



**Republic v Wafula (Criminal Case E003 of 2023)
[2023] KEHC 19022 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E003 OF 2023
WM MUSYOKA, J
JUNE 19, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

EVANS OUMA WAFULA ACCUSED

RULING

1. The accused is charged with the murder of Benard Ochieno Wafula, contrary to section 203, as read with section 204, of the *Penal Code*, cap 63, Laws of Kenya. The particulars are that on February 27, 2023, at Lung'a village, Nasewa location, Matayos sub-county, within Busia county, he murdered Benard Ochieno Wafula.
2. 4 witnesses gave evidence in this matter. Only 1 of them testified to have witnessed the accused person assaulting the deceased or doing something to him which could have caused his death. PW1, Desterio Wafula Sudi, was the father of the deceased and the accused. He was not present when the assault happened, but he was the one who took the deceased to hospital. PW2, No 2xxx6 police constable Peter Kibunguchi Wekesa, was among the police officers who responded to a call from provincial officials about the arrest of the accused person, they proceeded to the scene and re-arrested him. PW3, Rose Anyango, was the mother of the deceased and the accused. She was present when the assault happened. She said that a small stick was used, but she did not describe the injuries. PW4, No 9xx7 police constable Samuel Nyongesa Khaemba, was the investigating officer. He took over the matter from the officers who had arrested the accused. The prosecution presented the 4 witnesses on May 29, 2023, and closed its case the same day.
3. The defence did not submit.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.



5. On whether the deceased died, I have the evidence of PW1 and PW3, who were the parents of the deceased. They all confirmed that the deceased had died. The pathologist did not testify, and so I cannot tell what caused his death. As no evidence was placed on record on the cause of death, there is a tenuous linkage of the accused to that death. The only evidence is that of PW3. She testified that the accused hit the deceased with a small stick. She did not indicate whether or not he sustained any injuries, other than saying that there was bleeding from the head. PW1 also said that there was bleeding from the head, leg and arm. Was the bleeding the cause of death? I cannot tell, without medical evidence. The prosecution, did not call the pathologist, and did not explain why, and did not apply to have the matter adjourned to call him.
6. The small stick allegedly used to assault the deceased was not produced. The person who allegedly witnessed the stick being used on the deceased was PW3, but when she testified the stick was not placed before her, to identify the same. PW1 was alleged to be the one who retrieved the stick, yet when he testified, the stick was not shown to him for identification. It was when PW4 took to the witness stand that an effort was made to produce the stick, which was resisted by the defence, which objection I upheld. Curiously, the prosecution did not apply to have PW1 and PW3 recalled to identify the stick. With the stick not being produced, I cannot tell whether the same was lethal enough to cause the death. Overall, the evidence on the cause of death is inadequate, and the linkage of the accused to the death, is tenuous, for other than the allegation that he fought with the deceased or beat him with a stick, there is nothing to show that the deceased died of the injuries possibly inflicted on him by the accused in that fight or beating.
7. Whether there was malice aforethought largely depends on whether the accused was linked to the death. In this case, the evidence on that is very weak. Consequently, whether the accused acted with malice aforethought, in the circumstances, should not arise.
8. As it is clear that there is no adequate evidence against the accused person, there is no material upon which I can hold that there is a case against him, to require me to put him on his defence. The burden lay with the prosecution to establish beyond reasonable doubt that he caused the death of the deceased. There is no concrete evidence. I am not persuaded that there is adequate evidence upon which to convict the accused in the absence of any explanation from him. In the circumstances, I find and hold that no prima facie case was established against him to warrant his being put on his defence.
9. As no *prima facie* case has been established against the accused person, I hereby acquit him, under section 306(1) of the [Criminal Procedure Code](#), cap 75, Laws of Kenya. He shall be set free from remand custody, if he is still in remand, unless he is otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Were, Advocate for the accused person.

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