



**Republic v Wafula (Criminal Case 17 of 2017)
[2023] KEHC 1622 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 17 OF 2017
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ANTONY BARASA WAFULA ACCUSED

JUDGMENT

1. Antony Barasa Wafula (the accused) was arraigned before this Court with a charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). He pleaded not guilty. The prosecution presented evidence from nine witnesses in support of its case. The accused adduced sworn testimony in his defence without calling any witnesses.
2. The prosecution's case is that the accused, a boyfriend of the deceased was in the house of the deceased. They were quarrelling. Later, the deceased was found with a knife imbedded in her skull. The deceased was taken to hospital but succumbed to her injuries three days later.
3. The prosecution is required to prove the case against the accused beyond reasonable doubt. This criminal standard of proof is necessitated by the need to protect the innocent from conviction. The prosecution is therefore required to prove beyond reasonable doubt all the elements of the charge, in this case the charge of murder.
4. Prosecution is required to prove three ingredients. The elements of the offence of murder are:-The death of deceased.The accused committed the unlawful act/omission which caused the death of deceased.The accused had malice aforethought.

The Death of the Deceased

5. The death of the deceased was proved by the elder brother of the deceased namely, Zacharia Mugo Chege. He testified that on March 4, 2017, he attended Nairobi Women hospital where he identified



the body of the deceased to the doctor. The postmortem report of that date indicates that the deceased's body was identified by this witness alongside another witness.

6. The other proof of death is of the doctor Oduor Johnsen who performed the postmortem. The postmortem report was produced in evidence by Dr Grace Atieno a co-worker of Dr. Oduor Johnsen. That report shows that the cause of death of the deceased was head injury due to penetrating trauma.
7. In my view, the death of the deceased was conclusively proved, beyond reasonable doubt, by the prosecution.

Proof the accused committed the unlawful act which caused death of deceased.

8. Prosecution adduced evidence through Tabitha Njambi Chege. Tabitha was older sister of the deceased. She stated she knew that the deceased was having a romantic relationship with the accused. Tabitha said that the accused had moved into her plot to reside there about 4 to 5 years prior to the death of the deceased. He resided about 4-5 house away from where Tabitha resided. She stated that the deceased and accused had a romantic relationship for 2-3 years. They first met when accuse moved into Tabitha's plot and as at that time the deceased was residing with Tabitha.
9. On the material date Hannah Waithera Mageri was at the deceased' house. Both Hannah and the deceased had been friends for a period of one year. Hannah stated in evidence:-

“She (deceased) was my friend for one year. We lived in the same neighbourhood. I know where she used to live. I used to visit her often. She also used to visit me. She used to live alone. Her house was about 300 meters from my house.

We ere very close. We would sleep in each others house for sleep overs.”

10. Hannah confirmed she knew the accused. He was the deceased's boyfriend. She had met the accused on three different times, the third time being the day in question, that is, February 22, 2017.
11. On that day, February 22, 2017 Hannah was at her house at around 6 pm. It was then that the deceased went to hannah's house on her way home from work. The deceased assisted Hannah to get some water for bathing. After getting that water, deceased requested Hannah to go with her to her place and to bathe there. This was around 7pm. At the deceased's house, they ate and the deceased cleaned her house. Before deceased finished cleaning, the accused arrived. Accused found both deceased and Hannah in that house. Deceased warmed some water on the stove for Hannah to bathe with. Hannah said that on accused arriving, the deceased began to quarrel with accused. Hannah said:-

“She (deceased) complained that Anthony never gives her any money or pay the house rent.

It became a heated argument. Anthony said Njoki (deceased) should say whatever she wanted. Njoki said if he was not able to give her money the other day he would not be able to do so on that day.”

12. Hannah left deceased and accused in deceased's house as she went outside to the bathroom about 50 metres to bathe. She left the two quarrelling.
13. On returning to deceased' house after 20 minutes, Hannah said she found deceased's house door closed but not locked. She opened the door and found deceased lying on the bed. Deceased was breathing



heavily. Deceased's house was one room with the sleeping area cordoned off by a curtain. Hannah found that curtain drawn. Deceased was lying on the bed behind that curtain. Hannah stated:-

“I went close to her (deceased) and I found she had a knife on her eyebrow.”

14. Hannah noticed the stab was deep and the knife was imbedded in deceased forehead and only the handle of that knife was visible. Hannah identified the knife with a blue handle she saw on deceased's forehead as the one before court during trial.
15. Hannah said that on seeing deceased stabbed she was shocked. She tried to get assistance from the neighbours but they declined to help. Hannah obtained the assistance of a boda boda operator with whom they reported the matter at Kihunguro police post. The police went to the scene and requested for a police vehicle which transported deceased to hospital.
16. Tabitha older sister to the deceased stated that on 23rd February, she was telephoned and requested to go to Nairobi Women hospital to sign consent form consenting to surgery being conducted on deceased. Tabitha went to the hospital and did sign the form. She saw the knife still imbedded in deceased's skull. She saw the whole blade was in the deceased's skull. The handle of the knife which was visible was blue in colour. She stated that three day later the doctor informed her that deceased had passed away.
17. Daniel Kamisi is a law enforcement officer attached to the mobile telephone provider Safaricom. Daniel stated that on daily basis he processes requests from law enforcement agencies requiring information from Safaricom in respect to telephone numbers which are subject of criminal investigation. On February 28, 2017, he was requested to provide information of telephone number 0792853622. The request was to provide the subscriber's details and communication data between 10th January to February 28, 2017. Daniel on receiving such request in ordinary course of business, he stated that he does actual extraction from the mobile provider through his secure user account. He explained that by saying he used secure account, it meant he used a secured password and encrypted format to retrieve the record requested by investigators.
18. Daniel stated on February 28, 2017 he extracted call data for the telephone No 0792853622 and presented his report to the court in evidence. He stated that, that telephone account was registered in the accused's name and the report showed he, the accused had communication with that telephone line from 10th January, to February 27, 2017. The report under column 9 is an indicator of the provider's mast which received the subject cellphone number. That report revealed that at 19:09:36 hours the subject mobile number of the accused was active at Ruiru in Gitambaa area. The report showed how the accused's mobile number moved, and on that day at 21:40:52 hours it was captured at JKUAT area.
19. The accused adduced his defence under oath. He admitted the deceased was his girlfriend.
20. Accused stated that at the material time, he was a student at the Jomo Kenyatta University of Agriculture and Technology (JKUAT). He had been a student from the year 2014. While studying, he resided at a plot owned by Tabitha, deceased's sister, at Juja area. That he got to know deceased when she visited Tabitha at that plot.
21. Accused stated that deceased was married to a man he named as Ng'ang'a. Their marriage broke down in 2014. There were two reconciliations between them but they did eventually separate. When they separated deceased lived with her sister Tabitha in Juja in 2016 in the same plot that accused resided at. That in October, 2016 the deceased approached him and requested that they stay together because she, the deceased had a disagreement with Tabitha because Tabitha was insisting she, the deceased reconcile with her husband.



22. According to accused, the deceased was reluctant to reconcile with her husband because that husband used to assault her. Accused said he witnessed a healed wound on deceased's neck inflicted by her husband Ng'ang'a.
23. Accused said that he lived with deceased for one week, however, after deceased secured a job in 2016 at a company in Ruiru, she moved to Ruiru. The accused said he assisted by giving deceased some money to help her in that move.
24. He too got a job in December, 2016 at Murera area in Ruiru at a construction site. On February 22, 2017 he was at his place of work upto 5.30 pm. After purchasing some provisions from the market, 1km away from Ruiru, he proceeded to his place of residence in Juja. Accused said that prior to deceased's attack on February 22, 2017, he last had seen deceased on February 15, 2017 when they travelled for a visit in Githunguri.
25. Accused denied he was in deceased's house on the subject day and alleged the evidence of Hannah to the effect he was in deceased's house where a quarrel broke out was untruthful. He termed that evidence as lies.
26. Accused has brought forth the inconsistencies he perceives in the prosecution's case which he said impeached the prosecution's witnesses' evidence. I will endeavor to go through each of those alleged inconsistencies.
27. I begin by dissuading the accused on his submission that prosecution's case must fail because identification parade was not conducted.
28. The prosecution's identification's evidence is by persons who stated that they were well acquainted with the accused. Tabitha the sister of the deceased was a landlady of the accused. Her evidence is that deceased and accused began a romantic relationship when accused moved into Tabitha's plot where Tabitha resided with the deceased. Tabitha said deceased and accused were in that relationship 2-3 years prior to deceased's death. It is therefore very clear there was no reason to require an identification parade to be conducted in Tabitha's identification of accused. Tabitha had known the accused as her tenant for a considerable period.
29. Hannah, the friend of deceased stated that she knew accused as the boyfriend of the deceased. She had met him at deceased's house. On the day in question, accused came and found them at deceased's house. When she went out to bathe, she left accused in deceased's house. Accused and deceased were quarrelling. On her return, she found accused not there and deceased had a knife embedded in her skull.
30. It is pertinent to note that in cross-examination of Hannah, there was no intimation that she did not know the accused. The first suggestion that they were not acquainted is when the accused gave evidence in his defence. Undoubtedly, that suggestion in accused's defence that Hannah and him did not know each other is an afterthought and cannot be relied upon. The court accepts the evidence of Hannah that she had met the accused before the subject date and she knew him to be a boyfriend of the deceased.
31. In the accused suggesting Hannah lied that she knew him, or lied that he was the last person she saw in the company of deceased before she found deceased stabbed, fails to explain why Hannah would lie it was him and not anyone else whom she last saw in the company of deceased. That suggestion by accused is more incredible since he alleges they did not know each other.
32. Although the accused in his submissions suggest that Hannah could possibly be the person who stabbed deceased, again that was not put to Hannah in cross examination.



33. In my view, the evidence of Hannah that she knew deceased shows that there was no necessity to have Hannah identify the accused in an identification parade.
34. Accused faulted the evidence of police officers who testified hereof.
35. The prosecution's evidence is that Hannah on finding deceased lying on the bed stabbed, she was shocked. She said that she also became confused. Some neighbours whom she called for their help did not assist her. Those who responded only stood by watching deceased. They did not assist Hannah. Hannah called a boda boda operator by the name Sam. Sam suggested that they first report the matter to the police. They reported at Kihunguro police post. Sam and Hannah led the said police back to the deceased's house. The police on arriving first chased away a large crowd that had gathered there. Thereafter they called Ruiru Police Station and requested for a vehicle to take the deceased to hospital.
36. The police officer from the police post in evidence confirmed Hannah reported that deceased was stabbed by her boyfriend with whom they had been quarrelling. He confirmed that on arriving at deceased's home, they found deceased stabbed above her right eye and she was groaning in pain.
37. Accused in reference to the Occurrence Book (OB) filed at the police post and the one filed at Ruiru Police Station has submitted that there are inconsistencies with those OBs and the evidence of two police officers and that their evidences should be disregarded.
38. The OB of the police post recorded Hannah reported that a person known to her had assaulted her friend (the deceased) whom she stayed with in the same house. The OB further stated that deceased was assaulted by her husband. Sgt. David Masista from the police post in his testimony before the court stated that Hannah reported deceased was stabbed by her boyfriend.
39. The alleged inconsistencies in respect to that report at the police post highlighted by the accused was in respect to whether the person who stabbed the deceased was deceased's husband or boyfriend.
40. The evidence which the accused did not refute was that he had a romantic relationship with deceased for 2-3 years. Considering how often in Kenyan society a longtime boyfriend is loosely referred to as a husband, I find and hold that nothing comes from or turns on the different description of the accused as husband or boyfriend.
41. Similarly, nothing turns on different hours given by this officer in evidence before court and what is recorded in the OB. This officer stated in evidence that Hannah made the report at the police post some minutes after 6 pm. In the OB it is recorded 20:17 hours was the time of reporting. No question was put to the officer whether he wrote on that OB the time of reporting of the incident or whether the recording in the OB was done after his responding and going on the scene. The different recorded hours do not in my view, change that Hannah reported at the police post and the police from there responded by going on the scene. The submissions of the accused on the evidence of this witness does not impeach that evidence.
42. Similarly, the Ruiru Police Station OB No 66/22/2/17 indicates the time as 23:45 hours. The officer from Ruiru Police Station PC Samuel Kemboi was not asked whether the OB was recorded when the request for police vehicle was made or when he returned to the police station having driven the deceased to hospital. I therefore reject accused's submissions in that regard.
43. The deceased was admitted in hospital with the knife lodged in her forehead. It was not removed until the following day after Tabitha consented to surgery of deceased. In that regard, the knife must have been touched by many people and it would explain why it was not dusted for finger prints after it was released to the police by hospital.



44. The postmortem report reflects that deceased was a male. Accused has submitted the report for wrongly indicating deceased was a male and not a female; it should be disregarded. The doctor who testified and produced that report confirmed that it related to the deceased. Additionally, deceased's brother Zachariah Mugo confirmed he identified his deceased's sister's body to the doctor when postmortem was carried out. The error of describing the deceased as a male is nonconsequential.
45. What the accused has largely done by his submission is to pick in isolation, on dates and statements which he says shows inconsistency. That is undesirable: See the Tanzanian case of *Dickson Elia Nsamba Shapwata & Another v Republic* Criminal Appeal No 92 of (2007)(2008) TZ CA 17 (30 May 2008). The evidence ought to be considered wholesomely to find out whether there are inconsistencies.
46. There is no doubt that where there are unexplained grave contradictions, it can lead to rejection of evidence. In my view, however, the contradiction accused has raised in this matter are trifle and do not affect the prosecution's evidence. A case in point the Court of Appeal decision of *Richard Munene v Republic* (2018) eKLR thus:-
- “Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
- It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.’
47. I also refer to the case *Phillip Nzaka Watu v Republic* (2016) eKLR which shows that human of reality can lead to inconsistencies between witnesses but that does not necessarily mean they are lying; in that case, it was held thus:-
- “However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”
48. The prosecution's evidence in this case is circumstantial. In order to infer guilt, the inculpatory facts must be incompatible with innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of guilt: See the case of *Republic v Kipkering Arap Koske & Another* (1949) 16 Eac 135.
49. The evidence of Hannah, which was not subjected to cross-examination was that the accused on arriving at deceased's house, a quarrel ensued between them. The deceased was displeased with the fact accused was not providing her with money. Hannah went to the bathroom and left the two quarreling. On her return in deceased's house, a one roomed house, she found deceased lying in the bed with a



knife lodged in her forehead. The Safaricom data shows that the accused's cell phone was recorded as being at Gitambaa area between 19:09 hours and 19:13 hours.

50. Accused submitted that the information before court indicates the deceased was killed at Fort Jesus area within Ruiru sub-county and not in Gitambaa area.
51. I have perused the evidence of Sgt. David Masita. He stated he was stationed at Kihunguro Police Post where Hannah reported deceased had been stabbed. PC Samuel Kemboi stated a report was made at Ruiru Police station that the deceased had been stabbed at Fort Jesus area. PC Francis Mutuku of DCI Kiambaa stated that the report received was that deceased was stabbed at Gitambaa area.
52. The witnesses as it is seen from the above interchangeably referred to the place where the offence occurred as Fort Jesus and Gitambaa as one and the same place. The cell phone data places accused at the material time at Gitambaa. Hannah saw accused arrive at deceased's home and after returning from the bathroom Hannah found deceased stabbed.
53. Having considered the evidence adduced by the prosecution, I find that the evidence is incompatible with the innocence of the accused and it is incapable of any other reasonable explanation other than the guilt of the accused. That evidence meets the required criminal standard of proof. In the case *Miller v. Minister Of Pension* (1947) Denning J alluded to that standard of proof and held:-

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail 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 in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

54. The accused raised an alibi defence. He stated he was at work at Ruiru. That evidence was displaced by the evidence of the prosecution and more particularly, by that of Hannah which evidence was corroborated by the cell phone data. No reason was given by the accused why Hannah would lie about his presence in the deceased's house. Therefore, on weighing the prosecution's evidence and the alibi defence, I find the accused's guilt was established.
55. In that regard, no weight will be given to the evidence of bad relations of the deceased and the alleged husband of deceased, nor in the fact the prosecution did not call the neighbours who gathered when Hannah sought help to get deceased to the hospital.
56. I am satisfied prosecution provided evidence that linked the accused to the murder of deceased. The accused did in my view commit the unlawful act that caused the death of the deceased.

Proof that accused had malice aforethought

57. The deceased was stabbed on the forehead. The blade was imbedded in the deceased skull and only the handle of the knife was visible. The accused in assaulting the deceased as he did clearly had intention to cause death or grievous harm. The accused was therefore proved to have malice aforethought.

Disposition

58. In my conclusion, the Court finds the accused Anthony Barasa Wafula guilty of the murder of Mary Njoki Chege deceased and he is therefore convicted as charged.

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



MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julia

Accused Anthony Barasa Wafula :- Present

For accused : - Mr. Karanja

For DPP :- Mr. Gacharia

