respective cases and submissions, the only issue for determination is whether the Prosecution proved the charge of the offence of Murder to the required standard.
32. The offence and punishment of Murder is created by Section 203 as read with section 204 of the [Penal Code](#) in the following manner; -
 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person convicted of murder shall be sentenced to death.
33. In Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari -vs- Republic [2014] eKLR, the Court of Appeal established the elements that, if proved, constitute the offence of murder. It enumerated them as follows: -
 - (a) the death of the deceased and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
34. This Court will, hence, interrogate each of the elements in turn.

The Death and its Cause:

35. From the evidence of both the prosecution and the defence, the fact of death is not in contest. PW1 testified that after extensively searching for the deceased, he was eventually found dead in a bush. PW2's evidence was also direct evidence on the fact of death. He visited the scene and saw deceased lying dead on his stomach.



36. The Post-Mortem report was also a further conclusive proof of death. It also gave the cause of death as spinal injury by blunt object secondary to assault. Since there was no objection to the cause of death, this Court, therefore, finds that the death and its cause were proved.

Who Caused the Death?

37. As was correctly observed by the prosecution in their submissions, the whole case rested on circumstantial evidence since no single witness saw the commission of the act that caused the deceased's death. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
- (ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

38. The foregone principles were set out in the locus classicus case of R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.

39. The Court of Appeal in Musii Tulo (supra) in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -
'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

40. Further, the Court of Appeal in Sawe- Vs- Republic [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

.... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....



41. Returning to the case at hand, two notable things come to the fore. First, important witnesses were not called to testify and no reasons were given for such. They included Stephen, the owner of the drinking den where the deceased and the 1st accused were alleged to have fought. Therefore, the fight was not cogently and firmly established. Second, having failed to prove any fight, whereas PW3's conclusion as to the cause of death was spine injury from a blunt object secondary to assault, he further clarified that the injury could also be caused by a fall or a blunt object and that the injuries on the body of the deceased could have been caused by one going through a bush. Notably, the deceased was found lying in a bush. The injuries could not, therefore, be attributed to the those whom the deceased drunk with.
42. The accused gave their defenses. Although they were unsworn, they were to large extent corroborated by PW1 and PW2 in settling that the circumstances, as presented, were not clear as to how the deceased met his death. Further, the contention that the 1st accused was the last person to be seen with the deceased was, as well, not proved.
43. With the foregoing, this Court is convinced that the circumstances of the case are do not unerringly point towards guilt of any of the accused. It is not definite if there was a fight, it is not clear what time the deceased left the drinking den and most importantly, it cannot be said that the injuries on the deceased were sustained at the drinking den. In addition, it cannot be wished away the fact that the deceased was drunk as at the time he left the drinking den and that he had not eaten the whole day. He even complained of hunger, but nevertheless continued drinking. Being physically weak, the deceased would easily suffer an injury like dislocation if he fell.
44. This Court is not, hence, persuaded that the prevailing circumstances in this matter taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
45. This is a case where the accused were charged on the basis of suspicion. However, as was held by the Court of Appeal in *Sawe –vs- Rep* [2003] KLR 364: -
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
46. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -
- ... suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.
47. A similar view was expressed by the Tanzania Court of Appeal in *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -
- Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.
48. Therefore, whereas there may be some suspicion that any of the accused may have been involved in the death of the accused, that suspicion alone, however, strong cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.
49. The prosecution, therefore, failed to prove that the accused were responsible for the death of the deceased in any way whatsoever.



Disposition:

50. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
51. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused are found not guilty of the murder of the deceased.
52. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the [Criminal Procedure Code](#). They are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 24th day of March, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

No appearance for Mr. Wabwile, Learned Counsel for the Accused.

Miss. Rop, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

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