



**Republic v Wapukha (Criminal Case 36 of 2020)  
[2023] KEHC 18974 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 36 OF 2020**

**SN RIECHI, J**

**JUNE 20, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH MAKHUNI WAPUKHA ..... ACCUSED**

**JUDGMENT**

1. The Accused Joseph Makhuni Wapukha is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 22<sup>nd</sup> day of November 2019 at [particulars withheld] village in Mukuyuni Location, Bungoma Central Sub-County within Bungoma County he murdered Timothy Nyongesa.
3. The Prosecution case is that PW1 Ann Nanjala Wakuha who was married to Matayo Wekuha who died in 1986. Timothy Nyongesa who remarried the witness and they had one child called Timothy Nyongesa (the deceased). On November 22, 2019 at around 9 pm as he heard the deceased speaking outside, she went there and deceased told her he had been assaulted by a person he does not know. She observed the deceased and found he had injuries on the head near the right ear. She took him to Chwele Health Centre, Kimuli and later to Bungoma County Hospital where he died while undergoing treatment.
4. PW2 John Sikolia Wafula testified that she is the son of Anne Nanjala (PW1). He testified that the deceased was staying with his mother Ann in the same homestead but in the kitchen house. Accused Joseph was staying about 200 metres away. On November 27, 2019 he received information that the deceased had been assaulted and had been taken to hospital. he went to the hospital and found him unconscious and was awaiting scanning. He went to look for money to pay for the scanning and later received information that he had died.



5. PW3 Benson Wanaoni the Clan elder testified that Ann Nanjala is her neighbour. Ann had children among them Joseph (accused) and Timothy (deceased). On November 22, 2019 he received information that Joseph (accused) and Timothy (deceased) had fought over coffee proceeds. He went there and found Joseph (accused) face swollen. Accused told him that accused had quarreled with Timothy (deceased) and they fought. Accused then went to report to Mukuyuni Police Station. One Simon went to report to Chwele Police Station. Police later came and commenced investigations.
6. PW4 Simeon Khaemba Wanauna the brother of Benson (PW3) received information that the deceased who is his nephew had been assaulted. He went there and met Joseph (accused) who told him they had fought with deceased over money. He found deceased had been taken to hospital. He reported the incident to Mukuyuni Police station but was referred to Chwele Police Station where he reported. Visited the scene and recovered a panga.
7. In cross examination he stated that he did not witness the accused and deceased fighting but accused had told him that they fought.
8. PW6 No 60131 Senior Sergeant Sarah Situma was instructed by the OCS to visit a scene of murder. On November 28, 2019 she visited the scene and was informed by the mother of the deceased that accused and deceased had come home drunk and they fought she came out and found deceased lying down with a wound on the head. She saw accused going towards his house. Deceased was taken to hospital at Bungoma where he died. Ann Nanjala pointed out the house of accused. They went and searched and from under the bed they recovered a panga which appeared to have been recently washed. She took possession of the panga which was produced as Exhibit (Exhibit 1). She confirmed in cross examination that the panga had no blood stains.
9. PW8 Dr Haron Obongi produced the post-mortem prepared by Dr Musa Ochieng who performed the post-mortem and had gone for further studies. The deceased had a linear cut wound on left temporal region measuring 6 cm deep and cut wound on the head. From the examination he formed opinion that cause of death was due to severe head injury caused by a sharp object.
10. PW7 No 22xxxxx PC Simeon Namai was instructed by OCS on 3/8/2020 to arrest the accused. He and P.C. Maini went to the home of accused; found him present and arrested him. They took him to Chwele Police station.
11. PW9 NO 47456 Corporal Muloma Kisangi the Investigating Officer was instructed by CI Richard Chemweno to take over investigations on a report of murder. He commenced investigations. He found that November 22, 2019 Joseph (the accused) had fought with his brother Timothy (the deceased) and had cut him with a panga. The matter was reported at the police on November 28, 2019 upon the death of deceased. The accused escaped from the area and was arrested on 3/8/2020. He recorded witness statement. He then caused accused to be charged with present offence. He recorded witness statement from Ann Nanjala the mother which she later recounted. He produced the statement as PEXh. 3.
12. The accused upon being put on his defence gave sworn evidence. He testified that the deceased was his brother. On November 22, 2019 he had picked his 16 tins of coffee to sell to a customer Sikolia Wepukhulu, who came at 8.30 pm. The deceased then went to the house of accused and demanded money to go and buy alcohol. He did not give him the money. He then started going to their mother's house when on the way deceased hit him. The accused then got hold of deceased and fell him down. The accused noticed he had been injured and when deceased stood up he ran away to his house. While in his house he heard deceased making noise and then stopped. The next day he went and saw deceased had deep cut wound on the head. Deceased was taken to Chwele hospital where he was treated and discharged. The accused then went to Kisaju where he was working. Later he received information from



- Anna the mother that deceased had died. He later came home and in August 2020 he was arrested. He stated that he only held the deceased and threw him down while he was trying to defend himself. He reported the matter to Mukuyuni Police Post *vide* OB No 4/25/11/2019.
13. On being cross examined by M/S Kibet for State, he testified that he had a previous injury on his arm before the incident. He admitted on the material night he struggled with the deceased and the deceased sustained injury on the head which was 3 cm deep. He confirmed he reported to Mukuyuni Police Station that they had fought and deceased got injured slightly.
  14. M/S Lunani for the accused filed written submission. Counsel submitted that with the production of post-mortem report there is no dispute on the death of the deceased. Counsel however submits that there were 2 post-mortem reports on same deceased one showing that deceased died as a result of blunt injuries (D Exh. 1) and another by the same doctor produced by Prosecution (PEX 1) showing that deceased died due to injury inflicted by sharp object. The cause of death is not clear. Counsel further submits that the Prosecution did not prove its case beyond reasonable doubt. She submits that there was no eye witness to the murder; the alleged panga weapon does not have blood-stains and no clothing of accused with blood-stains were provided.
  15. Counsel further submits that the accused had no intention of killing the deceased. He was attacked and acted in self-defence. She submitted that that the accused's defence of self-defence accords the accused complete acquittal when reasonable force is used.
  16. The accused is charged with the offence of murder contrary to Section 203 *Penal Code*. Section 203 provides:
  17. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.
  18. The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:
    1. The fact and cause of death.
    2. The unlawful act or omission causing death.
    3. That it is accused who committed the unlawful act or omission or inflicted the injuries from which the deceased died.
    4. That there was malice aforethought.
  19. On death of deceased the post mortem report produced indicates that after the post-mortem a Certificate of Death No 1210124 was issued. This confirms the fact of the death of deceased. On the cause of death, PW8 Dr Harun Ombongi produced a post-mortem dated December 16, 2019 by Dr Musa Ochieng who found that the deceased had a linear cut wound on left parietal region 6cm long and formed opinion that the cause of death was severe head injury following assault with sharp object. The defence provided a document tendered as post-mortem Dexh 2. This Court has perused the document. It is a photocopy with erasures purporting to show that the death was due to assault with a blunt object. This cannot be correct as even the accused stated in his defence that deceased had cut-wounds on the head. A cut wound measuring 6 cm deep would only have been caused by a sharp object. I am therefore satisfied and do find that the cause of death was due to injuries inflicted using a sharp object. The unlawful act or omission causing the death of deceased was assault.
  20. Did the accused inflict injuries on the deceased that caused deceased death? None of the witnesses who testified stated that he saw accused inflict the injuries. PW1 Anne stated she found deceased with



injuries. PW2 and PW3 testified how the deceased had been injured and how accused told them he had fought with the deceased. The accused upon being put on his defence testified that on November 22, 2019 at around 8.00 p.m the deceased went to his house to demand for money from proceeds of sale of coffee. That the deceased then quarreled the accused and left. The accused then left for his mother's house while a few meters from there someone attacked and hit him. He reacted by lifting the assailant and hitting him on the ground. That the deceased though injured tried to continue the fight but the accused ran back to his house. He did not proceed to his mother's house to avoid further confrontation with the deceased. The deceased continued crying and shouting for a while. The following day he saw the deceased at their mother's house he had a slight injury on the left side of his forehead but he was in pain. Their mother took the deceased to the Chwele Sub-County Hospital for treatment and they came back home. That the deceased's condition worsened two days later he was taken to Bungoma District Hospital where he passed on November 28, 2019. The deceased died as a result of the injury inflicted by the accused.

21. The accused while admitting that he was hit by deceased readily admits that the injuries he was treated for were from a previous injury. He did not sustain any injury during the fracas. He readily admits that he was annoyed at the deceased's insistence that accused gives him money to buy alcohol. He therefore is stating that though he inflicted the injuries it is deceased who had provoked him. Where an accused is charged with the offence of murder and evidence is adduced to establish that accused acted under provocation Section 207 provides:
22. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only. 208. Provocation define only".
23. After considering the whole evidence I am satisfied that accused inflicted the injuries on the deceased which led to death of deceased under provocation. I therefore under Section 207 of the *Penal Code* find accused guilty of the offence of manslaughter contrary to Section 202 of the *Penal Code* and convict him accordingly.

**DATED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**S. N. RIECHI**

**JUDGE**

