



**Republic v Mwasasi (Criminal Case 2 of 2020)
[2024] KEHC 2353 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 2 OF 2020
GMA DULU, J
MARCH 6, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PASCAL KILEI MWAWASI ACCUSED

JUDGMENT

1. The accused person herein stands charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of offence are that on the night of 5th March 2020 between 18:00hours and 22:00hours at Ghana village in Mwakitau Location within Taita-Taveta County murdered Mwasi Nyambu.
2. He has denied the charge.
3. In proving their case, the prosecution called eight (8) witnesses. On his part, the accused person tendered sworn defence testimony and did not call any additional evidence.
4. PW1 Robert Mnamachi Shena testified that he was the Chief of Mwakitau Location and knew both the accused person and the deceased person well. It was also his evidence that on 6th March 2020 at 11a.m while attending a funeral, received a phone call from Timothy Mwamburi informing him that Mwasi Nyambu had been found dead along the road.
5. It was his further evidence that he rushed to the scene with Assistant Chief Thomas Kideto of Bodoma Sub-Location, and on arrival confirmed that a dead body lay face downwards at a footpath with a stab wound on the left hand and injuries on the head, and on searching the scene they recovered a left black shoe together with a broken bottle.
6. The witness then made a phone call to the police who came to the scene and collected the body to Voi hospital mortuary, and he asked members of the public to gather information about the suspected



murder and report to his office or the police. It was his further evidence that on 9th March 2020 Johnson Mwaema reported at his office that as Mwasi Nyambu was taking alcohol in a thicket Pascal Kaleli Mwawasi beat him until he intervened.

7. The witness and Johnson then proceeded to Mwakitau Police Post where Johnson recorded a statement. In the evening he learnt that Pascal had come to Bodoma Sub Location and he informed the police who arrested him from a cousin's house.
8. He stated that he met a crowd at the scene where the body was found but Pascal was not there, and that the deceased had no shoes and that in fact he was in the habit of not wearing shoes. He stated that they recovered the black shoe and a broken bottle of whiskey, and that he knew of no existing grudge between accused and the deceased, and that it was Johnson who talked of a dispute during alcohol drinking.
9. In cross-examination, he stated that the dead body was of Mwasi Nyambu, and that according to Johnson the deceased died on 5th March 2020. He stated that he received the phone call on 6th March 2020. He maintained that deceased wore no shoes, and further that Johnson said that they were drinking in a thicket and that he left when he saw Pascal assault the deceased.
10. PW2 Johnson Mwaema testified that Pascal Kilei Mwawasi the accused person was his Uncle, and Mwasi Nyambu was a friend of the witness. He testified that on 5th March 2020 at 6p.m he was at a liquor drinking den run by Maureen Nyambura and as they took alcohol someone created a commotion, and he heard the voice and told Nyambura that it was the voice of his Uncle Pascal.
11. According to him, he bought alcohol and passed some to Mathias Mbote and thereafter Pascal held and lifted him several times until he resisted further lifting, by evading him. During that incident the deceased arrived and ordered alcohol. It was his evidence that though Pascal wanted to be served more alcohol, he was told to pay prior to being served.
12. It was his further evidence that when the deceased (Nyambu) wanted to leave, the accused (Pascal) turned on him, and when the deceased fell down the accused jumped on him to hold his legs, and the witness intervened to assist the deceased and told the deceased to leave. Then the accused person pushed the deceased and the witness and Thomas went their way at 7:00p.m.
13. It was his further evidence that after about 10minutes Pascal (the accused) called and asked him to go back and show him the way as he had lost his way, but he did not go back and told him to find his way, and next day at 6:30a.m Pascal went to the witnesses' home.
14. It was his evidence also that when he asked Pascal why he caused a commotion the previous night, he said that he caught up with the old and broke him completely. It was his evidence that the accused said that he hit him with a bottle, and pointed at his own legs which had blood stains, on which he used water outside to clean his legs. It was his further evidence that Pascal (the accused) left one of his shoes at the scene and that that morning the accused wore different shoes from those he wore the previous night.
15. According to the witness, Pascal said that he spent the night at Masabu Shadrack's house. They then proceeded to a place where they bought drinks for 50/= each and parted at 10:00a.m, and the witness proceeded to a funeral where he met a woman making phone calls while crying and, on enquiry, the woman said that Mzee Mwasi had been found dead.
16. He stated also that when he went home to look for the accused person, he was told by his (witness's) brother that the accused person had left his panga (machette) and jembe (hoe) and gone home because he had seen a crowd and cruiser at the scene where he murdered Mzee Mwasi.



17. The witness went further to state that on 8th March 2020, when he passed by Maryane Nyambura's drinking den, Maryane told him that Pascal had called and wanted to talk to the witness. According to him, when they ultimately talked with Pascal, he asked if there was any problem and he assured Pascal that there was no problem and encouraged him to come back.
18. It was his further evidence that on 9th March 2020, he made a report to the Chief whereupon they proceeded to Mwakitau Police Station where he recorded a statement and on the same evening of 9th March 2020 he made a report to the Chief that the accused person had already been arrested.
19. In cross-examination, he stated that Pascal was at an earlier drinking place, and that there was no house at the drinking place. The alcohol was served with Kenya Cane bottles and no glasses were used. He maintained that the accused person lifted him at least three times. He stated that when the deceased arrived, he found him and Pascal at the drinking joint.
20. He maintained that the accused person turned on the deceased when deceased was leaving and the deceased fell down but was not sure if the deceased suffered injuries. He stated that as they left, the accused person pursued the deceased, but the witness did not follow them.
21. He stated further that the deceased wore gumboots that time. He said he saw Pascal (the accused) the next morning (6th March 2020), who said that he slept in the witness's younger brother's house. He maintained that the accused person told him in Kiswahili – "I broke that old man into pieces", but he did not specify the name of the old man – and he assumed that it was Mwasi.
22. PW3 was Shadrack Msabo an Uncle of Pascal the accused, who also knows Mwasi Nyambu the deceased. It was his evidence that on 5th March 2020 at 10:00p.m, Pascal came back home, and was very drunk. He did not have shoes and said that he fought some people where he was drinking. His shirt had dust.
23. In the morning, Pascal went to Johnson's place and after a short while they came back and said that they were going to buy alcohol; and later Pascal came back saying that Johnson had gone for a funeral. It was his evidence that Pascal said that he found a land cruiser and a crowd of people at his farm and then he left to his home but promised to come back.
24. According to him, on 9th March 2020 Pascal came back and took his panga and jembe and went to his brother's place, but at 9:00a.m the Chief arrived with the police and asked for Pascal, and the witness was asked to record a statement. According to him Pascal had lived with him for three (3) days.
25. In cross-examination, he stated that Pascal came to his house on 3rd March 2020 and left on 6th March 2020. He stated that he did not see blood stains on Pascals legs on the night of 5th March 2020 and that Pascal slept in his house and next day proceeded to Johnson's house. Pascal came with no shoes but in the morning he wore shoes. He stated that Pascal first went to the farm, and then said that he wanted to go home, then later came back on 9th March 2020 and took his tools, and proceeded to his brother's place about 5km away.
26. PW4 was Dr. Christopher Mliwa of Moi Referral Hospital Voi, who conducted post mortem examination on body of Mwasi Nyambu on 10th March 2020. According to him, the skin was already peeling and there were multiple wounds on scalp parietal region 4cmxlong x 2cm deep. On upper lip 3cm longx2cm deep. Head covered in blood. Blunt force depression on left orbit – 2cm long x 1cm deep. Upper limbs 3 stab wounds on left forearm 4cm long x 2cm deep; 3cm x 2cm; and 2cm long x 1cm deep. The cause of death was cardio pulmonary arrest due to severe bleeding as a result of stab wounds on the head and forearm. He produced the signed post mortem report as an exhibit.



27. In cross-examination, he stated that the injuries were caused by both sharp and blunt objects, and that the skin peeling was a sign of decomposition.
28. PW5 Cpl. Wesley Kipkoech Kirui testified that on 9th March 2020 at midday, he recorded a witness statement at Mwatate Police Post from Johnson in relation to the death of Nyambu. On the same day at 7:00p.m, he received a call from a member of the public that the suspect had been seen and in the company of PC driver Kimaiyo, Cpl. Baya, PC Simiyu and PC Lumbaka proceeded to arrest the suspect Pascal Kilei Mwawasi, whom he identified in court.
29. PW6 PC Benard Yegon testified that he was co-investigating officer with Sgt. Tankul. It was his evidence that on 6th March 2020 at 15:00hours, he was instructed while at Mwatate Police Station to visit a murder scene and he did so with PC Munywoki. They found the body on a footpath, where there was pool of blood. There was a sandal nearby, and a bottle of alcoholic drink (spirit). They also found a broken bottle near the sandal.
30. On interrogating the members of the public, they were given the names of the deceased as Mwasi Nyambu. They took photographs, and collected the body to Moi Referral hospital Voi for preservation. They noted cuts on the face and legs, and after post mortem examination, the doctor said that death was due to haemorrhagic shock.
31. It was his evidence that the suspect was arrested after some time, and that post mortem examination was done on 10th March 2020. According to this witness, on arrest, the suspect told him that they took alcohol together with the deceased, had some disagreement and fought, and that later IP Sophie recorded a statement under enquiry from the suspect.
32. It was his further evidence that, a key witness Nyambura had travelled to UAE. He produce the sandal, bottle and broken bottle in court as exhibits. It was his evidence that the sandal was suspected to belong to the accused person (Pascal).
33. PW7 Timothy Mwamburi Kirigha testified that the deceased was his employee and that on 5th March 2020 at 6p.m, he found that the livestock had not been put in the shed, and next day he still did not see the deceased.
34. On going to a funeral, he found two of his employees friends, who accompanied him in search of the deceased. They visited alcohol drinking joints but did not find him, only to find the deceased lying dead on a footpath soaked in blood, and they thus phoned the area Chief who called the police. He stated that the shoe found near the scene did not belong to the deceased.
35. PW8 was Cpl. Shem Alasha of Police Forensic Department who developed and printed photographs taken by PC Yegon. These were photographs of the deceased and the scene. He produced the photographs and certificate as exhibits. This was the prosecution evidence.
36. When put on his defence, the accused person tendered sworn defence testimony. It was a long defence testimony in which he described his anger for alcohol, and drugs being sold in a thicket of his grandfathers land by one Nyambura. He complained that the place was also used as a green lodge.
37. He described what he did on 5th March 2020, and stated that he bought a drink at Nyambura's joint, where they met the deceased, and that they had exchanged words, but that they left separately that rainy night. He stated that he slept at the house of the brother to PW1 and later shifted to sleep at his own brother's place.
38. He stated that he was arrested for an offence he did not commit, and was cross-examined at length.



39. This is a case of murder. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80), the burden is on the prosecution to prove all the elements of the offence. This being a criminal case, the standard of proof is beyond any reasonable doubt – see *Sawe v Republic* (2003) eKLR.
40. The first element of the offence of murder is the death of the deceased. Did the deceased die? The evidence of the prosecution is clear. Several witnesses including the police saw the deceased lying dead on a footpath with visible injuries. The police took the body to Moi Referral hospital Voi. PW4 Dr. Christopher Muliwa confirmed through post mortem examination that the deceased died of excessive haemorrhage.
41. I find that the prosecution proved beyond any reasonable doubt that the deceased herein Mwasi Nyambu died.
42. Was the death unlawful? No justification or legal reason has been given for the death. The deceased died of bleeding from injuries suffered. The injuries were not self inflicted. I find that the prosecution proved beyond any reasonable doubt that the death was unlawful.
43. Did the accused person cause the death of the deceased? The evidence connecting the death of the deceased to the accused person is that of PW2 Johnson Mwaema alone. They took alcohol together at a farm thicket with the deceased and the accused person on 5th March 2020. He testified that the accused person wrestled him and then later turned on the deceased, at the said drinking joint.
44. This witness also said that next day 6th March 2020, the accused person went to his house in the morning with blood stained legs and told him in Kiswahili that he had “broken the old man into pieces.” This witness also suspected that the shoe that was found near the deceased’s body belonged to the accused person.
45. Curiously however, though the body of the deceased was found on 6th March 2020, this witness PW2 gave his information to the police on 9th March 2020 which was a number of days later. In addition, the accused person actually slept at the house of Masabu Shadrack PW3, a younger brother of the witness PW2, who stated that he saw no blood stains on the accused, and infact after daybreak on 6th March 2020, the accused person proceeded to the house of PW2 to take him to go and take more alcohol. This witness did not see the accused fight or hit the deceased at the scene where the body was found. Nobody else did.
46. This is a case of circumstantial evidence, as nobody witnessed the stabbing of the deceased. The requirements for sustaining a conviction on the basis of circumstantial evidence were explained by the Court of Appeal in the case of *Sawe v Republic* (2003) eKLR. The evidence connecting the accused person herein to the death of the deceased must satisfy the above requirements stated, that evidence must point irresistibly to the guilt of the accused.
47. In my view, the prosecution has not proved that the accused person herein caused the death of the deceased, as the evidence of PW2 amounts to mere suspicion and is not reliable due to the time he took to inform the police about the alleged involvement of the accused. I thus find that the prosecution did not prove that the death herein was caused by the accused person.
48. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the *Penal Code*. In my view, with the several injuries found on the body of the deceased, it was clear and obvious that the death of the deceased was intended. I thus find that the prosecution proved that the death herein was caused with malice aforethought.



49. Having found that the accused person herein did not cause the death of the deceased, I also find that the prosecution did not prove the charge of murder against the accused person. I thus acquit him of murder accordingly.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF MARCH 2024 IN OPEN COURT AT VOL.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistant

Ms. Moke for State

Ms. Wambura for accused

Accused

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