



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Samwel (Criminal Case 9 of 2019)
[2024] KEHC 17044 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE 9 OF 2019**

RPV WENDOH, J

JULY 5, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHNES WAMBURA SAMWEL ACCUSED

JUDGMENT

1. By the information dated 15/7/2019, Johnes Wambura Samwel 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 charge are that on the nights of 3rd and 4th July 2019 at Nyachebo Sub location, Kuria West Sub County, within Migori County, murdered Gideon Rioba Magaiwa,
3. The accused denied the offence and the case proceeded to hearing with the prosecution calling a total of eight witnesses namely;- John Mginga Omae PW1; Agripine Indoshi (PW2); Dr. Olango Sylvester Ochieng (PW3); Rose Matinde (PW4); Susan Robi Matiko (PW5); CPL James Olago (PW6); Gilbert Tonui (PW7) and PC Jackson Chalo (PW8).
4. When called upon to defend himself, the accused opted to give unsworn evidence and called one other witness. DW2 Chacha Johnson Mwita.
5. PW1 recalled that on 3/7/2019, he closed his business(butchery) and in company of one Tumbo, they passed by the neighbours home, Robi Matiko at about 7;45p.m to take alcohol. They remained there and left after 11:00p.m to head home. He recalled that one Nyagesike had come to the drinking place while drunk, took more alcohol then left them there. When leaving he noticed Nyagesike outside had fallen and he called Tumbo and Accused to assist take Nyagesike to his home. They took him to his home and left him in the sitting room because the wife refused to allow them to take him into the bedroom. As they placed Nyagesike on the sofa, he saw the deceased whom he knew as a neighbour, walk out of the deceased's bedroom and went out of the house. Outside, the deceased met the Accused



who was outside the house; PW1 got out of the house and saw Accused with a stick with which he was hitting the deceased on the head. PW1 said that the accused had a spotlight and they had been together and so he knew who he was. He identified three of the 3 sticks produced in court as exhibits. When PW1 asked the accused why he was assaulting the deceased, he replied that the deceased was breaking his uncle's home. He tried to intervene but the accused hit him on head and he shouted for help and Robi Matiko, Guku Matiko Gilbert and Joel Boke responded. They took deceased to the road side to try to take him to hospital but realized that he had died. Because people left him alone, he also left the deceased's body at the roadside and reported to the village elder. Next day, he went to work and was arrested together with others, taken to Kehancha Police Station where he recorded his statement and was released. He denied that the deceased was killed at Robi's house and carried to Nyageseki's house. He also denied having killed the deceased.

6. PW2 knew Samuel Wambura as a neighbour at the place she worked. She denied knowing the deceased; that she was married to Josephat Nyageseki and that when the deceased was killed, her husband was asleep in the house, drunk; that the husband came home with the deceased and three other people; that her husband was by then asleep inside her house; that they took him out and later brought him back; that Accused was one of the people who came to her house; that upon knocking, she opened the door and one of the people lapped her and she fell; that the people started beating the deceased and her husband too was beaten using pangas. She denied being able to identify the people who beat the deceased though she had named one as Johanes; that the deceased was injured on the leg and was carried away by the people he had come with.
7. PW3, performed post mortem on the deceased and found 3 deep cut wounds on the head, one torn medially and diagonally extending to the scalp, the other was supra orbital laterally and the third on the occiput region. He found that there was bleeding under the scalp, and a skull fracture. He formed the opinion that the cause of death was intracranial bleeding secondary to head injury and probable weapon used was a sharp object.
8. PW4 Rose Matinde was going to work at her hotel on 4/7/2019 about 6:15 a.m when she found the deceased's body besides the road. She observed the body identified the body as that of deceased and called the Assistant Chief.
9. PW5 Susan Robi Matiko recalled that on 3/7/2019 about 7:00p.m she was selling changaa at her home to Johnes, Gilbert and Joel who were later joined by Tumbo and John Muinga; that later, Nyageseki arrived while drunk; that Muinga, Johnes and Tumbo and John carried Nyageseki because he was drunk. Later, when still with Joel and Gilbert, Tumbo returned to tell them that somebody was being killed. She went with Joel and Gilbert and found the deceased on the ground bleeding; that John Muinga was standing there while Johnes was still beating the deceased, she screamed and Johnes threatened to hit her and she went back home. Next day, she learnt that the person who was beaten had died.
10. PW6 of DCI Migori , of crime scene Migori received photographic prints for certification, and produced them as PEXNO. 4 (a- 3) and his report (PEXNO. 5)
11. PW7 of DCI Kuria West was the investigating officer recalled 11/7/2019, he was called by the DCIO and asked to proceed to a murder scene at Nyancho - Nyamokorogoto Road where he found a body by the road side and took photographs of the scene. He was led to the home of Joseph Nyageseki where the murder took place and the body moved to the road side. He interrogated the witnesses who confirmed that the deceased was at Nyageseki's home and he noted blood stains on the ground at the home. PW7 was informed of how PW1, Accused, one Tumbo took a drunk Nyageseki to his house only for the deceased to emerge from Nyageseki's bedroom. It is then that Accused attacked the deceased for



- allegedly destroying people's marriages and that PW3 showed them the murder weapon which were sticks (poles). He later arrested the accused from his house and attended post mortem on 8/7/2019.
12. PW8 then of DCI Kehancha was asked by his boss to accompany the OCS Kehancha to the murder scene. PW8 found the body lying along the Nyanchabo – Nyamokorogoto Road. On making enquires, he was led to the home of Nyageseki where the deceased was murdered and they observed blood stains at the home and recovered three (poles) sticks which were blood stained and which were said to be the murder weapons. He produced them as PEX NO. 1 & 2 (a) and 1. He also identified photographs taken of the scene.
 13. When called upon to defend himself, Accused gave unsworn evidence. He recalled that on 3/7/2019, about 9:00p.m he went to his step mothers house Susan Robi, where he found Gilbert Chacha, Aloys Mane Titus Matiko and John Muinga (PW1) taking chang'aa while Nyagesike was asleep in a chair, drunk; that John Muinga took Nyagesike home, found Rioba asleep in Nyagesike's house; that it is John who beat the deceased with a panga and cut the deceased even as they tried to intervene and told him to stop and that John(PW1) threatened that if anybody gave evidence against him, they would face dire consequences; that it is him and Nyagesike who reported the matter.
 14. DW2 Chacha Johnson Mwita testified that on 14/7/2019, he received a call and was informed that his brother Gideon had been killed; that he went to the scene, called the Assistant Chief who in turn called police; that John Muinga was one of those arrested but was released and treated as a witness. He did not witness the brother's murder.
 15. I have duly considered all the prosecution and defence evidence on record. In Criminal cases, the prosecution has the burden of proving beyond reasonable doubt that the accused committed the offence. In Republic vs. David Ruo Nyambwa & 4 others (2000) EKLR the Court said:

“An accused person does not assume any burden to prove his innocence in a criminal case. He is obligated only if he so wishes to give an explanation or raise a defence to the charge which is probably or possibly true.”
 16. The legal burden of proof of beyond reasonable doubt was aptly explained in the case of Woolmington vs. DPP (1935) AC 482 as not being to the hilt or absolute. The court said:-

“That degree is well settled. It needs not reach certainty; but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”
 17. In a charge of murder, the prosecution must prove beyond reasonable doubt the following ingredients:-
 1. Death of the deceased;
 2. That the accused caused the death by unlawful act or omission
 3. That the accused possessed malice aforethought.



Death of deceased;

18. PW1 and PW2 witnessed the deceased's death and PW4 and PW5 saw the deceased's body lying besides the road and later PW3 performed the post mortem on the body of the deceased after it was identified to him by family members in the presence of PW6, the investigating officer. The Doctor found that the cause of death was intracerebral bleeding secondary to head injury and probable cause of injury was sharp object. No doubt the deceased met his death, not due to natural causes but injuries inflicted by other means. Death of the deceased was proved.

Whether Accused committed the unlawful Act or omission

19. Accused's defence is that he did not kill the deceased but that PW1 did it. The accused admitted that he was with PW1 and others when the deceased was assaulted. The three witnesses present, PW1, PW2 and PW5 all testified to the Accused assaulting the deceased using sticks (pole). The said sticks allegedly used in the assault by Accused were produced in evidence. They had blood stains on them. Unfortunately the sticks were not taken to the Government analyst to ascertain whose blood was on them.
20. Contrary to what PW1, PW2 and PW5 told the court, that sticks were used to assault the deceased, The Doctor (PW3) who performed the post mortem was of the view that the injuries that caused the injuries to the deceased's head were caused by a sharp object. PW1 admitted that he had a panga which he uses at his work as a butcher but denied using it on the deceased. I found the evidence of PW2 quite inconsistent. At first she denied seeing the people who assaulted the deceased. However, she later changed her story. At first PW2 told the court that the people who went to her house were with deceased and that some of them beat the deceased and her husband. She specifically said "They used pangas to beat deceased". Later in cross examination, she said that those who assaulted the deceased used sticks. She then mentioned accused as one of the assailants but later denied knowing those who assaulted the deceased. She was so inconsistent that one cannot tell what the truth is. Were both pangas and sticks used in assaulting the deceased? Her testimony however seems to support the deceased's defence that a panga or pangas were used to assault the deceased which evidence is further supported by the Doctor's findings. Unfortunately the prosecutor never questioned the Doctor further to find out whether both sharp and blunt objects were used to assault the deceased. As things stand, doubt has been implanted in the court's mind as to how the death occurred, who caused it and what weapon was used. Is it Accused, or PW1 or both of them or there were more people involved in assaulting the deceased? For all the above reasons. I find that the prosecution has not proved beyond reasonable doubt that it is the Accused who inflicted the fatal injuries on the deceased.
21. Having failed to prove that Accused committed the unlawful act against the deceased, there is no need to consider whether or not there was malice aforethought proved.
22. For all the above reasons, the doubt raised in the defence must be resolved in favour of the accused. Accused is hereby acquitted of the charge of murder as charged and is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 5TH DAY OF JULY, 2024.

R. WENDOHO

JUDGE

In presence of; -

Ms. Ikol for the state



Appellant Present

Ms. Emma –Court Assistants

