



**Republic v Kibanga & another (Criminal Case 19 of 2018)  
[2023] KEHC 3022 (KLR) (3 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 19 OF 2018  
RM MWONGO, J  
APRIL 3, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**GRACE WAKAREMA KIBANGA ..... 1<sup>ST</sup> ACCUSED**

**BENJAMIN MWANGI NJENGA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. On the October 12, 2018, the deceased Nahashon Kahuwai, a driver, completed ferrying maize stalks for cows for his uncle Isaac Waweru Kahuwai. He left the maize in his uncle's lorry saying he was tired. He then left for his home at about 7.00pm. This was according to the evidence of PW2, Isaac Waweru Kahawai.
2. It is not clear from the evidence adduced when Nahashon got home to his wife Grace Wakarema Kibanga, the 1<sup>st</sup> accused. However, in her unsworn statement she said the deceased arrived home at about 7.00 pm. He then flashed her on the phone. At the time, she was at her church in a prayer meeting, Kesha, about 300 metres away from their home.
3. Grace stated that when she got home, she found Nahashon there. She gave him supper and he took a bath. She then asked him to take her back to church so they could collect her last born, aged four, who she had left at church. He declined. So, she told him she would run to church and pick her child and return. He agreed and she left.
4. According to Grace, before she reached the church gate, Nahashon called her and told her to look near the house nearby, and when she saw a motorbike, she was to go there. So, she went back and soon found a motor bike with a rider. Nahashon was in the pillion seat. He gave her the house keys and took one house key off. He said he was going to Karangatha Centre, and told her to follow him there, to



- Mwangaza Club. She followed on foot. On getting there, she called him on the phone when she didn't see him. He did not respond.
5. Grace then entered into the club and saw Nahashon seated there having a drink. She removed his hat and they did not speak to each other, and she went out again. She flashed him on her phone and he told her to wait for him to finish his drink and they would go together. She waited for him at a spot where there was no direct light from the bulbs.
  6. She continued waiting and, when Karagatha Centre appeared to be emptying out of people, she went back in to the club. She asked someone if he had seen Nahashon. The man said Nahashon had been in a fight and gone out. According to Grace, she then left the club and went home, where she found him.
  7. Without waiting for her to speak, Nahashon immediately started beating her. She ran out of the house and onto the road. It was dark. She called her mother-in-law on phone and told her what was happening. Suddenly her shoulders were grabbed from behind, and it was Nahashon. He started beating her again and she screamed, as she fell onto the fence. According to her there were other people there.
  8. Nahashon then stopped beating her and told the people he would take her home. However, she pulled herself away and fled to a plot which had uninhabited houses and hid there the whole night. The following morning, she found that her clothes were bloody and soiled so she went back home to change.
  9. On reaching the house, she entered fearfully. She found him inside and called him twice. He responded from a distance. The house was in disarray from the previous night's fight and Nahashon was on the floor, and his face and one of his eyes were swollen. She removed her clothes and called her neighbour, Danson Muyuro (PW3). She went to his house and returned with Danson. She asked him to help her take Nahashon to hospital, but seeing how Nahashon looked, Danson thought they needed help from a third person.
  10. Grace then called Nahashon Githitho (PW1) who lived nearby. He arrived and called for a taxi. When it arrived, the three of them - Githitho, Danson and Grace - carried Nahashon to it and they went to AIC Dispensary. She was told to wait outside. Eventually the news came out that Nahashon could not be moved from there without a police letter because he was dead.
  11. The evidence of Nahashon Githitho (PW1), the deceased's cousin, accords with that of the 1<sup>st</sup> accused. He said that his father called him on October 12, 2018 at about 7.00 am. His father told him to go to Nahashon's house because he had been called by Grace who said Nahashon was sick. Githitho called Grace who asked him to come quickly.
  12. On going to Grace's house, Githitho found his cousin Nahashon on the bed, battered and unable to talk or walk. Githitho called a friend, Staned, a taxi driver, who came with a taxi vehicle and left it with Githitho. He, Grace and a friend, Danson, then carried Nahashon to the taxi and took him to Karangatha Dispensary. On getting there, the doctor noted that Nahashon was dead, and they would need a letter from the police to take the deceased who was still in the car to hospital. They then went to Haraka Police Station where after questioning her, the OCS directed that Grace be locked up.
  13. At the office of the OCS, Grace said that she and the deceased were fighting. Grace, also separately told Githitho that she had had a fight with the deceased the previous night.
  14. PW3 Danson Muyuro corroborated Githitho's evidence. He said that Grace called him at 7.00 am on 13<sup>th</sup> October and asked him to help him with her husband who was sick. Danson went there and found the single roomed house in disarray. Grace showed him where Nahashon was on the floor. She told him



- they had fought and that he had been drinking the previous night. When Danson called Nahashon he did not answer. So, he told her to call family members.
15. On going to Grace's house, Githitho had found his cousin Nahashon on the bed, unable to talk or walk. Githitho called a Friend, Staned, a taxi driver, who came with a car and left it with Githitho. He, Grace and a friend, Danson, carried Nahashon to the taxi and took him to Karangatha AIC Dispensary. On getting there the doctor said Nahashon was dead, and that they would need a letter from the police to take the deceased who was still in the car, to hospital. They went to Haraka Police Station where the OCS directed Grace to be locked up.
  16. At the office of the OCS, Grace said that accused 2 and the deceased were fighting. Accused 1, Grace, also told Githitho that she had had a fight with the deceased, the previous night.
  17. PW3 Danson Muyuro corroborated Githitho's evidence. He said that Grace called him at 7.00 am on October 13, 2018 and asked him to help with her husband who was sick. He went there and found the single roomed house in disarray. Grace showed him where Nahashon was on the floor. She told him they had fought and that he had been drinking the previous night. When Danson called Nahashon he did not answer. So, he told her to call a family member. She called Githitho and he came. He then called for a car, which came, and they took Nahashon to AIC Dispensary. Githitho drove.
  18. On examining Nahashon at the dispensary, the doctor told them Nahashon was dead. They took the body back and went to Karangatha Police Post, and then on to Kwa Haraka Police Station. There the OCS questioned Grace and arrested her. The police took the body to Nyayo Ward Engineer Hospital.
  19. In cross-examination, Danson reiterated that Grace had told him they had a fight; and that the deceased and Grace had three children.
  20. PW4, Pastor Samuel Njenga, a resident and Pastor at Karangatha, testified that his church, Bethsaida Jordan Israel Church, had a kesha on the night of October 12, 2018. At 7.00 pm Grace attended the church with her two children. At 9.00 pm she left, and at about midnight, he heard some shouting but did not bother with it.
  21. The following morning, he noticed that Grace's children were still in church. At about 6.00 am that morning he went home with his children and Grace's children. At 9.00 am the police arrived and asked where the deceased's home was. He pointed it out and the police went there. At that point he was not aware that anyone had died.
  22. PW5 Susan Wanjiru Ngugi, who worked with the government chemist for 7 years, gave forensic evidence. She said she conducts analysis of human fluids, DNA, and makes comparisons. She testified that she analysed a blood sample of: the deceased (sample D1 and D2); blood stains from a sweater, (sweater B), blood stains from a light blue T-shirt, (T-shirt C). The clothes were identified as belonging to Grace.
  23. On comparison of the DNA profile of the blood on items 'B' and 'C'; they matched the DNA profile from blood samples D1 and D2 of Grace. In essence, PW5 found the DNA profile of blood on the sweater and shirt matches the DNA of Grace.
  24. Eric Mwangi, a 14-year-old minor, gave unsworn testimony following a voir dire examination. He said he is the first born and has two sisters. He said he went to a kesha with his mother, accused 1 at their church. His mother later left and brought a coat for his sister Njeri. Later on, he went to look for his mother but did not find her. They therefore stayed at church the whole night. The next day they went to the Pastor's home and their mother did not come for them.



25. PW6 then walked home alone. It was not far. He found the home in disarray with the bed, chair and blankets in disorder. On his mother's bed he found blood. He knew something was wrong and went to the road where he started crying until some askaris came and took him with them. He later saw his mother at the police station. In cross-examination he said he heard people fighting somewhere outside the church but he did not get to see.
26. Joseph Kimani Kabutha testified as PW7. He was working in Mwangaza Bar on the night of October 12, 2018. He said that Nahashon, whom he knew as a customer and friend, came to the bar at about 9.00 pm. He had a drink and soon a lady came to the bar and removed Nahashon's marvin. Nahashon said nothing and the lady left. Nahashon had two more drinks and left through the corridor door at about 10.30 pm. Joseph then locked the front door of the bar, so customers could leave through the back door.
27. At about 11.00 pm the lady who had taken Nahashon's marvin returned to the bar and asked for Nahashon. He told her he'd left. She insisted on peeping inside. The lights were on and he saw her clearly as they spoke. She then left and he went home.
28. The next day at about 1.00 pm, Joseph saw crowds chasing a young man called Kamau. They said they wanted him to explain what had happened the previous night at the Kesha. It was then that he heard that Nahashon had been killed. About three days later the police came to his bar and told him to go and write statements. He later discovered that the accused, who had come to the bar, was the deceased's wife.
29. Dr Titus Ngulungu, a pathologist at Nakuru General Hospital carried out the post mortem of Nahashon on October 16, 2018. The deceased was identified by Githotho (PW2). The background information he was given was that the deceased had been found dead in his house after a misunderstanding with his wife. On being taken to hospital he was pronounced dead.
30. On examination of the body, Dr Ngulungu found head injuries, blood in the eyes, bruises on the left front of hands measuring about 25mm. The rear right of the thighs had bruises of about 10mm. On dissection, he found; fracture of right parietal region; There were lacerations and contusion of the brain at the epicentre of the fracture; and the blood was mixed with brain substance. It was a severe head injury with skull fractures, epidural, subdural and ultra cerebral haematoma.
31. Dr Ngulungu formed the opinion that the cause of death was severe head injury attended by skull fracture, epidural and subdural haematoma with brain laceration. He attributed this to blunt head trauma which correlates to the circumstances to include or exclude homicide; but resembles homicide.
32. In cross-examination he said the injuries were fresh; that the forearm injuries were of a defensive type; and that the deceased had survived for some time as there were no changes on the injuries such that death may have occurred within 2 - 5 days.
33. Inspector Alexander Muriithi Njagi of Njabini Police Station, testified on behalf of the investigating officer Simon Lubuya, who had passed on a month before the hearing. He said that on the material day Simon Lubuya and corporal Misoi had left him in the office to go for a meeting. The OCPD then called corporal Misoi and informed him of a reported case of murder at Kwa Haraka Police Station. They two went to Kwa Haraka where they found two suspects under arrest. One who was Grace and the other was accused 2.
34. The OCS asked that the arrested persons ought to show them the body of the deceased, which was in a Probox vehicle outside the station. They then went to the deceased's house and recovered a hammer, a grey sweater with blue and red colours (MFI -3) a jumper sweater. He produced the sweater as PEx



3. They also found a polo T-shirt with blood stains in the house, which he produced as PExb 4. The hammer was produced as PExb 7, as the items used to hit the deceased. The clothes were taken to the government chemist for analysis.
35. In cross-examination the witness said that both the 1<sup>st</sup> accused and deceased were farmers; as such, it would be common to find a hammer in their home.

### **Analysis of Evidence and Determination**

36. To achieve a conviction, the prosecution is required to prove: That the deceased died; that the death of the deceased was caused by the accused; and that the death was actuated by malice aforethought on the part of the accused.
37. It is not disputed that the deceased died. Dr Titus Ngulungu examined the body. He gave his opinion on the deceased's death. This is not contested evidence.
38. Was the death caused by accused 1 or accused 2?
39. As is often the case in many such instances, there was no eye witness testimony availed concerning how the deceased died. With respect to the 2<sup>nd</sup> accused, there is no evidence whatsoever that connected him in any way to the death of the deceased. There was also no evidence that he contributed to the death of the deceased.
40. The available evidence on the 2<sup>nd</sup> accused was his own evidence. He testified on oath that on the material night he did not meet with either the deceased or the 1<sup>st</sup> accused. He said he was arrested the following day when he was part of a crowd that was headed to the police station to find out what had happened.
41. PW1, PW2 and PW3 all said they knew the 2<sup>nd</sup> accused but gave no evidence about his involvement in the death. DW4 knew accused 2 as a boda boda rider in that area. PW7 said he knew the 2<sup>nd</sup> accused as his neighbour, but was not the person called Kamau knew he had seen being chased by the members of the public. Even the police investigator made no mention of the 2<sup>nd</sup> accused.
42. In light of the foregoing, the 2<sup>nd</sup> accused had no role whatsoever in deceased's death and is hereby acquitted.
43. The evidence against the 1<sup>st</sup> accused was as follows: PW1 Githitho said in cross-examination that he had been told by PW2 that the 1<sup>st</sup> accused, when calling for help for Nahashon, told PW1 to go to Grace's house as she had told him the deceased had been beaten.
44. The evidence of PW2 was that he received a call from Nahashon's mother Hannah Wambui, saying he had been beaten. However, Hannah Wambui was not called to give evidence.
45. The evidence of PW3 Danson, was that when he went to Grace's house in response to her call for help, she told him that she and the deceased had had a fight, and he had been drinking the night before. His evidence in examination in chief was:

“She told me they had fought and had been drinking the previous night.....”

In cross-examination he said:

“.....Grace told me her husband had drunk beer and they fought. I did not write in my statement but I told the police... may be they did not write”.



His re-examination was as follows:

“Shown his statement: I told the police they had quarrelled and fought. They wrote it”.

46. The evidence of Eric Mwangi, Grace’s son, was only that he was at the church keshu the night of the incident. When he went home, he found the house in disarray and there was blood on his mother’s bed.
47. PW7 the bar man said he saw the 1<sup>st</sup> accused at the bar, that he saw her remove Nahashon’s marvin at about 10.00 pm on the material night; That at about 11.00 pm that night she returned to the bar and asked for the deceased.
48. In her own unsworn testimony, Grace corroborated the evidence of the barman, that she had removed Nahashon’s hat, and that she had left then returned to the bar later. She said that on getting home, the deceased beat her; and that she screamed and run out of the house and fell in the fence where there were other people. She said she went back home in the morning, and changed her clothes.
49. Tying together all the evidence, what clearly emerges is as follows: The deceased was at the bar drinking on the night of October 12, 2018. His wife Grace showed up but they did not return together. When she got home, they got into a fight which explains why the house was in disarray. The deceased likely initiated the fight and she defended herself.
50. In any event, she was able to overpower her husband after hitting him with a blunt object, most probably the hammer. After he collapsed, she ran out and hid but returned in the morning. She called Hannah Wambui and told her about the fight. In turn, Hannah told PW2 who recounted the story to PW1, and requested him to go to Grace’s house.
51. Grace called PW3 Danson for help and told him that the couple had had a fight and she needed help to take him to hospital.
52. Would the available evidence that the deceased died in a fight with the 1<sup>st</sup> accused, Grace be sufficient to result in a conviction? I think not.
53. It is clear that the unsworn evidence of the 1<sup>st</sup> accused is the one that has enabled a complete piecing together of the events of the material night as they probably unfolded. However, it is trite that unsworn testimony is by nature untested by cross-examination and thus of low probative value. Further, no adverse inference can be drawn against an accused for electing to make an unsworn statement.
54. In *Mercy Kajuju & 4 others v R* [2009] eKLR, Emukule J discussed at length the above and value of unsworn statements as follows:

“I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.

.....

There are of course constitutional issues to overcome for instance section 77 of the *Constitution* on fundamental rights and compulsion to give evidence. There is need to study these provisions and ss.211 and 306 of the *Criminal Procedure Code*, for the better enforcement of the law in relation to the criminal justice system and eliminate these unsworn



statements as they add no value to the system and if any, they confuse the accused who are mostly ignorant of their effect, and thereby obfuscate the system all together.....

Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused persons elects to make an unsworn statement, he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-

- (1) to test the credibility of the witness;
- (2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and
- (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,
- (4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.

In *Amber May v The Republic* [1999] KLR 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions section 211(1) of the Criminal Procedure Code. On appeal against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal *inter alia* held-

1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.
2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by section 211 (1) of the Criminal Procedure Code (cap 75, Laws of Kenya)"

55. It is therefore inappropriate and unsafe to rely on the unsworn statement of Grace, as proof that she caused the deceased's death. Even if her evidence was taken as true, there is other evidence by PW6, and PW7, for example, that other people were heard fighting on the vicinity not far from the church and that someone called Kamau was being chased by a crowd in connection with the killing. Even the barman had said the deceased had been involved in a fight.

56. In addition, suspicion that the fight between the 1<sup>st</sup> accused and the deceased led to his death is not tenable as evidence. It has been repeatedly held that "suspicions however strong is not sufficient to achieve a conviction".



In criminal appeal No 2 of 2002 *Joan Chebichii Sawe v R*, the Court of Appeal settled this point as follows:

“In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. 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. As this court made clear in the case of *Mary Wanjiku Gichira v Republic* (criminal appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

### **Conclusion**

57. Ultimately, I think that it is clear that the prosecution did not prove the case against either the 1<sup>st</sup> or 2<sup>nd</sup> accused beyond reasonable doubt. In the case of the 2<sup>nd</sup> accused there was barely any evidence of his involvement in the crime, let alone his culpability.
58. In the case of the 1<sup>st</sup> accused there was hearsay and unsworn evidence, which at best amounted to or raised suspicions. There is however no proof of either the actus reus or the malice aforethought to prove murder.
59. Both accused cannot therefore be convicted and are both acquitted. They shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AT KERUGOYA, THIS 3<sup>RD</sup> DAY OF APRIL, 2023.**

**R. MWONGO**

**JUDGE**

**Read out Virtually in the presence of:**

1. Karanja for both the Accused
2. Atika for State
3. Accused 1 Present at Naivasha Maximum Prison
4. Accused 2 Present in open Court
5. Q. Ogutu Court Assistant

