



REPUBLIC OF KENYA



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**Republic v Wekesa (Criminal Case 90 of 2016)
[2023] KEHC 1911 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 90 OF 2016
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

DENNIS WAFULA WEKESA ACCUSED

JUDGMENT

1. Dennis Wafula Wekesa the accused, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of that offence are that the accused:-

“On the 13th day of November, 2016 at 22.30 hours at Citizen Building within Makongeni Estate Phase 5 within Kiambu County murdered Patrick Mwangi Wanderi.”

2. The accused pleaded not guilty. Prosecution called 8 witnesses while the accused tendered a defence under oath without calling witnesses.
3. The accused was employed as a bouncer in a club called Citizen. Prosecution’s case is that while employed at that club, the accused and others robbed David Kimotho of his mobile phone. David was the brother of the deceased. On the material date when David went to the club and asked the accused for his mobile phone, the accused abused David and also struck him. David without saying what he meant, said the deceased “joined in” and the accused fled to the butchery within that club and came out with a knife. He further said that although he, David and the deceased fled, the accused pursued them and soon David realized the deceased was not in flight with him. David saw accused seated on deceased and he noted they were struggling. The deceased freed himself but the accused followed him and stabbed the deceased. The deceased died later as he was being taken to hospital. He was pronounced dead on arriving at the hospital. Police officer who attended the club that same evening recovered a kitchen knife from the accused: he had it in his waist. The Investigating Officer recovered a Tshirt that the accused was wearing when he was arrested and on that Tshirt being subjected to examination by



- the government analyst, was found to have blood whose DNA profile matched the deceased's blood. The knife did not have traces of blood.
4. The accused defence is that on the day in question, he reported on duty at 6 pm. Three young men approached him. He did not know them. They wanted to attack him saying he had their phone. When he told them, he did not have their phone, they began to attack him. He stated that he had taken alcohol. In the fight which ensued, accused said he was being over powered. That they were using chairs to beat him. Accused ran to the back of the club which is a hotel. The three followed him. He saw a knife, picked it wanting to scare the young men. That was when he stabbed the deceased. The three young men left running. He saw them ride away on a motor bike.
 5. The Court of Appeal in the case of *Anthony Ndegwa Ngari Vs Republic* (2014) eKLR discussed the element of murder and held thus:-

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

 - (a) the death of the deceased and the cause of that death;
 - (b) that the accused committed the unlawful act which caused the death of the deceased and;
 - (c) that the Accused had the malice aforethought.’
 6. The death of the deceased was proved by the prosecution through the father of deceased who identified deceased's body for the purpose of postmortem being performed. It was also proved by the doctor who performed the postmortem. The cause of death was severe loss of blood due to severed large blood vessels in the neck and thigh having stab wounds. Deceased was stabbed once behind the left ear, on the right thigh and on the left forearm.
 7. The second element prosecution is required to prove is that the accused committed the unlawful act which caused the death of the deceased. The accused raised the defence of self-defence.
 8. My examination of the prosecution's evidence leads me to find that the accused did indeed commit the act that led to the deceased's death but the evidence points to the fact that he did so in self-defence in fear for his life.
 9. Section 17 of the *Penal Code* provides as follows:-

“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”
 10. The Court of Appeal in the case of *Ahmed Mohammed Omar & 5 Others Vs Republic* (2014) eKLR extensively examined the English Common Law on self-defence and I am well guided by that consideration.
 11. The Court of Appeal in that case began by considering the English case of *Palmer V R* (1971) EAC 814 as follows:-

“What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in *Palmer V R* [1971] AC 814. The decision was approved and followed by the Court of



Appeal in *R v McINNES*, 55 Cr App R 551. Lord Morris, delivering the judgment of the Board, said:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

12. David the brother of deceased stated that he and his brother went to the accused to ask for David's phone which David alleged the accused had taken. David was adamant that he was only in the company of his brother, the deceased. PC James Maina in the company of another police officer went to the Citizen club to arrest the accused. The two unnamed persons who accompanied these police officers told the police officers that while there, there was a commotion at the club, and the accused stabbed the deceased. The Investigating Officer also when under cross-examination confirmed there was “mzozano” (dispute and confrontation). What is important to note is that there were three men against the accused. The accused said that they were beating him with chairs. It is under that circumstances that the accused retreated to the hotel area where he got a knife. The assailants followed him. He stated his intention in taking the knife was to scare the men but they continued beating him and it was then that he stabbed the deceased.
13. I do not believe the evidence of David that the accused chased him and his brother with a knife and that while outside slightly away from the club the accused pinned deceased to the ground and stabbed him there. The police officers who testified in this case did not state that their investigations revealed the stabbing occurred as narrated by David. David did also say that there was a lot of blood where deceased was stabbed. Again, the police officers did not at all state there was blood stains either inside or outside the club.
14. What lead me to find credence in the accused's defence is that the accident occurred in a club. There obviously were many people even the accused's co-workers who witnessed exactly what happened. The fact there were witnesses is confirmed by the testimony of the investigating officer, Chief Inspector Alfred Ruto. He stated that on following day on reaching the scene:-

“I got a few witnesses but the eye witnesses were not there.”



15. From that testimony, it is clear that not only were there more than one person who were present when the incident occurred but there was also more than one eye witness. The prosecution however only called David, the deceased's brother as the only witness of the incident. This Court is left wondering what the other witnesses who were not called could have testified.

16. The failure of calling other persons that were present when the incident occurred and the fact that the accused was in a fight or what I believe was being attacked by three men was serious enough to put the accused in peril and therefore, he proceeded to take defensive action. Accused did say that he took the knife to scare away the attackers which included the deceased. The statement made by David, that deceased 'joined in' implies there was a fight. It is useful to consider the quote by the Court of Appeal in the case of Ahmed Omar V Republic (*supra*) from Archbold – Criminal Pleading, Evidence and Practice 2002 thus:-

“There is no rule of law that a man must wait until he is stuck before striking in self defence.”

17. The Court of Appeal in the case *Robert Kinuthia Mungai Vs Republic* (1982-88) IKAR 611 which was cited in Ahmed Mohammed Omar (*supra*) held:-

“... we think, in view of the earlier East African cases we have considered, and the more recent English decision in *R V Shannon* Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in *Palmer V R* is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered.”

18. I find and hold that the accused was attacked by more than one man, more likely three men and foreseeing the imminent danger and acting out of defensive action, stabbed the deceased. There is no evidence that the accused armed himself with a knife prior to the confrontation by the deceased and others. The accused's action of defending himself in my view was reasonable and accordingly, his defence of self defence succeeds.

19. I end my analysis by quoting from the holding in of *R Vs Mc Innes (Supra)* that:-

“It is both good law and good sense that a man who is attacked may defend himself.”

Disposition

20. This Court finds that Dennis Wafula Wekesa is not guilty of murder of Patrick Mwangi Wanderi. He is therefore acquitted of that charge and an order is hereby made for Dennis Wafula Wekesa to be set free unless otherwise lawfully held.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

