



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Wandaka (Criminal Case 48 of 2017)  
[2023] KEHC 21279 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21279 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE 48 OF 2017**

**RB NGETICH, J  
JULY 24, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JAMES MWANGI WANDAKA ..... ACCUSED**

**JUDGMENT**

1. The accused person has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the charge being that the accused on the 9<sup>th</sup> day of November, 2015 at [particulars withheld] village in Koibatek Sub-county within Baringo County, murdered Alima Muthoni.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 4 witnesses in support of the charge preferred against the accused.

**Prosecution Evidence**

3. Pw1 JJM testified that the deceased who was his biological mother and the accused biological father. He said in the year 2015, he was 15 years old and on 9.11.2015 at 8:00 p.m he was doing his revision in preparation for K.C.P.E examination the next day, when his father arrived home while drunk and found his mother talking to a neighbour in the house. He said his father was making noises when he arrived and after the neighbour left, his sister called his mother on phone and his father asked for the phone from his mother to speak to his sister which he was given and since he was drunk, he was unable to communicate well prompting his mother to ask for the phone from him.
4. He testified that his father started quarreling when his mother asked for the phone from him, he thought he was disrespected and asked for the phone from the deceased again who refused to give him and asked him to call his daughter using his phone. He said after that the deceased when outside while the accused went to the bedroom where he continued talking. He said the deceased came back to the



- house very upset and angry after hearing the accused insulting him. He said the deceased removed the sweater she was wearing and threw it at him as he was at the sitting room doing his revision and then entered the bedroom carrying a big stick of about ½ a metre long. Pw1 said he was not bothered since they used to quarrel. He continued with the revision.
5. Pw1 said he heard their parents quarrelling in the bedroom. He said he tried to tell his father to stop insulting the deceased. He later saw his mother come out of the bedroom holding her left side of the head and saw blood dropping on the floor. He said his father holding the deceased on the neck as though he was strangling her. The deceased held his hand and the accused released his mother. He said his father tried to get out of the house but he (pw1) was still holding his hand. Pw1 said he inquired from the accused what happened as his mother was bleeding but his father told him he did not know what had happened. He saw his mother crouch and become weak.
  6. Pw1 said he became confused, released his father's arm and went to the house to help his mother. He said he was screaming as he went into the house; he said his mother was crouching before he sat on the floor trying to straighten up but there was blood everywhere on the floor and on her legs; her black skirt was stained with the blood.
  7. Pw1 said he went outside screaming for help and did not find his father outside the house; he called his elder brother JOM who arrived. Pw1 run out to call neighbors. Neighbors arrived. He said his mother died in the house. He said he only saw his father next at the police station about 1 year after the incident, he stated that his father is the accused.
  8. Pw 2 Sergeant Sammy Cheruiyot No. 216481 testified that on the 9.11.2015 at 9:00 a.m he was at the camp when he received a call from Assistant Chief James Waweru who told him that there was a lady who had been stabbed at Kambi area at [particulars withheld]. While at the camp's gate heading to the scene, he found a man who identified himself as James Mwangi Wandaka. He told pw2 that he had a report to make. He went back with the man to the office and while interrogating him, he got a call from the Assistant Chief who told him that the person making the report was the one who had killed his wife. He arrested him and left him under guard of the police officer on duty and he went to the scene.
  9. He said the accused informed him that he had fought with his wife. He said at the scene, he found the body lying at the sitting room on her stomach facing down with her clothes on and had injuries on the left leg. He learnt that the lady by the name Halima Muthoni was the wife to James Mwangi Wandaka.
  10. Pw2 said he found Assistant Chief. They searched the house and found a knife on the bed in the bedroom with blood stains. He took the knife. He said there was blood where the deceased lay on the bed. He handed over the knife to the officers from Nakuru police station.
  11. Pw 3 Joseph Kamau Waweru the senior Assistant Chief of Maji Mazuri sub-location testified that on 9.11.15, he was the acting chief of Maji Mazuri sub-location and at about 9:00 p.m; he was at home when he received telephone call from a village member namely Francis Mwangi who informed him that his neighbor had stabbed his wife Halima Muthoni and she was in critical condition. He testified that he knew the neighbour James Wandaka and his wife for 35 years and as a leader of the area, he knew that there were frequent fights; pw3 advised him to take the victim to hospital then called Ap Police Sergeant Cheruiyot and prepared to visit the scene.
  12. While Pw3 was going to the scene, Francis Mwangi called him again and told him that Halima had died. He went to the house and found the deceased lying on the ground with blood everywhere. He said she had a stab wound on the left leg. He did not find the accused at the scene and while at the scene, Sergeant Cheruiyot came to the house and he learnt that the accused had surrendered at the AP Camp. He confirmed that he searched the house and found a blood-stained kitchen knife on the bed. He said



Sergeant Cheruiyot called Sergeant Mwangi from Makutano police station who went and received the knife and the body was taken to the mortuary.

13. Pw 4 James Magondu Njuru, No. 00273, Senior investigating officer, IPOA based in Mombasa testified that before he was transferred to Mombasa, he was DCIO Eldama Ravine and on the 9.11.15 and about 10:00 p.m he received a call from his colleague Boniface Chebosi who informed him that he had received information that there had been a killing at [particulars withheld] area of Eldama Ravine and he asked him to accompany him to the scene. At about 10:30 p.m, they left the station with Corporal Boniface Chebosi to Maji Mazuri area where they were received by Sergeant Sammy Cheruiyot of APC Maji Mazuri; they also met the area chief. They went to the scene and found the body of a woman lying on the ground dead with a cut wound on her thigh which was bleeding profusely. They took photographs and preserved the scene and thereafter took the body and put in the vehicle. He said Sergeant Sammy Cheruiyot recovered a blood-stained knife from the bedroom of the house which he handed over to him.
14. He said as they were leaving the scene, they got information that the accused had surrendered at the AP Camp at Maji Mazuri; they went there and found that the accused had been put into holding cell; they took him to Eldama Ravine police station and after getting him to the police station, they realized that his clothes (black T-shirt and Brown Checked T-shirt) had blood stains which were retained as exhibits and accused placed in custody.
15. He testified that they took the body to Eldama Ravine mortuary for preservation and at the mortuary clothing of the deceased which were blood stained were recovered and kept as exhibits. On 10.11.2015, they took the accused to Eldama Ravine Principal magistrate's court where he sought time to complete investigations and on the same date after court, he recorded his statements together with corporal Boniface Chebosi. On 13.11.2015, he went to Eldama Ravine Hospital to witness the postmortem of the deceased which was conducted by Dr. Yator. He found that the cause of death was blood loss due to stab wound. He said on the said 13.11.2015, samples were taken from accused and the deceased and taken together with clothes recovered from the two to the Government Analyst for examination. He produced the exhibits in court.
16. Upon the closure of the prosecution case, the court delivered a ruling on the 27<sup>th</sup> day of July, 2022 finding that the prosecution had established a prima facie case against the accused and he was placed on his defence in accordance with Section 306(2) of the criminal procedure code.

### **Accused's Defence**

17. The accused gave sworn statement in his defence. He denied killing the accused. He stated that on the 9.11.2015, at 7:00 p.m, he arrived home from the farm and found his neighbor with his wife Halima Muthoni. He said after his neighbor leaving, he went to his bedroom. He said his wife had been sleeping in the sitting room for 7 years.
18. He further stated that his wife started abusing him while in the sitting room then she entered his bedroom and held his neck and lay on his chest. He stated that he tried to free himself, then his wife jumped and ran to the kitchen while telling him that, "you will see me, I will stab you with the knife". He said his wife found his son Juma who was 8 years old in the kitchen, threw her sweater on the child and told him that his father will see her today.
19. He testified as he came out of the bedroom his wife was coming back from the kitchen and they met at his bedroom door; he said his wife had a whip on the left hand and a knife on the right hand. Accused said he hit the hand which had a knife and ran away but he never touched the knife. After that he went straight to the chief and found police at chief's office; he informed the police he was going to report



that his wife wanted to kill him and the police told him to go and come back the next day. He went and while at the gate he was called back and asked to sit down.

20. He further stated that he was told that he stabbed his wife and ran away. He was taken to Eldama Ravine. He said for 7 years his wife was not sleeping in his bedroom, that his younger son used to cook food for him and keep under the bed. He said he used to arrive home drunk and eat in his bedroom.
21. He further stated that he left the house after hitting his wife's hand and he did not know she had been stabbed with a knife. He admitted that Juma his son who testified in court was present when they were quarrelling with his wife on the 9.11.2015. He invited the court to look at the statement of his son which he produced as exhibit in court. He stated that it is true the deceased used to beat him and she would go for one month and leave him with the children. He said they never used to talk and would bypass each other. He said he did not know what caused his injuries.

### **Accused's Written Submissions**

22. The defence counsel filed written submissions dated 24<sup>th</sup> May, 2023 and submits that the onus to prove a murder charge lies on the prosecution and the burden never shifts to the accused. He submits that the standard of proof is beyond reasonable doubt and the prosecution has to prove that there was actus reus and mens rea. That to establish actus reus, the prosecution must be able to show deceased person in the case before court is dead; the death of the person killed was caused by the accused person under trial and the cause of the death is an unlawful act or omission perpetrated by the accused person before court.
  1. Counsel further submits that to establish mens rea, the prosecution must be able to show that the accused before court possessed the intent to cause the death or grievous bodily harm and knew the act or omission will cause the death or grievous of the person killed.
24. on the first issue, although no death certificate was produced, it is not in dispute that the deceased person died. That no postmortem report or death certificate was produced by the prosecution in this case thus the cause of the death is unknown.
25. That Pw 1 testified that what he saw was blood on the deceased legs and he could not tell which leg was injured, Pw2 stated that the deceased had injuries on the left leg. Pw3 informed the court that the deceased had a stab wound on the left leg while Pw4 told the court that they saw in her thigh, the deceased had a cut that was bleeding profusely.
26. They submit that the prosecution did not produce the postmortem report to enable the court to understand the nature of injuries that the deceased sustained leading to her death. That all the witnesses herein have given a different description of the injury sustained by the de cease. That there is so much difference between a stab wound and a cut wound and the same cannot be alluded to mean the same thing.
27. Counsel further submits that Pw 4 confirmed they took samples for DNA tests to the government chemist for analysis and confirmed that he attended the postmortem of the deceased and was told that the deceased had died from blood loss due to a stab wound, but the report prepared was not before court to enable the court to understand the nature of the injuries that the deceased sustained leading to her death, and referred to the case of *Ndungu v Republic* [1985]KLR 487 and the case of *Chengo Nickson Kalama v Republic*[2015]eKLR.
28. Counsel submits that in the circumstances of this case, it was important for the prosecution to produce the death certificate to clearly show the cause of the death and such failure is fatal to this case. That the



circumstances under which the deceased sustained the fatal injuries have not been properly explained to make the court conclude that the deceased received the said injuries from the accused.

29. On the second and third issue is whether the death of the deceased was caused by the accused person and if the accused person committed the unlawful acts or omissions, counsel submitted that Pw1 was the most crucial witness in the prosecution's case; that he testified the accused returned home drunk and noisy and disagreement arose during the telephone conversations with their daughter; that Pw1 confirmed that he took accused to his bed and he did not have any weapon and Pw1 never testified that he saw the knife that was later collected from the scene of crime; that Pw3 on cross examination said Pw 1 saw the knife but there is no such evidence by Pw 1.
30. Counsel submits that evidence before this court is that the deceased entered the bedroom intending to harm the accused who was drunk and was verbally abusing; that there is evidence before the court that the couple was not sleeping together; the accused slept in the bedroom and the deceased in the sitting room and there was hence no basis for the deceased to go to the bedroom after the accused person had retired to bed.
31. Counsel further submits that the deceased went to the bedroom and then went outside and on her way back to the bedroom, she was carrying a stick and told the son "hatakuwa akinisumbua"; and whatever that meant only the deceased can tell as she was the one who went to physically fight the accused person; counsel further submits that Pw1 confirmed to the court that he had seen the parents fight before and on the said occasion, it was the deceased who was beating the accused person. That the deceased was heard by Pw1 threatening the accused with dire consequences.
32. Counsel submits that no eye witness saw the accused injure the deceased. Pw 2 stated that he was told by Pw3 that it was the accused who had stabbed the deceased and Pw 3 said he was told by Francis Mwangi (who never testified before the court). Pw 4 was told by both Pw 2 and Pw 3 and there is nowhere that either of them states that Pw1 told them that it was the accused person who stabbed the deceased. Counsel further submit that there was no evidence to show that the accused person's fingerprints were found on the knife. That the prosecution wishes to rely on circumstantial evidence in support of the case.
33. Counsel submits that for the court to apply circumstantial evidence to conclude that the accused unlawfully caused the death of the accused, the evidence must lead to only one conclusion, that the accused is guilty of committing the offence of murder. That the conditions for the application of circumstantial evidence to sustain a conviction in any criminal trial have been laid down by several authorities of this court and referred to the case of *Abanga alias Onyango v Republic* CR. App. No. 32 of 1990(UR) and in the case of *Sawe v Republic* [2003] KLR 364. (elements)
34. Counsel submits that those elements have not been established in this case. That the deceased denied committing the offence and none of the prosecution witnesses witnessed the commission of the offence and there is possibility that the deceased stabbed or even cut her self during the scuffle.
35. And finally, there is no evidence to draw the inference that it was the accused who stabbed the deceased; that had he stabbed the deceased, there would have been a lot of blood on his clothes and Pw 2 would have noticed immediately after the accused person went to report; and submit that the prosecution has failed to prove that it was indeed the accused person who caused the deceased the injury sustained by the deceased.



## Analysis And Determination

36. I have considered evidence adduced together with submissions filed and what I wish to consider is whether the ingredients of the offence of murder being proof of death, proof that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
37. There is no doubt that the deceased died. All the prosecution witnesses testified that the deceased died on the evening of November 9, 2015 and her body was taken to Eldama Ravine mortuary for preservation. Although the postmortem report was not produced in court as exhibit, the issue of the death of the deceased is not in dispute.
38. The next issue to determine is whether it is the accused who killed the deceased. The accused has submitted that no post mortem report or death certificate was produced by the prosecution in this case hence the cause of the death is unknown.
39. Proof of death in an offence of murder is mandatory although, ordinarily, it is not a cause for much anxiety. More often than not, a postmortem on the deceased's body will be undertaken to establish the cause of death and in the process certify the deceased's death. For this reason, pathologists or persons of the like expertise appear in court to recount their observations upon examination of the deceased's remains and express their opinion on what they think caused the deceased's death. The details of their evidence will be contained in a post-mortem report that would, subject to the rules of evidence, be accepted as part of the prosecution evidence.
40. The deceased's case is exceptional; though a postmortem was conducted, the doctor who conducted it did not testify and make his findings known; his report was not produced. Apparently, the doctor was one of the witnesses who were shut out when the state closed its case after several attempts to procure their attendance in vain; this case has been pending in court for close to seven years, the state closed its case.
41. Against this background, the question that arises is, in the absence of the medical officer's evidence, can this court conclude that a person was murdered and was so murdered by the unlawful act or omission of the accused persons, in which case they can therefore be said to have committed an offence under section 203 of the *Penal Code*? Is the trial court entitled to disregard the absence of expert medical evidence and rely on raw facts to conclude that the deceased died and died as a result of the injuries he sustained from the attack?
42. Raw facts being facts which were uncontroverted but no expert evidence was adduced to confirm. From evidence adduced, the accused's and deceased's son confirmed fatal attack on her mother; Pw 2 and Pw 3 immediately visited the scene and found the body of the deceased lying in the sitting room with blood on the floor and in her legs; they recovered a blood stained knife of the deceased. Pw4 the investigating officer visited the scene and found the deceased dead. He further stated that he was present during postmortem and deceased's relatives positively identified the deceased's body before the post-mortem was conducted and they were informed that the cause of the death was blood loss due to stab wound.
43. The question that arise is whether this court should disregard this evidence because postmortem was not produced due to failure to secure witness despite several adjournments
44. In the case of *Republic v Cheya* [1973] EA 500, the court held that that the absence of medical evidence as to the fact of death and its cause was not fatal because it was open for the prosecution to produce and rely on other evidence to establish these two facts. The judge relied on evidence of eyewitnesses



- who saw the deceased when he was assaulted and while in hospital and subsequently saw his body after he died to find that the deceased had died and that he had died as a result of the injuries he sustained.
45. In the instant case evidence adduced show that the deceased was fighting with the accused in his bedroom, which was witnessed by their son Pw1. She came out of the bedroom bleeding and died shortly thereafter. Pw 2, Pw 3 and Pw 4 arrived at the scene on the material day and soon thereafter the body of the deceased was removed, not to the hospital for treatment but direct to the mortuary where, again, it was positively identified as the body of the deceased. In my view, there is no doubt as to the fact of death of the deceased and the cause of her death in these circumstances. For the reasons above, I am persuaded that the deceased died.
46. The next issue for determination is whether the accused killed the deceased. The accused and deceased were husband and wife respectively. It is the evidence of PW1 who is their biological son that that on the evening of November 9, 2015 testified that there was a struggle between accused and deceased. The accused confirmed that he struggled the deceased at the door as he came out of the bedroom. He said he held her hand which had a knife. Apart for their son, there was no one else in the house. Accused said his wife entered the bedroom and held him by the neck as she abused him. He said the deceased had a whip and a knife and he held deceased's hand which had a knife. Shortly after the struggle, pw1 saw the deceased fall and was bleeding; and he saw his father holding the deceased on the neck as though he was strangling her. Pw1 held accused's hand and in the process, he removed his hand from deceased's neck; he saw his mother bleeding and shortly started crouching and sat on the floor and there was blood on the floor. The deceased died shortly in the house. This clearly connect the accused to the death of the deceased.
47. What I now wish to consider is whether the prosecution have proved beyond reasonable doubt that the accused had malice aforethought. Malice aforethought is defined under Section 206 of the [Penal Code](#) which provides;
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - (c) an intent to commit a felony;
  - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
48. Evidence adduced show that the accused got angry after being denied by the deceased to talk to her daughter on phone using the deceased's phone. A quarrel ensued. Accused said the deceased hauled abuses against him while threatening to kill him and went to the kitchen for a knife. He said he held deceased's hand which had a knife. No one else was involved in the fight as from pw1's evidence, they were 3 in the houses and the struggle was between the accused and the deceased. Pw1 confirmed that they quarreled and struggled. He saw the accused hold deceased by the neck.



49. Evidence adduced show that the accused and deceased did not live harmoniously. They never shared a room as husband and wife and from accused's evidence the deceased was not cooking for him and they were not in talking terms; accused and deceased used to have quarrels; accused said the deceased used to beat him and even cut his ear in the year 1992.
50. From evidence adduced, the accused lost his cool after repeated abuses and stabbed the deceased leading to her death. In my view, the accused acted out of self defence and extreme provocation
51. Section 207 of the Penal Code provides for instances where a defence of provocation may be accepted. The section provides;
- “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.”
52. Further in the case of RC v Republic [2005]2 KLR 239 the Court of Appeal in dealing with a defence of provocation stated;
- “Under section 207 of the Penal Code, an unlawful killing in circumstances which would constitute murder would be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing was done.”
53. In view of the above I find that the accused acted in the heat of the moment when he was provoked by the actions of the deceased who instigated a fight and prolonged unresolved issues between the accused and the deceased.
54. Final Orders
1. I hereby find the accused guilty of the offence of Murder to Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.
  2. Right of appeal 14 days

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 24<sup>TH</sup> DAY OF JULY 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Kemboi - Court Assistant.

Ms Ratemo – Counsel for state.

Accused present.

Ms Wangari holding brief for Mr. Waiganjo for accused.

