



**Republic v Wafula (Criminal Case E009 (32) of 2020)  
[2024] KEHC 9341 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE E009 (32) OF 2020**

**AC MRIMA, J  
JULY 25, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**TYSON WAFULA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Tyson Wafula, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were as follows: -  
  
On the night of 4<sup>th</sup> day of October, 2020 at Chepchoina Location of Endebes Sub-County within Trans Nzoia County, murdered one Emmanuel Kyalo.
3. When the accused was arraigned and charged before Court, he denied committing the offence thereby prompting the hearing of the case against her.
4. After the close of the prosecution’s case, the Court found that a prima facie case had been established against the accused. The accused was placed on his defense. The Accused elected to give sworn testimony and called no witness.

**The Prosecution’s case:**

5. The Prosecution called a total of 5 witnesses.
6. Martin Mbithi Nziu testified as PW2. He was the father to Emmanuel Kyalo, the deceased in this matter. He testified that at around 8pm on 4<sup>th</sup> October 2020, the accused who was in the company of five other men went into his homestead. They were Amos Munyasi, Lombo, Peter Mutetu and



- Kennedy Wanyonyi. PW2 did not know the last person. Although PW2 saw and could recognize the accused that night, he did not know his name until at the police station on the following day.
7. According to PW2, the people demanded to see the deceased. They indicated that the deceased had eloped with their woman at the local Soko Mjinga market. PW2 lived just a few metres from the said market.
  8. PW2 engaged the people for about 30 minutes. He then gave them his undertaking to take up the issue with his son when he returns home and to also report the matter to the Village elder since him and his son were members of the Nyumba Kumi Initiative. He then escorted them and they left.
  9. Later that night, the deceased returned home and PW2 asked him about the allegation she had received. The deceased was truly surprised and denied any such involvement. They parted ways as the deceased proceeded to his house which was next to a Posho mill which at the far end corner of PW2's one-acre farm.
  10. At around 11pm, PW2 was awoken up by a Village elder. He was informed that the deceased had been injured. PW2 accompanied the elder to where the deceased was, but first passed through his son's house. He found the door closed, but not locked. His son was not in the house. He then followed the elder to a distance of about 30 metres from the deceased's house. PW2 found his son laying on his stomach. He was lifeless. The police had already arrived at the scene.
  11. PW2 narrated to the police what had transpired earlier that night. He accompanied the police to look for the 6 men who had gone to PW2's home to look for the deceased. Eventually, four of them were arrested, but the accused was not among them. They were all inside a house not far from the scene.
  12. The police then collected the body of the deceased and left together those who had been arrested. The body was taken to the mortuary whereas the rest were taken to Endebes Police Station.
  13. Peter Wanjala Murutu testified as PW3. He lived near the Soko Mjinga market in Endebes. He testified that on the fateful day, he had left his workplace and went to his home. That was around 6pm. He then went to the market to buy some fish to prepare supper.
  14. On his way back home, PW3 heard someone, whose voice he could readily recognize as that of a man, ahead of him screaming. The person was saying that his wife had been taken away.
  15. PW3 rushed to where the person was. He recognized the person as the accused, whom he knew quite well. As many people had gathered, PW3 saw Lombo and Amos among others in the multitude.
  16. According to PW3, the accused alleged that it was the deceased who had eloped with his wife. He walked towards PW2's home. The people followed the accused including PW3.
  17. The accused met PW2 at his home. The deceased was reportedly away. The accused explained what the deceased had allegedly done to his wife. PW2 assured the accused to deal with the matter once the deceased returned home and to even report the matter to the Village elder since PW2 and the deceased were members of the Nyumba Kumi Local Security Initiative. The people then left.
  18. PW3 further stated that, as they left, he overheard the accused saying that he will deal with whoever he will find out to have taken away his wife.
  19. As PW3 retired for the night, he was awoken by a knock on the door at around 2am. He enquired who the person was and he was informed that they were police officers. He was arrested and escorted to Chepchoina Police station where he was booked into the cells. He learnt that the deceased had died. He found Lombo and Amos in cells having been earlier on arrested.



20. In the morning, PW3 recorded a Statement and was transferred to Endebes Police Station where he again recorded another statement. He was release later in the evening.
21. No. 68207 Sgt. Noah Sirol was by then attached to Chepchoina Police Station. He testified as PW4.
22. He was one of the arresting officers who accompanied the OCS to the scene and collected the body of the deceased. He described how the lifeless body of the deceased lay on the ground with blood spilling all over. He also recalled a Village elder giving the police a list of suspects.
23. PW4 testified that the police left after processing the scene and collecting the body. He returned to his house as the body was taken to the mortuary. He reported to work in the morning.
24. As PW4 was settling down at work, the accused appeared. It was around 7am. He introduced himself to PW4 and stated that he had decided to report to the Police station since he overheard that the police were looking for him in connection with the death of the deceased.
25. PW4 arrested the accused and placed him in the cells. He clarified that he did not interrogate the accused since he was not the investigating officer.
26. No. 108678 PC Eddie Mwangi was designated as the investigating officer in the matter. He was by then attached to the DCI Endebes Sub-County. As he had been transferred from the station and was not readily available to attend Court, his testimony was tendered by No. 93238 PC Abdalla Ekal who took over the matter. He testified as PW5.
27. In the course of investigations, witness statements were recorded and an autopsy done. It was PW1, Dr. Denis Nanyingi, who conducted the post mortem examination on the body of the deceased at the Kitale County Referral Hospital on 12<sup>th</sup> October, 2020.
28. The body was identified by Annah Kanini Nziu (not a witness) and Martin Mbithi Nziu (not a witness).
29. PW1 examined the body externally. There was a wound at the left lateral anterior end of the base of the neck about 1cm above the clavicle board. The wound was about 2cm to 3cm in depth. Further, the left artery and left vein were punctured.
30. Internally, all systems were normal. The cause of death was opined to be hemorrhagic shock secondary to assault. PW1 filled in and signed the Post Mortem Report which he produced as an exhibit.
31. PW5 testified that in the course of investigations, several suspects were arrested and interrogated. They were Pauline Nelina [the wife of the deceased], Elvis Rogo, Peter Wafula and Amos Bunyasi and the accused.
32. According to PW5, witnesses had recorded statements with the police including one Kennedy and Jared [who were brothers to the wife of the deceased] as well as Pauline who stated that they saw the accused with a knife as he vowed to stab the deceased.
33. PW5 further stated that after going through the police file, there was no way the charge could succeed if the eye-witnesses, being Pauline, Jared and Kennedy, do not testify. He, however, stated that although the witnesses had recorded statements, they were unavailable for bonding.
34. It was PW5's further testimony that upon completion of the investigations, the police recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information. The accused was



accordingly charged after he underwent a mental examination assessment which confirmed his fitness to stand trial.

35. After close of the Prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.

#### **The Defence:**

36. The accused elected to give sworn testimony without calling any witness.
37. The accused asserted that he did not commit the offence. He posited that none of the witnesses had connected him with the offence. He prayed that he be discharged.
38. After the close of the defence case, parties were directed to file their respective rival written submissions. Mr. Gemenet, Learned Counsel for the accused filed submissions dated 11<sup>th</sup> October, 2023. He contended that the prosecution failed to prove the information against the accused and called for dismissal of the charge and that the accused be set at liberty.
39. The Prosecution on the other hand presented its written submissions also dated 30<sup>th</sup> October, 2023. It submitted that the State had established a case to the required standard of proof, being beyond reasonable doubt, against the accused. It urged the Court to find the accused guilty as charged.

#### **Analysis:**

40. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari v Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
- (a) the death of the deceased occurred 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.
41. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

#### **The death of the deceased and its cause:**

42. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
43. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased wounded and his lifeless body lay at the scene. The body was later released to its relatives and was subsequently buried.
44. The second way in which the death of the deceased was proved was through the evidence of PW1, a Medical Doctor who conducted the autopsy on the body of the deceased.
45. PW6 observed a grave injury around the neck. He concluded that the deceased died as a result of a hemorrhagic shock secondary to assault.
46. This Court, therefore, finds and hold that the death of the deceased in this case and its cause were both sufficiently proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:



47. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long dead and lying on the ground at the scene, which was around 30 metres from his house.
48. Be that as it may, the case, therefore, revolves around circumstantial evidence. 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.
49. The foregoing principles were set out in the locus classicus case of *R v Kipkering arap Koske & Another* [1949] 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI v Republic* [2013] eKLR, *Musii Tulo v Republic* [2014] eKLR among many others.
50. 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.'
51. Further, the Court of Appeal in *Sawe v 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.....
52. Returning to the case at hand, apart from the evidence of PW2 and PW3 affirming that the accused had complained to the deceased's father that the deceased had taken away his wife, there was nothing more to connect him with the eventual killing of the deceased.
53. It appeared that although there were witnesses who would have aided this Court to further unveil what truly happened, they did not testify on account of non-availability.



54. It, therefore, seems that the only evidence that connected the accused with the death of the deceased, as presently in this record, was his complaint to the father of the deceased.
55. 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.
56. This is a case where the evidence points to strong suspicion against the accused. However, as was held by the Court of Appeal in *Sawe v Rep* [2003] KLR 364: -
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."
57. 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.
58. 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."
59. Therefore, whereas there may be some suspicion that 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.
60. The prosecution, therefore, failed to prove that the accused was responsible for the death of the deceased in any way whatsoever.

**Disposition:**

61. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused is found not guilty of the murder of the deceased.
62. Consequently, the accused herein, Tyson Wafula, is hereby acquitted pursuant to Section 322(1) of the Criminal Procedure Code.
63. The accused is hereby set at liberty unless otherwise lawfully held.
64. Orders accordingly.

**DELIVERED, DATED and SIGNED at KITALE this 25th day of July, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court in the presence of:**

**Mr. Gemenet, Learned Counsel for the Accused.**

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

**Chemosop/Duke – Court Assistants.\*\***

