



**Republic v Wambua & another (Criminal Case 10 of 2017)
[2024] KEHC 38 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 38 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 10 OF 2017
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

FREDRICK WAMBUA 1ST ACCUSED

ELIJAH MUTUNGA 2ND ACCUSED

JUDGMENT

1. The two accused persons herein stand charged with two counts of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of count I are that on the night of 12th/13th March 2017 at Salama village, Mutitu Location Mbooni West Sub County within Makueni County murdered Mumo Maingi.
3. The particulars of count II on the other hand are that on the same day and place murdered Joseph Musyoka Ntheketha.
4. They have denied both charges, and to prove their case, the prosecution has called seven (7) witnesses.
5. PW1 Charles Musyoka Musembi testified that on 12th March 2017 at 6 pm he went to Nector Pub Mukatini, with many others and they drank until 8 pm or 9 pm when there was a fight between Kamomo and another young man whose name he did not know before, but whom he identified in court as the 1st accused.
6. According to him, when 1st accused was escorted by waiters outside the club, he threw two stones into the club and the second stone hit Kamomo at the back of his head and Kamomo was injured and started bleeding, and the assailant ran away.



7. The witness however remained at the club until 11 pm when it was closed and he left the club with Mwenje and Chege.
8. According to this witness, about 250metres from the club, attackers started beating the three companions from behind saying

“I will revenge.”

The three then ran away, and the witness diverted way from the other two companions – Chege and Mwenje. Though he heard foot sounds of people following him, that ceased after a short distance.
9. He testified that he proceeded home and slept and the next day between 7a.m and 8a.m police officers went to his home with a waiter from the club called Maxwell and arrested him and interrogated him about his whereabouts the previous night. He was then taken to the police station where he was informed that Chege and Mwenje had been murdered.
10. At the station, the two accused persons herein were also brought. He was released after recording a statement with the police.
11. In cross-examination, he stated that he took three cups of Senator liquor at the club. He also stated that 1st accused picked stones 4 meters to 5meters away from the club.
12. PW2 Muli Mutinda testified that on 12th March 2017 at 5 pm he came from work and proceeded home and then to Nector Club where Wambua (1st accused) hit him with a stone and injured him. He did not see the 2nd accused that night.
13. It was his evidence that on being hit with a stone, he ran home. That though he knew Chege and Mwenje, he did not know when the deceased died.
14. PW3 James Musau Muli testified that he was a retired military officer and that on 12th March 2017 at 5:30 pm he went to Nector bar and was there until 10:00 pm, and that while at the bar a young man (PW2) was hit on the back of the head. He then heard from the owner of the bar (Mwangi) that the young man had been hit by Wambua.
15. The witness continue to take his drink, and did not see the 1st accused at the club.
16. As he walked home that night however, he saw the 1st accused person with a tall guy whom he knew by appearance. According to the witness the tall guy persuaded the 1st accused to keep his distance from the witness. He identified the tall guy in court as the 2nd accused person.
17. It was his evidence that he was shocked to see each of the two accused persons carrying a piece of timber, and that after passing the two he heard them say -

“today they will know us.”
18. It was his further evidence that he called on phone 1st accused cousin who was at the bar Musyoka Ndekena and informed him to be cautious, and that the said Musyoka told him that he was with Gakii. It was his further evidence that Musyoka was in the habit of walking with Gakii.
19. On 13th March 2016 at 7:30a.m he was called on phone by officers from Mbooni Police Station and informed that two people Mwenje and Musyoka had been killed near Nector bar. He then went to the mortuary and saw the bodies of the two deceased persons, who used to work for him on casual basis.
20. In cross-examination, he reiterated that he did not see either of the accused persons at the bar that night.



21. PW4 Maxwell Gasyoki Irungu testified that on 12th March 2017 at 9 pm, one of his clients entered the Nector bar bleeding, and said that he had been hit on the back of his head by Wambua.
22. He then asked two people to offer the injured person first aid, and sent two waiters to look for Wambua, and they found Wambua near the club still carrying a stone, as security lights were on. According to this witness Wambua ran away.
23. The club business continued thereafter until 11 pm when it closed. By that time there was Chege, Charles a watchman, one Mwenje and the deceased.
24. According to this witness, Mwenje and Chege left but Chege returned shortly talking on phone, and he gave the phone to the witness and Musau (PW3) told him on that phone that Wambua and another were somewhere carrying stones and that people be cautious. Thereafter, Charles, Mwenje and Chege left.
25. Thereafter, they heard no screams and slept, but in the morning the butcher man called on phone and informed him that people had been killed at Salama. The police took them to the scene about 1km from the bar. He then informed the police that three people, including Charles left the bar together the previous night. He then recorded a statement.
26. In cross-examination, he stated that Muli left the bar at 11 pm, that there was security lights on, and that the two accused persons were in the bar in early evening hours of 12th March 2017.
27. PW5 Dr. Blastus Kakundi, a senior medical superintendent testified to post mortem examination reports prepared by Dr. Mwonga Kimolo who had gone for further studies. On the deceased Mumo Maingi, he had wounds on the neck, face and bruises on the shoulder, right elbow and chest. He also had bruises on scrotum and right knee. Internally, he had broken ribs on left side, neck and major blood vessel was severed with bleeding in the brain. Cause of death was massive bleeding. He produced the signed report as an exhibit. On Joseph Musyoka – body had deep cut wound, head, lost incisor teeth. Cause of death was massive bleeding. He produced post mortem form as exhibit.
28. PW6 was Susan Wanjiru Ngugi a Government Analyst based in Nairobi whose evidence was that she received from PC Kennedy Murungu of CID Mbooni through an exhibit memo – Pair of black jeans trouser in khaki envelope marked ‘A’ Piece of wood marked ‘B’ Blood samples of Joseph Musyoka deceased – ‘C’ Blood sample of Mumo Maingi deceased – ‘D’ Blood sample of Fredrick Wambua (accused) – ‘E’ Blood sample of Elijah Mutunga – ‘F’
29. It was her evidence that she conducted analysis and comparison – and the report was that the pair of trousers was slightly stained with human blood – DNA matched that of Fredrick Wambua ‘E’. There were no blood stains on the other items.
30. She prepared and signed the report, which she produced in court as an exhibit. She also produced the exhibit memo as an exhibit.
31. PW7 Cpl. Kennedy Murunga the investigating officer testified that on 13th March 2017 at 6a.m he received a phone call from Ag. DCIO Kikima Mbooni that a murder incident had been reported to Mbooni Police Station and he recorded witness statements and the two accused persons.
32. From his investigations he learnt that Fredrick Wambua (1st accused) assaulted Muli Mutinda at a bar, and that the said Fredrick Wambua later armed himself and ambushed the two deceased persons.
33. It was his evidence that he gathered that the 1st accused Wambua went home looking drunk, claimed he had been attacked and took a piece of wood and left, and the 2nd accused who lived with him followed



- him, and near BPC Church they met three (3) people who were from Nector bar and attacked them, and 2nd accused got frightened and escaped to home with the piece of wood that had been given to him by the 1st accused.
34. It was his evidence that on 13th March 2017 police officers recovered the murder weapon – the stick and a jeans trouser with blood stains belonging to Fredrick. He used an exhibit memo to send those items and blood samples of each of the accused persons and each of the deceased to the Government Analyst. He produced the pair of jeans and the stick as exhibits. He identified both accused persons in court.
 35. In cross-examination, he stated that Muli Mutinda was the person who disagreed with the 1st accused at the bar. He stated that no inventory of recovered items was prepared by the police. He was not present when items were recovered. He agreed that the piece of wood was not blood stained. That is the prosecution evidence.
 36. When put on their defences, each of the two accused persons tendered sworn testimony. In his sworn defence 1st accused Fredrick Wambua denied killing any of the two deceased persons. He stated that on 13th March 2017 he heard people knock his door at 7:30a.m, and call his name. He came out and the OCS asked him if he knew Mumo Maingi and Joseph Musyoka and he replied that he knew them.
 37. The OCS then asked him if he killed them and he denied and was arrested and put in the cells. Then PW1 was brought and also put in the cells but was later released. Then the 2nd accused was brought and put in the cells. He stated that he was tortured while in custody.
 38. According to him, on 12th March 2017 he was at work fixing a house door. He stated that at that time he lived with a sick Uncle. He was cross-examined at length.
 39. The 2nd accused DW2 Elijah Mutunga also testified on oath and denied killing any of the two deceased persons. He stated that he was a casual worker and on 12th March 2017 he had an idea of starting a poultry and looked for chicks that day, returned home at 7 pm and cooked supper.
 40. On 13th March 2017 at 10:00a.m police came to his home and arrested him and took him to Kikima Police Station. After 3 days he was taken by a CID Officer to a place where he found papers and he was beaten and forced to sign. Thereafter, he was taken to Tawa Law Courts, later to the High court.
 41. It was his testimony that he worked for James Muli for 2 years 2014 and 201 and he was to give him a young calf, which he did not. He was very surprised by what James Musau Muli said in court. He was cross-examined at length.
 42. This is a murder case. The two accused persons stand charged with two counts each of murder. The prosecution has the burden of proving each of the offences against each of the two accused persons as codified under Section 107 of the *Evidence Act* (Cap.80).
 43. This being a criminal case, the standard of proof is beyond any reasonable doubt - see *Sawe v Republic* (2003) eKLR. The prosecution was required to prove each of the elements of the two offences beyond reasonable doubt.
 44. Did the two deceased persons die? The evidence on record is that the bodies of the two deceased persons were found that morning of 13th March 2017 lying about 1km from Nector bar in Kikima area of Makueni County. The bodies had visible injuries, and there was visible bleeding.
 45. Post mortem examination was done on the bodies and the post mortem report is that each died of massive bleeding due to external injuries and cuts, as well as internal injuries. I find that the prosecution proved beyond reasonable doubt that both alleged deceased persons died.



46. Were the deaths unlawful? No explanation or justification has been given for the death and manner of death of any of the two deceased persons. Each of the two must have been attacked viciously and killed painfully. I find that the deaths of each of the two accused persons was unlawful.
47. Did the two accused persons or any of them cause the death of the deceased or any of them? The evidence is circumstantial as no one witnessed the incident. To prove a criminal act, such circumstantial evidence should point irresistibly to the guilt of the accused person. Mere suspicion however strong is not a basis for sustaining a criminal conviction – see *Sawe v Republic (supra)*.
48. In my view, the evidence on record did not establish that any of the two accused persons caused the deaths herein. There was indeed an incident of throwing a stone at the bar by 1st accused. However, the person who disagreed with the 1st accused at the bar is not one of the deceased persons.
49. The evidence of the retired military officer on what transpired that night at the point of attack was also not consistent with other evidence. None of the accused persons was found with traces of any blood of the deceased, even on their clothes. The alleged stick was not found to have blood stains. There is also nothing else that connects the two accused persons to the death of any of the deceased persons.
50. I thus find that the threshold for proof of guilt on the basis of circumstantial evidence was not satisfied by the prosecution. I come to the conclusion that the prosecution did not prove beyond any reasonable doubt that any of the two accused persons caused the death of any of the two deceased persons.
51. Were the deaths caused with malice aforethought? Malice aforethought is defined under Section 206 of the *Penal Code*. It is an intention to cause death or do grievous bodily harm.
52. With the vicious external and internal injuries found on the bodies of the two deceased persons, I find that each of the two deaths was caused with malice aforethought.
53. Having found that none of the two accused persons caused the death of any of the two deceased persons, they are entitled to a verdict of not guilty and an acquittal.
54. I thus find that both accused are not guilty of any of the two offences of murder. I acquit each of the two accused persons to each of the two counts of murder herein.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Omolo for State

Both accused

