



**Republic v Wangari (Criminal Case 40 of 2016)
[2023] KEHC 1595 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 40 OF 2016
RM MWONGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

RAPHAEL KAMAU WANGARI ACCUSED

JUDGMENT

Prosecution Case

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on 26th November 2016 at Kinungi Village in Naivasha Sub-County within Nakuru County, he murdered Simon Muturi Mungai.
2. The prosecution adduced evidence through nine witnesses.
3. The evidence on record is that the deceased was murdered at or during a fight that occurred at a circumcision ceremony for the initiate, one Peter Kabugu, which he had attended on the night of 26th November, 2016.
4. According to Eliud Mwangi Njenga (PW3), he was Peter Kabugu's brother. He was among those that took the initiate to hospital for surgery on 26th November, 2016. Thereafter he brought him back home. Many guests were at the house for the ceremony, including the accused, Raphael, and the deceased, Muturi. The accused then asked one Githire to give some counsel to the initiate. Githire declined, but Muturi supported him.
5. The accused got up and challenged Muturi saying if he was circumcised he should go out for a fight. Muturi stayed put. After some back and forth between the deceased and the accused, the others present restrained them. Everyone settled and ate. They then left to go to the home of Mama Ngendo, two kilometres away, where another initiation had taken place.



6. According to PW3, as they left the compound, they found Muturi lying down facing up near the gate. Eliud then called Muturi's brother, Francis Manga Mungai (PW2) to come and pick Muturi up. In his testimony, Eliud said he did not witness any assault, and did not know how Muturi had sustained the injuries.
7. Francis Mungai (PW2) arrived at the scene of the incident on a motorcycle soon after receiving the call from Eliud. According to him, he found Muturi lying face down on the roadside. He saw a large wound on his head. He and Eliud picked Muturi up and placed him on the motorbike. Supported by one Peter Karanja, he drove Muturi to a private hospital, and later to Naivasha District Hospital. He learned afterwards that Muturi had died on arrival. Francis later wrote a statement at the Police station, and also identified the body for post mortem.
8. Paul Kamau Manga, PW1, testified that he was an employee of Patrick Kabugu, the initiate. On the material night he received a call from his son, Peter Karanja, who told him he was on the way to hospital escorting the deceased who was in bad shape. A while after the initial call, PW1 then called his son, and learnt that the deceased had died. He then took a taxi and went to Naivasha Police Station. He recorded a statement and later identified the body for post mortem.
9. Thomas Muteti Waithera (PW5) and George Githire Kinuthia (PW6) both testified that they were in the room at the initiation ceremony when a quarrel broke out between the accused and the deceased. Thomas Waithera's (PW5's) account was that:

“ At 9.00pm there was a fracas started by the Accused (in dock). We evicted him. We stayed and after a while he returned to the house where we were.... It is as we left that the accused hit...No I did not witness assault. We found deceased outside the house and the accused standing by..... .

When we got out we found an enraged accused saying: ‘Do not mess with me I will thrash and even kill you’
10. In cross examination PW5 stated that after eating the accused left the room and the deceased also came out of the house; that he could not tell where the accused went; but that the accused was standing by the deceased who lay on the ground; that the accused was present when the deceased was found lying down.
11. George Kinuthia's (PW6) account was as follows. He lived in Kinungi and had come to the initiation celebration of a fellow called Kabogo, the son of one Njenga. he reached Njenga's at about 9.00pm on 26th November, 2016. He then went to Kabogo's place, not far from the main house.
12. At Kabogo's there were two rooms where he and other celebrants had congregated, including the accused and the deceased; that the accused told him that it was he (the Accused) who should be in the room to give advice to the initiate; that the deceased who was in the room said that he (PW6) should not be touched by anyone; that an argument started between the Accused and the deceased as the Accused was insulting the deceased; and that the Accused was removed from the room by PW5. He added that later on the Accused returned and told the deceased to leave the room; and that he (PW6) left them arguing and went home.
13. In cross examination PW6 asserted that no fight began in the house before the accused was removed from the house; that when he, PW6 left the house the accused was not outside; and that he did not know when the incident occurred.



14. Dr Titus Ngulungu, PW4, conducted the post-mortem on the deceased's body and produced the report in court as P Exhibit 1. In the Report, he noted the following injuries: Body had features of brain injury; there were blood tracks on the ears and the head was swollen with abrasions. On internal examination, the findings were as follows: there were lacerations on the head and haematoma on the left side; there was depressed skull fracture on the left side of the head with concentric lines consistent with a spherical object, there was laceration of the brain and the lungs were collapsed.
15. According to Dr Ngulungu other systems were normal. He stated that he did not conduct a toxicology report; that there were no defensive wounds on the body, that the digestive system did not reveal volatile material such as alcohol; and that the injuries were not consistent with a fall. He opined that the cause of death was due to rear head injury and skull fracture with brain injury due to blunt force trauma.
16. PW 8 PC Jared Mose, was the Investigating Officer. He tried to piece the whole incident together. In a nutshell, his evidence was that: he was tasked to investigate the matter; that he proceeded to the scene the day following the incident; that he was informed that some young men had congregated for an initiation celebration at the home of Peter Karugu, the initiate; that they were in a room about twenty metres away from home of the initiate's parents; that he was shown a spot where there was blood and told that was where the deceased was found; that he did not see any foreign material that would have caused injury to the deceased's head; that the accused's home was about 2 kilometres away.
17. He also visited the deceased in the Sub-county hospital mortuary and saw the wounds to his head which had a fresh cut. He summoned witnesses and discovered that a group of young men had gathered for an initiation ceremony; that at around 9.00pm as they were preparing to be served with food, the accused was denied an opportunity to give advice to the initiate; that as a result a quarrel developed between the accused and deceased who hurled insults at each other; that calm was restored and they had supper.
18. PW8 testified that after the meal people left the premises with some heading home and others going to other ceremonies. As a bunch of young men were leaving, they spotted a person lying on the ground by the gate. Using their torches they identified the person on the ground as the deceased, and noted he appeared unconscious. The accused was standing next to him, but suddenly fled from the scene and disappeared into the darkness. People converged in large numbers at the scene as some called for a motorcycle to carry the deceased, who was finally taken to hospital. The accused presented himself to the police at Nyahururu on 27th November, 2016, where PC E Kitera recorded his statement.
19. PW9 PC Woman Ekitela Crimpoline testified that she was at Nyahururu Police Station on 27th November 2016, at the report office. At about 11.30 am the accused came to the Police Station and told her his names and contact details. He said he was "surrendering" himself as he was afraid that people were after him in Naivasha; that his life was in danger. He explained that he had been at an initiation meeting and a fight broke out between two groups; that he hit one young man who fell down.
20. She further testified that the accused told her that after people checked the young man's pulse they said "*amekufa, amekufa*", that he was dead, so he ran away. When the people as he was being chased. he appeared shocked and anxious. She then told the OCS who told her to record the accused's report in the OB, and he would check with Naivasha Police Station whether the incident had been reported. in the meantime she placed the accused in the cells.
21. In cross examination, she confirmed that she was not the investigating officer; that she was alone at the report desk when the accused came to report; that the accused did not record a statement with her; that she explained to the accused his rights that she wrote the accused's report in the occurrence book but did not provide the OB Number. She also said that she wrote her own statement one year later – on



20th December, 2017 – because she went on long leave, although she admitted that she had a month to write her statement before going on leave, after which she was transferred.

Defence Case

22. After hearing the prosecution evidence and the representations of the parties, this court found that the accused had a case to answer. He was placed on his defence and gave sworn evidence.
23. The accused testified that he was 26 years old and lived in Kinungi area. That on 26th November, 2016, he was among many other young people who went to circumcision celebrations for boys who had undergone the ritual. He went to the home of Muturi (the deceased) who was a cousin to his friend Githire (PW6). He told Githire to advise the newly circumcised, as it was the role of older boys to give advice to initiates. An argument arose on that issue, and Muturi stood up and asserted that Githire would not advise the boy. According to the accused Muturi appeared drunk.
24. The argument with Muturi intensified, and others joined in taking sides. The accused and one, Muteti (PW5), were then removed from the room, but Muteti soon returned. The accused stayed outside for a while before returning to eat and join in a game of drafts. The argument had died down and, according to the accused, it was peaceful in the room. Soon after, Muturi left the room, and the accused also left and went to Gicheha’s boma nearby. This was about 8.00-9.00pm.
25. A short while later, the accused received a message from a friend that he was being sought to explain what had happened to Muturi. people also started saying he was a foreigner, a person who had come to the area from outside , and not a member of what was commonly called Community Number 61 or Group of 61, a gang.
26. Seeing what was happening, he decided to flee from the area and went to Nyahururu. There he met PW9 Ekitela but spoke to another policeman who was wearing khaki, and that they advised him to flee to Maralal.
27. In cross examination, he said he went to live in Flyover. his relocation was because he was alleged to have been involved in the incident. he admitted he was at the scene of the incident on the night of the killing, but that he was not the one who started the arguments.

Analysis and Determination

28. The offence of murder is described under Section 203 of the *Penal Code* as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. 204. Any person who is convicted of murder shall be sentenced to death.”
29. The ingredients necessary to prove the offence of murder were re-stated by the Court of Appeal in Criminal Appeal No 352 of 2012 *Anthony Ndeewa Nsari v Republic* [2014] eKLR by Visram, Koome and Odek JJA as as follows: thatThat the death of the deceased occurred;That the accused committed the unlawful act which caused the death of the deceasedThat the accused had malice aforethought.
30. Here, it is not in dispute that the deceased died. All witnesses attested to the death of the deceased The post-mortem report by Dr Ngulungu produced as PExhibit 1 certified the death. According to Dr Ngulungu, the deceased died “due to rear head injury and skull fracture with brain injury due to blunt force trauma”.



31. The defence impugned the conclusions of the doctor on the cause of death, and placed on record medical material which challenged the doctor's determination that the blunt force could not be from a fall. The medical authorities suggest that a distinction between injuries from falls and from blows be made. he cited:

-Vera Sterzik, David Duckowitz & Michael Bohnert (2016) Accident or Crime? About the meaning of face injuries Inflicted by Blunt Force, Forensic Sciences Research; 1.1.14-21:

“to distinguish between falls and blows, the shape and number of injuries can also be of help besides the localisation. Guyomarc'ht

et al showed that the following criteria point towards blows with items: more than three lacerations, laceration length of 7cm or more , comminuted or depressed fractures, lacerations or fractures located above the hat brim line (HBL), Left side lateralisation of lacerations or fractures, more four facial contusions or lacerations...

32. Counsel further quoted from an article by *Elena Kranioti: Forensic Investigation of cranial injuries due to Blunt Force Trauma: Current Best Practice, pg 28:*

“..depressed fractures are normally associated with slow loading in a small area of the skull resulting in multiple fracture lines (comminuted) on the surface...”

33. Counsel thus submitted that the depressed skull fracture and concentric comminuted. found on the deceased's skull do not resonate with an assault but are more consistent with a fall. He argued that these injuries create some doubt concerning the doctor's conclusions.

34. Whilst the defence arguments cannot be ignored, counsel did not cross examine the doctor using the materials he quoted, and therefore the court did not have the opportunity to properly evaluate the evidence of the doctor on that basis. Accordingly, I make no finding as to the whether the injuries were from a fall.

35. Thus, the only outstanding issues for determination, are whether the evidence points, beyond reasonable doubt, first, to the fact that the accused committed the act that led to the death of the deceased; and, second, that the accused had malice aforethought in doing so.

36. Did the accused commit the act that led to the death? The evidence of PW3, PW5 and PW6 is the best eyewitness evidence of what happened at the scene. PW3 was present in the room when there was an argument between the deceased and the accused concerning who should give advice to the initiate. The accused even challenged the deceased to a fight. However, no fight actually took place since after some back and forth between the deceased and the accused, the others present restrained them. Everyone settled and ate. They then left to go to the home of Mama Ngendo, two kilometres away, where another initiation had taken place. According to PW3, it was as they left the compound, they found Muturi lying down facing up near the gate.

37. PW5 said he was in the room at 9.00pm where there was a fracas started by the Accused. it was not clear what the nature of the fracas was, because he also testified that those in the room evicted the accused. The accused later returned and as they all left they found the deceased outside and the accused threatening that he would thrash the deceased. His words were:

“No I did not witness assault. We found deceased outside the house and the accused standing by. Deceased lay on the ground....



When we go out we found an enraged Accused saying: ‘Do not mess with me I will thrash and even kill you’ ”

38. In cross examination PW5 stated that the accused and the deceased were the main disputants; that:

“After eating the accused left; that the deceased also came out of the house; I cannot tell where the accused went....The accused was standing by the deceased who lay on the ground”.

It was shown in cross examination that PW5 did not, in his statement to the police, state that the accused was present as the deceased lay down on the ground. It also seems unusual and unlikely that if the accused hit the deceased with the kind of violent force indicated by the postmortem report, that the accused would have stood by waiting to be discovered by the witnesses.

it appears more likely that the accused ran away when he heard that the deceased having been killed, people were now looking for him on account of the argument he had had with the deceased.

39. PW5 also said that:

“The body lay 7 metres from the house and outside the compound where the ceremony was held....There are no lights outside the compound. No I could not see the body from the homestead, only at close quarters. I maintain that the accused was present when the deceased was found lying down. I did not see him carrying any weapon. Accused did not seem to have any injuries or blood

40. In re-examination, PW5 re-stated that the deceased lay on the ground later while the accused stood by.

41. I do not find the evidence of PW5 that the accused was present standing over the deceased who lay down on the ground, credible. It is such critical information that I find it strange that PW5 did not put that evidence in his original statement to the police. It appears like an afterthought. In addition I find it less than credible when taken in light of the fact that this occurrence was at 9.00pm and there was no light outside the compound. There is also no indication by what light PW5 saw the accused standing next to the deceased who was allegedly lying down.

42. The evidence of the third eyewitness, PW6 corroborates the evidence that there was an argument or altercation that took place between the accused and the deceased inside the house where there was light from a paraffin lamp. He left the room after the argument started and the two were arguing.

43. It is also surprising that none of the witnesses testify to hearing and seeing an actual fight between the accused and deceased. PW3 spoke of an argument and the accused challenging the deceased to a fight but did not witness a fight. PW5 also did not witness the assault and did not report to the police that he saw the accused standing over the deceased outside; and yet did not see any weapon on the accused or any blood or injuries on the accused. PW6 merely saw the two arguing before he left the room and went home.

44. The other evidence put forth by the prosecution was that of PW9 PC Ekitela who said, in effect, that the accused admitted to her that he hit one young man who fell down and that people checked the victim’s pulse and said the victim had died. That evidence was allegedly recorded in the OB. However, the OB report was not introduced as an Exhibit, hence the content is not available for scrutiny as corroborative evidence. Further there was no contemporaneous statement in which the alleged admission was recorded. Indeed, the alleged admission, was not recorded in PW9s statement until a year after the incident.



Conclusion

45. In conclusion I find that the evidence presented by the prosecution appears to raise the strong suspicion that the deceased was hit or bludgeoned to death by the accused following an argument. That is the evidence of PW3, PW4 and PW 6. That there was an argument between the accused and deceased; that both of them went out and came back into the room; that at some stage which is not clearly indicated, the accused was outside with the deceased and that the deceased hit him to death. That no one in the vicinity which was crowded with people attending the initiation celebrations saw the accused hitting the deceased. That after he hit and killed the deceased, the accused stood over the body until PW5 came , and then the accused ran away.
46. Where evidence leads to strong suspicion, how is it to be treated? The Court of Appeal in [*Joan Chebichii Sawe v Republic*](#) [2003] eKLR expressed itself as follows on that point:
- “The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.”
47. It was for the prosecution to prove beyond reasonable doubt that he accused murdered the deceased and that he did so with malice aforethought. I find and hold that they did not muster the evidence to that level of proof.
48. Accordingly, I find the accused not guilty and hereby acquit him. The accused shall be set at liberty unless otherwise lawfully held.
49. Orders accordingly.

DATED AT KERUGOYA THIS 10TH DAY OF MARCH,2023

RICHARD MWONGO

JUDGE

In the presence of:

Mr Wairegi for the Accused

Mr Atika for the State

