



REPUBLIC OF KENYA



**Republic v Wesonga (Criminal Case E016 of 2023)  
[2025] KEHC 4290 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E016 OF 2023  
WM MUSYOKA, J  
APRIL 4, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MOSES WAFULA WESONGA ..... ACCUSED**

**JUDGMENT**

1. The accused, Moses Wafula Wesonga, faces a murder charge. It is alleged that, on 19<sup>th</sup> January 2023, at Bugengi Sub-Location, Bukhayo West Location, Matayos Sub-County, within Busia County, he murdered Richard Wabwire Ochieng, contrary to section 203, as read with section 204, of the [Penal Code](#), Cap 63, Laws of Kenya. He denied the charges. A trial ensued. 7 witnesses testified.
2. PW1, Wilfroda Ajambo Sidialo, was the wife of the deceased. The deceased came home on the material day, at 7.00 PM, they had a disagreement, and he began to beat her, and she rushed out of the house, for her own safety. PW2, Geoffrey Ochieng Okumu, was a brother of the deceased. While at a nearby shopping centre, he heard screams from the house of Florence, their aunt, and found the deceased being assaulted there. He identified the accused, a son of Florence, as the assailant. He removed the deceased from the house of Florence to his own house.
3. PW3, Peter Ochieng, was another brother of the deceased. By the time he got home, at 9.00 PM, he found that the deceased had been assaulted. The deceased told him that he had been beaten by the accused, who was their cousin. He complained of pains to his head and ribs. He said that the accused had informed him that he had had a quarrel with his wife, PW1, who fled to the house of the accused and his mother Florence, and that he, the accused, had followed her there. PW4, Africanus Pamba Oduto, was another brother of the deceased. He was in Nairobi when it happened, was telephoned and rushed home, and found the deceased had passed on. He participated in the arrest of the accused.



4. PW5, No. 113008 Police Constable Eunice Namatsi, was the investigating officer. PW6, No. 258643, Police Constable Dickson Nzuki, was the arresting officer. PW7, Dr. Dancan Nabuya, was the medical officer who performed autopsy on the body of the deceased and produced the post-mortem report. He noted a subdural haematoma on the left temporal region of the head, with haemorrhage into the brain, and opined that that was what caused the death, because of a severe head injury from a blunt force trauma. He stated that the deceased had no prior medical condition.
5. I put the accused on his defence, on 31<sup>st</sup> May 2024. He testified on oath, on 1<sup>st</sup> July 2024, and called 4 witnesses.
6. The accused testified as DW1. He denied killing the deceased. He testified that the deceased had been taken to hospital by the time that he, the accused, got home at 8.00 PM. He stated that he had information that he had been taken to hospital in the morning. He said that he had been at the market playing pool before 8.00 PM. He claimed that the deceased was HIV positive, and had been sickly for a while. He claimed that the deceased had injuries, but they had been sustained at work. He said that the case was a frame-up over a land dispute.
7. DW2, George Wesonga Maduli, was a brother of the accused person, and a cousin of the deceased. He testified that he was among the persons who removed the deceased on the morning of 19<sup>th</sup> January 2023, and took him to Busia County Referral Hospital, and he was admitted. He further testified that he saw the accused at home later that evening at 10.00 PM. He asserted that the deceased could not have left the hospital, where he was admitted, to engage in a fight with the accused. He explained that there were land and work disputes between the accused and the family of the deceased.
8. DW3, Eric Taabu Kitari, was a taxi driver. He testified that he took the deceased to hospital by his taxi on 19<sup>th</sup> January 2023. DW4, Linus Barasa Andrea, and DW5, James Wafula Wandera, were cousins of both the accused and the deceased. They testified that they were playing pool with the accused person, at the time he was alleged to have been assaulting the deceased. DW5 testified further that the deceased had told him that he fell at work and was injured.
9. DW6, Risper Ajambo, was the mother of the accused. She testified that she was aware that the deceased was unwell and was taken to hospital on 19<sup>th</sup> January 2023. She asserted that there was no fight between the accused and the deceased, on the evening of 19<sup>th</sup> January 2023, as alleged. DW7, David Adungosi Opakasi, was a co-worker with the deceased. He testified that the deceased had been sickly, and was on and off work since September 2022, suffering from tuberculosis. He stated that he was informed that he had died in January 2023.
10. After DW7 testified, the Advocate for the accused person, Mr. Omeri, applied for an order to get the medical file for the deceased, from the Busia County Referral Hospital, on grounds that he had been seeking to access those records to no avail. He also sought for an order to have the Medical Superintendent, in charge of that hospital, summoned to show cause why the file could not be availed. That order was made on 8<sup>th</sup> October 2024.
11. There was no compliance with the order, and a warrant of arrest had to be issued, on 17<sup>th</sup> October 2024. The Medical Superintendent was escorted to court on 5<sup>th</sup> December 2024. He did not have the medical file or records for the deceased, and an order was made to have him avail them, on 3<sup>rd</sup> February 2025. Come 3<sup>rd</sup> February 2025, the medical file or records were not availed. Mr. Omeri instead presented a medical report by a Dr. JEK Ogara, who he did not avail to testify. He said that the medical report was self-explanatory, suggesting that the idea of presenting the medical file or records had been dropped. That medical report was placed on record, with the concurrence of Mr. Onanda, for the Republic. Mr. Omeri thereafter closed the case for the defence.



12. Neither party submitted orally, nor filed written submissions.
13. The elements, for the offence of murder, are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the death with malice aforethought.
14. On the death, there is ample proof that the deceased died. His brothers, PW3 and PW4, testified to his death. Post-mortem was conducted on his body by PW7, in the presence of PW5.
15. On the cause of death, the medical officer of health, PW7, testified that the deceased had bleeding into his brain, caused by a severe injury to his head, which had been caused by a blunt force trauma to the head. The defence presented the medical report, dated 11<sup>th</sup> December 2024, by Dr. Ogara, which indicates that the deceased, who had HIV/AIDS and TB, had been admitted on 20<sup>th</sup> January 2023, and diagnosed with meningitis, and he died the following day of aspiration pneumonia. The defence witnesses also testified that the injuries that the medical officer had noted at post-mortem had been inflicted at work.
16. So, what was the cause of death? Was it the head injury, as opined by PW7, or was it the pneumonia, according to the medical report by Dr. Ogara?
17. PW7, the medical officer who had conducted the post-mortem attended court, and testified on what he saw, by way of injuries on the body, both superficially and after he opened the skull, and on the opinion that he formed thereafter. He also produced the post-mortem report that he prepared on his findings and conclusions. He was cross-examined by the Advocate for the accused person. He owned his report and defended it at the cross-examination.
18. Dr. Ogara did not testify. The accused person did not avail him, on 3<sup>rd</sup> February 2025, when the defence was due to provide medical records on the treatment at the Busia County Referral Hospital. No explanation was given for the unavailability of Dr. Ogara on the due date. The Advocate for the defence merely said that “a doctor was to attend court to produce medical report dated 11/12/24.” He did not inform the court that the doctor was not available or would not be attending court, instead he said that the medical report was self-explanatory, and could be adopted without calling the maker, which suggestion was embraced by the Republic. The maker of that medical report did not, therefore, bespeak the contents of the report. He did not own it. He was not tested on its veracity and credibility, by way of cross-examination. Indeed, it was not established, because of Dr. Ogara not being availed to testify on his report, whether he, Dr. Ogara, existed, and whether his alleged report was not a false creation.
19. I find it surprising, that the Advocate for the defence, in criminal proceedings, where his client faces a murder charge, would shy away from availing a doctor who has prepared a report that he wishes to place on record, to contradict a post-mortem report that was properly presented in court by its maker, who then subjected himself to cross-examination, would opt to have the medical report placed on record without calling the maker. The very idea that such a critical document can be placed on record by consent, and its maker excused from the witness stand, is alien to criminal practice, where the standard of proof is very high. The oral testimony of the medical officer who conducted the post-mortem, on the cause of death, can only be challenged by contrary evidence by another doctor being presented in court, by the defence, to testify orally on a contrary cause of death.
20. The failure to present the maker of the report, dated 11<sup>th</sup> December 2024, completely robbed it of any probative value. It would have been critical to have Dr. Ogara availed. So that he could own his purported report, and so that his credibility as a witness, and the authenticity of his report, could be tested through cross-examination. The failure to avail him was fatal. The medical report, dated 11<sup>th</sup>



December 2024, is, as a result, a useless piece of paper. It is a very lazy approach to criminal litigation, for Advocates to assume that they can dispense with witnesses appearing, by merely agreeing to have documents presented in court without calling their makers. Such a practice is a wasted effort, and an abuse of criminal procedure.

21. In any event, when the issue of presenting counter medical evidence, on the cause of death, arose, on 1<sup>st</sup> July 2024, it was about medical records being produced, and not a medical report. Medical treatment notes are not as easy to fabricate as a medical report would be. It is not clear, as to at what point the defence moved from having the medical records being produced, to a medical report being placed on record in lieu.
22. The other consideration, of course, is that the issue that the deceased died of another cause, apart from that opined by PW7, was an afterthought, that was sprang up at the defence hearing.
23. When the prosecution witnesses testified, the defence did not at all cross-examine them on whether the deceased person was labouring under HIV/AIDS and TB, and whether he was under medication for those ailments and conditions. Those questions were not put to his wife, PW1, nor to his brothers, PW2, PW3 and PW4. The questions would have been particularly relevant when PW7 testified. He testified on cause of death, and the defence, which emerged at the defence hearing, was that the deceased died of other causes. No questions were posed on PW7, by the defence, on whether he established that the deceased had any signs or symptoms of HIV/AIDS, TB, meningitis or pneumonia. An issue on prior condition was raised by the Republic, and PW7 testified that he did not detect any. Neither was PW7 confronted with the medical report by Dr. Ogara, which had findings or conclusions on a cause of death that were contrary to his.
24. The material, brought up at the defence hearing, should have been raised during presentation of the prosecution case. The fact that they were not would mean that they were an afterthought.
25. The conclusion that I would make, in the circumstances, is that the cause of death is as found by PW7, and not what is contained in the report by Dr. Ogara.
26. On the role of the accused in the causation, the Republic presented evidence which pointed to involvement of the accused in the causation of the death. PW2 testified that he witnessed the accused assaulting the deceased at the house of his mother, Florence. He testified that he saw the deceased being hit on the head and abdomen with what looked like a metallic pipe. PW2 went on to say that it was him who removed the deceased, from the house where at he was being assaulted, and he took him back to his house. PW3 did not witness the assault, but he spoke to the deceased shortly thereafter, after the deceased had sent his own son to call PW3, and the deceased informed him that it was the accused who had assaulted him.
27. The accused, in his defence distanced himself from the incident. He testified that at the time and hour when the deceased was alleged to have been assaulted, he was shooting pool at the local trading centre, and he went home after the time of the alleged assault. DW3 and DW4 testified that they were indeed with the accused at the centre playing pool at the time he was said to have killed the deceased.
28. Which of these 2 versions should I believe?
29. The defence, no doubt, presented what was an alibi defence. However, an alibi defence ought to be presented earlier, by way of the defence notifying the prosecution of the nature of the said defence, to afford a chance to the prosecution to present rebuttal evidence. It is not something that should be sprung at the prosecution after the accused is put on his defence.



30. Secondly, DW4 and DW5, who alleged to have been shooting pool with the accused at the trading centre, were with the accused only at the centre. They did not testify that they went with him up to his home, to vouch for the fact that he did nothing connected with what he is charged with. They did not account for what the accused did after they parted with him at the place where they were playing pool.
31. Thirdly, the defence placed on record a document, the medical report, dated 11<sup>th</sup> December 2024, which indicated that the deceased was admitted at the Busia County Referral Hospital on 20<sup>th</sup> January 2023. Yet, DW2 claimed to have been among the persons who moved the deceased to that hospital on 19<sup>th</sup> January 2023. He asserted that the deceased was at the hospital on 19<sup>th</sup> January 2023. DW1 testified that he assisted in that exercise. DW3 was the taxi driver who allegedly transported the deceased to hospital, on 19<sup>th</sup> January 2023. DW4 also claimed that the deceased was admitted in hospital on 19<sup>th</sup> January 2023, after falling ill on 18<sup>th</sup> January 2023. The testimonies of DW1, DW2, DW3 and DW4 were all at variance with the medical report by Dr. Ogara, on the date the deceased was admitted in hospital.
32. There was evidence which placed the accused at the same place with the deceased, and the injuries noted by PW7 were consistent with the places that PW2 said he saw the accused hit the deceased at with that metallic pipe-like object.
33. The last consideration should be whether the accused caused that death with malice aforethought.
34. What constitutes malice aforethought is defined in section 206 of the *Penal Code*. One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. These four would suffice for the purposes of this discussion.
35. The question then is, were the injuries inflicted on the deceased herein so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were the injuries caused recklessly and indifferently, or was the intention to commit some sort of felony?
36. The killer blow was the injury to the head, which led to the bleeding into the brain. There is ample case law that an injury caused to any part of the body, which houses a vital organ, such as the brain, would be deemed, should it cause death, to have been so inflicted with the intention of causing death. See Republic vs. David Mweha Waweru [2015] KEHC 2190 (KLR) (Lesiit, J), Republic vs. Ambrose Katharu M'Itubiri alias M'Muraga, Seberio Kobia Munoru alias Zeberio Mugambi Kabuseria & Dominic Muchiru Munoru alias Kobia Munoru [2019] KEHC 10401 (KLR) (Ong'injo, J) and Republic vs. Wainaina [2022] KEHC 12672 (KLR) (Kimondo, J).
37. The injury in this case was to the head, which houses the brain, a vital body organ which controls and coordinates the rest of the body. A blow, to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury. I am persuaded that the death was caused with malice aforethought.
38. In the end, it is my finding and holding that the offence of murder has been sufficiently proved, against the accused person herein, and I do hereby find him guilty, and convict him, under section 322 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of Richard Wabwire Ochieng, contrary to section 203, as read with section 204, of the *Penal Code*.
39. For the purpose of sentencing, I do hereby direct the Busia County Director of Probation and Aftercare Services, to evaluate the circumstances of the accused, and thereafter prepare and file a pre-



sentence report, within 14 days. A sentencing hearing, where the accused shall have a right to make a statement in mitigation, shall be conducted thereafter.

40. It is so ordered.

**DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA ON THIS 4<sup>TH</sup> DAY OF APRIL 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Omeri, Advocate for the accused person.

