



**Republic v Wanyanga & another (Criminal Case E112 of 2021)
[2023] KEHC 20280 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E112 OF 2021
PJO OTIENO, J
JULY 14, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BRIAN WANYANGA 1ST ACCUSED

STEPHEN WANYANGA 2ND ACCUSED

RULING

1. Brian Wanyanga and Stephen Wanyanga were charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The information alleged that the accused persons on March 23, 2021 jointly assaulted the deceased Daniel Onyango who was then rushed to Yala Sub-County Hospital but unfortunately he later succumbed following the sustained injuries.
2. The prosecution called four (4) witnesses to testify in support of their case being Phelix Omondi (PW1), Joseph Wanyanga Nyaundo (PW2), Seline Yvonne (PW3) and the Investigation Officer (PW4).
3. The thrust of the prosecution case is that on March 23, 2021 at around 20:30, Mr Onyango, the deceased who had been having an affair with one Sheila Achieng, arrived at Sheila's house and they locked themselves inside. Sheila's step children were unhappy with this so they screamed calling for the attention of neighbours.
4. According to PW1, a minor who gave unsworn statement after voir dire, among the neighbours who came to the in response to the alarm were PW2, Joseph Wanyanga (Bima), one Mr Ouma and Mr odeny. When the mob demanded that the door be opened, the deceased came out armed with a panga and immediately assaulted Joseph Wanyanga cutting him on the hand. Following deceased's aggressive conduct, the angry mob chased him, caught up with him, disarmed and assaulted him with the same panga he used to assault Bima. The witness said he knew the accused persons as his relatives but that he never saw them that night.



5. Upon cross examination, the witness told the Court that after cutting PW, the deceased ran and disappeared into the darkness and that he was just told that PW2 had been taken to hospital.
6. PW2, Joseph Wanyanga Nyaongo, testified that on the fateful day, he was in the house after supper when a nephew, PW1, went to him and told him that a stranger had got into the house of his brother who lives in Nairobi. He went there and knocked thrice before the door was opened for him to enter. On entry into the house he was attacked and cut with a panga. He was rushed to hospital where he was admitted for treatment and while there another person was equally admitted and he was told that it was the person who had injured him.
7. The witness was discharged from hospital the next day, went and reported matter at the police station and later accompanied the police to the scene and showed them his home and the home of the deceased. By that time news had emerged that the deceased had died and later the police visited and arrested the two accused persons who are sons to the witness. He added that a panga he could not identify was recovered from the house of 2nd accused, that when he went to the scene there were many people but he was unable to identify any because the compound had no lights and that he did not know who was said to have entered the house. Having been taken to hospital, he did not witness nor could he know what befell his assailant.
8. On being cross examined, he said that the recovered panga was showed to him from a distance while wrapped, adding that the home had no security lights and that he knew nothing about the death of the deceased. On being questioned by the Court, the witness said that the home had no solar lights, that he did not recognize who cut him because the assailant left the house running.
9. Seline Yvone, a sister to PW1, gave evidence that on the material day she had come from school, went to fetch water and once back home, she was told by PW1 how he had been sent to the home of the deceased to deliver a letter, managed to read the letter and learnt that their step mother had invited the deceased to come to the house at night. That night, the witness and her sister did not go to the house to sleep but decided to stay out and watch if the deceased would come. During their vigil, they saw the deceased approach the house where the step mother was and was let in. The girls approached the house and knocked and after insistence were let in and found the deceased hiding under the bed. They raised alarm and many people came including PW2 and 1st accused.
10. When PW2 entered the house he was attacked and cut by the deceased who then ran off into the night darkness without being caught only to learn the next day that he had died. On being cross examined, the witness told the Court that he saw the two accused persons at the scene but neither had a panga. She denied ever seeing anybody cut the deceased because being in the night it was not easy to see what was happening where the deceased had run to.
11. The fourth and last witness was number 86722, Corporal Leteipa to who the investigating officer handed over the case file upon transfer. He relied on the file to say that upon the report of murder, investigations were carried out and witness statements recorded from those who had given evidence. He was also handed over a panga said to have been the murder weapon and recovered from the house of the 2nd accused but without any inventory. He then with the consent of the defense produce the panga as well as the autopsy report as PEH 1 and 2. The autopsy report made a conclusion that the cause of death was due to multiple deep cut wounds.
12. He then gave the circumstances leading to the offence to have been that the deceased was found in the house with one Sheila whose husband worked in Nairobi and when confronted by the husband's family, he emerged from the house wielding a panga and even injured PW2. He said that the two accused persons were the sons of PW2 who chased the deceased and used the panga used against PW2



to cut and inflict the injuries to which the deceased succumbed. He conceded that none of the witnesses saw any of the accused persons assault the deceased.

13. On cross examination, the witness expressed no knowledge how the initial investigator related the house where the panga was recovered, two days later, with accused 2 but added that it was Sheila who identified the panga to belong to her. He said the panga had blood stains then, which were not there at the time of giving evidence, but no tests were conducted to show that the blood was human and if related to the deceased. He added that no finger prints were lifted to associate either of the accused with the panga. He repeated that no witness saw any of the accused assault the deceased because the incident happened at night and that he did not verify the lighting conditions of the scene that night.
14. With the four witnesses the prosecution's case was closed and both the prosecutor and the defence counsel invited the Court to determine whether a prima facie case had been established by relying on the evidence on record and opting not to offer any submissions.
15. In determining whether or not a prima facie case has been established, the court must be satisfied that the evidence on record is sufficient for it to enter a conviction even if no further evidence was available. In *Ronald Nyaga Kiura vs Republic* (2018) eKLR, the Court determining what amounts to prima facie case held: -

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient, on its own, for a court to return a guilty verdict if no other explanation in rebuttal is, offered by an accused person.”

16. Based on that trite position of the law and upon detailed evaluation and appraisal of the evidence on record, many gaps remain to be sealed. There is no evidence that the accused persons or any of them laid a hand on the deceased. While it is sad that a life was lost, it was the evidence that the accused persons were just within the mob that responded to the alarm raised by PW3 and her sister.
17. While it is most likely that the deceased was assaulted by the mob after he assaulted PW2, the law remains that the death of the deceased must be connected with the accused whose acts or omissions leading to such death must be proved to have been unlawful.
18. In the circumstances of this case, there is evidence by all the witnesses including the Investigating Officer that the deceased was pursued by a mob after he assaulted PW2. I am not fully satisfied that the prosecution has made out a case against the accused persons to justify the two being placed on their defence. To place them on their defence when the prosecution is yet to make out a watertight case requiring rebuttal would be akin to hoping that they would say something to help build the prosecution's case. That is to shift away the burden upon the prosecution. It was therefore held by the Court of Appeal when determining an appeal against a decision of the High Court putting the accused on his defence, in *Anthony Njue Njeru v Republic* Crim. App. No. 77 of 2006 [2006] eKLR that:

“It seems as if the appellant was required to fill in the gaps in the Prosecution evidence.”

18. There is no prima facie case established against the accused to merit them being asked to give an explanation or rebuttal. The accused persons are hereby found not guilty of the offence of murder as charged and are therefore acquitted under Section 306, *Criminal Procedure Code*.
19. Let the two be freed and released into liberty forthwith unless otherwise lawfully held.



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

