



**Republic v Wekesa & another (Criminal Case E002 of 2021)
[2024] KEHC 3947 (KLR) (12 April 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E002 OF 2021
JN ONYIEGO, J
APRIL 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANIEL WANJALA WEKESA 1ST ACCUSED

RONALD MAYOKA EDWARD MALEYA 2ND ACCUSED

JUDGMENT

1. The 1st and 2nd accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 15.03.2021 at around 2000hrs at Qahira Farm situated in Raya area in Garissa Sub county within Garissa County, jointly murdered Peter Wafula Kundu.
2. Upon pleading not guilty to the charge, prosecution called eleven (11) witnesses to establish their case.
3. PW1 Abdullahi Yussuf Ahamad, a farmer and resident of Raya in Garissa County testified that on 15.03.2021, at about 11 p.m., a boy known as Dan called him. That Dan informed him that a neighbour's worker had entered his shamba screaming but thereafter fell down. That since there was a curfew imposed during that time, he asked Dan to help by giving first aid to the deceased. It was his evidence that upon reaching 6.00 a.m., Dan called again informing him that the deceased had passed on. He stated that Dan was his employee having worked for him for a period of two days prior to the incident herein.
4. PW2 Fatuma Mohamed Mahamud, a farmer and resident within Raya in Garissa County testified that while at her home, she received a call from Hassan informing her that her farm hand had passed on. That upon going to the scene of crime, she found police officers and the deceased's body lying on the ground. She stated that the deceased had worked for her for eight days.



5. PW3 Hassan Muhidin Mahamud, testified that he was a farmer and a resident of Raya as his farm is located within Qahira. It was his evidence that on 15.03.2021, at about 11.p.m., Abdullahi called and informed him that PW2's farm hand had passed on while in his farm. That upon visiting the scene, he found the deceased lying dead on the ground. He stated that the deceased's body had changed and foam was oozing out of his mouth. It was his further evidence that the police arrived and took over the scene and later on, took away the body.
6. PW4 106348 P.C. Gabriel Leguyo, stated that while at the station, he received a call from Inspector Kariuki who informed him of a murder case which had occurred at Raya Farm. That upon being informed, he together with Inspector Kariuki, made their way to the scene where they found the deceased lying dead near the 1st accused person's house. It was his testimony that he did not examine the body of the deceased as the DCI officers upon arrival took over the scene. That the officers searched the house of the 1st accused person and from therein recovered left over ugali, green vegetables and some insecticides in two papers. It was his case that the 1st accused person stated that he lived with the 2nd accused person in the very house.
7. PW5 No. 236641 Inspector Kariuki Fredrick Kinyanjui, officer in charge Raya Police Post testified that on 16.03.2021, he received a call from PW1 informing him that his worker had informed him that a friend who had previously visited him had fallen down dead. It was his testimony that he informed other officers and in the company of PW4, headed to the scene where they found the deceased lying down dead and oozing foam from the mouth.
8. That upon questioning the 1st accused person, he told him that the deceased had previously visited him and that they cooked, ate and thereafter the deceased spent the night at his house. He further told him that the deceased did not look sick but all over sudden, he started shaking and thereafter, fell and died. It was his case that he sensed that the 1st accused person was lying and so, he arrested him. That at about 10 a.m., the DCI officers arrived and, he handed over the 1st accused to them. He stated that the DCIO entered the 1st accused person's house and from therein, recovered remains of ugali, vegetables, flour and some insecticides.
9. PW6 Robert Wafula, a farmer from Bungoma testified that the deceased was his neighbour from home. He thus identified the body to the doctor who performed post mortem on the deceased.
10. PW7 Saustin Baraza Wamalwa, a casual labourer from Bungoma testified that upon learning of the death of the deceased, together with the DCI officers, they arranged for the body to be transferred to Nairobi for post mortem. It was his testimony that he did not get to know the cause of the deceased's death.
11. PW8 Dr. Peter Mwaniki Ndegwa, a medical officer testified that he conducted a post-mortem examination the body of the deceased on 24.03.2021. According to him, the cause of death was a suspected chemical poisoning. On cross examination, he stated that there were no physical injuries on the body of the deceased.
12. PW9 Dr. Muendo Muthini, a government chemist analyst testified that on 24.03.2021, he received various exhibits vide Exhibit memo marked PMFI 2 from Cpl. Mutua. The said exhibits were listed as follows: A1 sample of Dynamec 01 & EL, A2 sample of Duduthrin, A3 sample of Easy Grostarter, A4 sample of Milraz WP70, A5 sample of Presento, A6 sample of profile 440 EL, A7 thermos flask cup, A8 sample of Ziwa maize flour, A9 mixture of ugali and cooked vegetables, A10 cooked vegetables, A11 ugali, A12 blood, A13 liver and kidney and A14 stomach and contents.



13. The said exhibits were all indicated as belonging to the deceased and meant for and examined to determine the presence and toxicity of any chemically toxic substance(s). It was his testimony that he conducted the said test via gas chromatography – mass spectrometry and chromatography – headspace methodology.
14. That according to his findings, methyl phenol, an insecticide was detected in the stomach, liver samples and in the item marked A2; abamacin, an insecticide was detected in item A1; cyhalothrin, a carbonate was detected in item A3; diazinon, an organophosphate pesticide was detected in items A2, A7 and A8; profenofos, an organophosphate pesticide was detected in item A6,A7 and A11; methomyl, a carbonate pesticide was detected in items A9 and A11; propineb, a fungicide was detected in item A4 and; in item A5 found to be present was a pyrethroid insecticide.
15. He thus produced the said report as Pex 17. On cross examination, the witness testified that the said insecticides are normally used in farming. That the same are normally in liquid and others in powder form. It was his testimony that he was not in a position to tell which of the pesticides were ingested directly or through food.
16. PW 10 No. 60903 PC Githae Mutinga from scenes of crime department testified that on 15.11.2021, he received eight pieces of photographs of the deceased from PC Abdi. He thus produced the said photos as Pex 18 (a) – (h).
17. PW 11 No. 88410 Mohamed Abdi Farah, the investigating officer testified that on 16.03.2021 at around 10 pm, while in the office, Cpl. Mutua informed him of a death incident at Qahira. It was his evidence that PW5 had also previously called and informed him of the said incident and so, together with Cpl. Mutua, PC Constance Mureithi, PC Isaak Rawi, PC Emmanuel Bulu and PC Mbuva, visited the scene.
18. That they found the deceased lying under a mango tree near the house of the 1st accused person and immediately cordoned off the scene. He continued to state that they did thorough search and managed to recover a ziwa maize flour, left over of cooked ugali and greens in a sufuria, blue thermos flask, A1 sample of Dynamec 01 & EL, A2 sample of Duduthrin, A3 sample of Easy Grostarter, A4 sample of Milraz WP70, A5 sample of Presento, A6 sample of profile 440 EL, A7 thermos flask cup, A8 sample of Ziwa maize flour, A9 mixture of ugali and cooked vegetables, A10 cooked vegetables and A11 ugali.
19. He testified that they arrested the 1st and 2nd accused person and took them to Garissa Police Station for further investigations. That on 24.03.2021 at 11 hrs, post mortem was done at the Nairobi City mortuary to ascertain the cause of the deceased's death. That he also referred a request to the government chemist for analysis and forwarded the exhibit as shown in the government analyst report. The government analyst was then tasked to examine the listed items and determine the presence and toxicity of any chemically toxic substance(s).
20. After completion of investigations, he preferred the instant charges against the accused herein and further recorded witness' statements. He stated that the 1st accused person was arrested at the scene and out of his investigations, it turned out that he was a good friend to the deceased and when the incident happened, they had taken meals and slept together in the same house. The 2nd accused allegedly cooked for the 1st accused person and that he also took supper together with the two.
21. According to the investigations, the 2nd accused partially poisoned the deceased through the food they had cooked. That it was the 2nd accused person who disclosed that the 1st accused person was the one responsible for poisoning the deceased's food.



22. DW1, Daniel Wekesa Wanjala in his sworn testimony stated that he hailed from Bungoma and was working as a casual labourer prior to his arrest. It was his testimony that while sleeping, he heard somebody walking outside. That he thus armed himself with a torch, a panga and a slasher and upon getting out, flashed his torch and saw somebody lying on the ground. According to him, the person was not talking and therefore, he called his boss to inform him of the situation at the farm.
23. That the boss promised to come in good time but meanwhile, people continued to stream in the compound. He denied the allegation that prior to the death of the deceased they had eaten together in his house and further, that the food in the sufuria was recovered from his house. Instead, he stated that the alleged food came from the house of the deceased and that he had nothing to do with the deceased's death. On cross examination, he testified that the deceased did not work far from where he worked. On re-exam, he stated that he was staying alone in his house and that he had no grudge with the deceased.
24. DW2 testified that he hailed from Mbale in Uganda and that he came to Garissa in the year 2020 looking for a job. He stated that he neither knew the 1st accused person nor the deceased. That on the night when the deceased was found dead, he was in his house. He denied ever cooking food in the house of the 1st accused person or poisoning the deceased. On cross examination, he stated that he was not aware why he was arrested as he had nothing to do with the offence herein.
25. Upon close of the hearing, the court directed that the parties file their written submissions to which the prosecution via their submissions dated 27.11.2023 submitted by placing reliance on the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to express the position that for the offence of murder to be proved, the elements to be proved are that; death occurred; the accused caused the said death and; that he had malice aforethought. The prosecution urged that indeed death occurred as the same was proved vide the testimony of PW6, PW7 and PW8 among them the doctor who conducted post mortem on the body of the deceased.
26. On whether the said death was caused by the accused persons, it was urged that PW2, PW3, PW4 and PW5 all testified that the deceased was found dead near the homestead of the 1st accused person. That according to PW9, methyl phenol, an insecticide was detected in the stomach and liver samples of the deceased. In the same breadth, duduthrin, an insecticide was also recovered from the 1st accused person's house and the same was noted to be harmful to human beings if ingested. It was further urged that PW8 who conducted post mortem on the body of the deceased formed a view that the cause of death was due to ingestion of poison.
27. On malice aforethought, it was submitted that the 1st and 2nd accused persons who lived near where the deceased was found were liable for the said death. That from the investigations, it was established that the two colluded to kill the deceased. Additionally, that the 1st and 2nd accused persons knew very well that if poison is ingested, the same was capable of causing death. To buttress that position, reliance was placed on the cases of *Republic v Tubere* 1945 EACA 63 and *Nzuki v Republic* [1993] KLR 171 where it was held that malice aforethought in murder can be established by ascertaining the nature of the weapon used and the manner in which it was done. This court was urged to find the 1st and 2nd accused persons guilty of the offence of murder.
28. Via submissions dated 31.01.2024, Mr. Bosire, counsel for the defence submitted that the prosecution did not prove its case to the required standards. It was contended that the evidence by the investigating officer not only failed to live up to its expectations but also, was contradictory in nature to enable this court reach a conviction. That the investigating officer stated that there was no motive and/or intention by accused persons to kill the deceased and therefore, the same exonerated them.



29. It was urged that mere suspicion cannot be the basis to proving any charge and therefore, this court was urged not to fall for such whims. It was submitted that it was common knowledge that pesticides are used in farming activities and therefore, it was not unique that the said pesticides were found in the house of the 1st accused person. Reliance to that end was placed on the case of *Republic v Joseph Shitandi & Another* [2014] eKLR where the court in acquitting the charges against the accused persons stated that no prima facie case had been established to warrant the accused persons be placed on their defence. Counsel therefore urged that this court ought to acquit the 1st and 2nd accused persons of the charge herein.

Analysis and determination

30. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. See section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The standard of proof is always that of 'beyond any reasonable doubt. See also *Miller v Minister of Pensions* [1947] 2 ALL ER 372 - 373].
31. In the instant case, the accused persons are facing a charge of murder contrary to section 203 of the Penal Code. Murder is defined as; 'when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder'.
32. The elements of murder and which the prosecution ought to prove are that:
- i. The death of the deceased;
 - ii. The death was accused by unlawful acts;
 - iii. That the accused committed the unlawful act which caused the death of the deceased; and
 - iv. That the accused had malice aforethought.
- [See *Anthony Ndegwa Ngari v Republic* [2014] eKLR].
33. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
34. As to the death of the deceased, it is not in doubt that the deceased herein died. PW8, Dr. Peter Mwaniki Ndegwa testified that he conducted post mortem on the body of the deceased after which he formed the opinion that the cause of death was suspected chemical poisoning. PW6 testified that he identified the body of the deceased to the doctor who performed the mortem. Besides, the accused persons confirmed that the deceased's body was found outside accused one's house. In view of the foregoing, the fact of death was proved. See *Johnson Njue Peter v Republic* [2015] eKLR.
35. The next question is whether the death of the deceased was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. See *Sharm Pal Singh v R* [1962] EA 13.
36. The post-mortem report prepared by PW8 revealed that the deceased's cause of death was suspected chemical poisoning. It therefore follows that the death of the deceased herein was caused by an act which is not excusable or authorized by law and therefore, unlawful. See *Republic v Boniface Isawa Makiod* [2016] eKLR.



37. The next issued is whether it was the 1st and 2nd accused persons who unlawfully caused the deceased's death. None of the prosecution witnesses actually saw the accused persons poison or kill the deceased. In essence, the prosecution case was based on circumstantial evidence.
38. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:
- “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence...”.
39. In the instant case, PW1 testified that Dan informed him that a neighbour's worker had entered his shamba screaming and in the process, died. PW3 testified that Abdullahi called and informed him that the deceased had passed on in his farm. That upon visiting the scene, he found the deceased lying dead on the ground. He stated that the deceased's body had changed and there was foam oozing out of his mouth.
40. PW4 and PW5 testified that upon visiting the scene, they found the deceased lying dead near the 1st accused person's house. It was their testimony that they did not examine the body of the deceased as the DCIO's officers arrived and embarked on searching the 1st accused person's house from where they found left over ugali and green vegetables and some insecticides in two papers. In the same breadth, PW5 testified that the 1st accused person told him that the deceased had previously visited him and that they cooked, ate and thereafter, the deceased spent the night at his house. He continued that the deceased did not look sick but all over sudden, started shaking and thereafter, fell and died.
41. On the other hand, PW 9, Dr. Muendo Muthini, a government analyst testified that having received various exhibits vide Exhibit memo marked PMFI 2 from Cpl. Mutua, he conducted an analysis on the same and found that methyl phenol, an insecticide was detected in the stomach, liver samples and in the item A-2(sample of Duduthrin); profenofos, an organophosphate pesticide was detected in items A6, A7 and A11; methomyl, a carbonate pesticide was detected in the items A9 and A11. The witness further noted that pesticides are poisonous and may be harmful to humans if ingested.
42. PW11 testified that upon reaching the scene, together with his colleagues, they cordoned off the scene, did thorough search and managed to recover the exhibits sent to the government analyst. He further stated that he found out that the 2nd accused allegedly cooked for the 1st accused person and that he took supper together with the two. Additionally, that the 1st accused person and the deceased were best friends as they hailed from the same area in Bungoma County. That the accused persons poisoned the deceased through the food they had cooked.
43. On the other hand, DW1 denied killing the deceased stating that the alleged poisoned food came from the house of the deceased. DW2 on the other hand claimed that he neither knew the 1st accused person nor the deceased. That on the night when the deceased was found dead, he was in his house. He denied ever cooking food in the house of the 1st accused person or poisoning the deceased.
44. From the evidence adduced herein, it is highly likely that the accused persons were the last persons to be with the deceased. I say so for the reason that the scene of crime was near the house of the 1st accused person and additionally, the said ugali and Sukuma week left overs, were recovered from his house. In as much as the 1st accused person in his defence claimed that the said ugali and Sukuma wiki were recovered from the house of the deceased, the same is not convincing for the reason that PW2, the employer of the deceased stated that her farm did not border the place where the deceased was found.



45. It is also clear that the deceased fed on the ugali and sukuma wiki left overs recovered from the 1st accused person's house. It was PW9's evidence that after having analysed the exhibits that were recovered from the 1st accused person's house, it was found that some of the pesticides recovered therein were traced in the food eaten by the deceased.
46. In the same breadth, PW8 who conducted post-mortem on the body of the deceased testified that the cause of death was a suspected chemical poisoning. In my humble view, the prosecution evidence considered in totality, corroborated each other and led to the conclusion that the deceased met his death after having eaten poisoned food at the 1st accused person's place, the scene where he was found.
47. It could not have been a coincidence that the 1st accused's cooking tools and remains of food were laced with poison similar to the one found in the same house, yet the 1st accused and co-accused were not affected by the same poison. They must have eaten the same food but selectively served the deceased with food laced with poison. How come the two accused persons were not affected. Circumstantially, a blameworthy finger can be pointed at the first accused person. There was nothing or evidence to even remotely imagine a case of the deceased committing suicide. That possibility cannot even be inferred.
48. Although there is no direct evidence to connect any of the accused persons with the death of the deceased, there is reasonable circumstantial evidence to infer that the deceased was poisoned during the time he ate at the house of the 1st accused person. Courts have time and again safely convicted based on circumstantial evidence. See *Sawe v Republic* (2003)KLR where the court held that;
- “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...”
49. The 1st accused did not offer any explanation to justify the presence of remains of food in his house laced or contaminated with poison. Considering the chain of events and generally the circumstances under which the deceased met his death, one cannot be blamed for connecting the 1st accused with the deceased's death.
50. Accused one's defence is a mere denial. His claim that the deceased did not go to his house is not true. The denial that the deceased did not eat in his house cannot be true given the poisoning of the deceased on the same day the remains of food laced with poison were found in his house. Nobody had reason to plant food contaminated with poison in his house. Under Section 111 and 119 of the [evidence Act](#), the 1st accused is bound to give reasonable explanation on the presence of food contaminated with poison in his house
51. I have no doubt accused one is the person who squarely must be held responsible for the death of the deceased. Malice aforethought is clearly inferred from the mode of execution which is poisoning hence an unlawful act intended to cause grievous harm thus fitting the definition provided under section 206 of the penal code. Also see the Court of Appeal holding in the case of [Joseph Kimani Njau v R](#) (2014) eKLR]. Accordingly, taking into account the general circumstances under which the deceased died, accused one must be held culpable hence I return a verdict of guilty and therefore convict him of murder as charged.
52. Regarding accused two, the investigating officer stated that it was him who disclosed to have cooked the food but the first accused was the one who poisoned the deceased. This statement is an attempt to introduce a confession through the back door hence not admissible. In the absence of this purported admission, I cannot conclusively without an iota of doubt connect the 2nd accused with the death of the deceased. There is some element of doubt. He did not know the deceased before nor did the deceased



go to his house. There is no evidence to suggest that he had knowledge of the existence of the poison in accused one's house nor did he cook and poison the deceased using food.

53. In view of the above holding, I do not find sufficient evidence to connect accused two with the death of the deceased hence do acquit him. As a consequence of the above, I enter a finding of guilty against the 1st accused and acquit the 2nd accused person accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF APRIL 2024

J.N.ONYIEGO

JUDGE

