



**Republic v Wamuyu (Criminal Case 13 of 2020)
[2023] KEHC 19680 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 13 OF 2020
CM KARIUKI, J
JULY 6, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

CHARLES GUAMA WAMUYU ACCUSED

JUDGMENT

1. The accused has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The Prosecution called a total of six (6) witnesses in support of its case, and at the close of its case, the accused was put on his defence. He gave sworn evidence and called one witness.
3. The parties were directed to canvass submissions by written submission, which they filed and exchanged.

PROSECUTION SUBMISSIONS

4. The ingredients of murder are well set out in the case of [Republic -vrs- Henry Obisa Ouko](#) (2018) eKLR as follows: -
 1. The death of the deceased.
 2. That the accused committed the unlawful act which caused the deceased's death.
 3. That the accused had malice aforethought



The death of the deceased has occurred.

5. It is not contested that Samuel Njoroge Wamai was identified as the deceased. A postmortem was conducted and produced as Prosecutions exhibit1, which confirms that the deceased died on 25th August 2020 due to Cardiac Arrest caused by exangulation secondary to a stabbing in the chest.

That the accused committed the unlawful act which caused the deceased's death.

6. PW 1 testified that on the fateful date to wit 25th August 2020, at around 7:30 am, she left her house and headed to Stano's farm, who had requested her to work on his farm. She went with her daughter and commenced digging trenches and continued until around 1:00 pm when she heard someone shouting for help. She then turned to see who was shouting for help. She saw a person bleeding from the chest near his heart side. Since she knew him as Njoroge, she asked him what had happened to him, and he told her that CHALO had stabbed him. Immediately he fell down and died.
7. PW 6 The investigating officer after receiving information that the accused was moving from his house, did arrest him, and upon searching his house he discovered a knife that was blood stained and the same was subsequently forwarded to the Government Chemist for analysis.
8. The accused first name is Charles, which name is usually shortened to Chalo hence fitting him exactly. The accused was well known, which is why he was the one identified despite the fact that Charles is a common name.
9. Though the accused denied the offence and even not knowing the deceased and PW 1 who testified, he placed himself at Olkalou the fateful date after having left his home at 3:00am, a fact which he sought to prove by presenting his wife who testified as DW2.
10. Similarly, since no one saw him committing the offence, the circumstantial evidence coupled with the statement by the deceased that it's Chalo who committed the offence shortly before his death points out to him as the one who committed the offence.

That the accused had malice aforethought.

11. PW 6 testified that he got information that the accused was moving out of his house, which prompted him to move and arrest him and recovered a blood-stained knife in his house.
12. The conduct of the accused of moving out of his house immediately after the offense was committed raises an eyebrow in that he was escaping and indicates that he had malice aforethought. He had a guilty mind and had thus decided to flee.
13. This limb has been proven as well.
14. It's also submitted that the Prosecution did not avail very important witnesses. It's quite true that critical witnesses had not been called simply because the Prosecution had sought an adjournment to secure their attendance which was declined. The Ruling delivered that the accused had a case to answer.
15. In his defense, the accused denied ever committing the offense and called his wife, who supported him in his denial. The court is urged to disregard the accused defence and find that the Prosecution has proved its case and thus urge this court to convict him accordingly.

ACCUSED/DEFENCE ON SUBMISSIONS

1. Whether the Prosecution was able to prove its case beyond any reasonable doubt.



2. Whether the accused committed the unlawful act which caused the deceased's death.
 3. Whether the prosecution evidence was free of doubt and if any existed in whose favour the same should be resolved.
16. There is no doubt that the deceased succumbed to stab injuries; The only doubt is whether the accused persons committed the unlawful act. It is our humble submissions that the burden lies with the Prosecution to prove the charges against the accused person beyond any reasonable doubt. This burden does not shift to the accused person. In the circumstances, the Prosecution must adduce evidence to prove that three ingredients of murder under Section 203 of the *Penal code*. These ingredients are: the accused person carried out an unlawful act or omission; the execution of the unlawful act or omission caused injury to the deceased person causing the death of the deceased, and the accused person had formed the intention to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.
 17. In the case of *Republic- versus- Andrew Omwenga* 2009 eKLR, Malice aforethought describes the mensrea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. In our laws Section 206 of the *penal code* provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established.
 206. An intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not.
 18. The Prosecution called six (6) witnesses in total. None of the Prosecution witnesses saw the accused person kill the deceased. In fact, all witnesses stated that it is PW 1 who told them that the deceased had talked to her before he died. The said PW 1 testified that the deceased person came to where she was digging trenches for potato planting but other witnesses testified that they found the deceased's body at a maize plantation.
 19. The said witness was not able to explain the language that the deceased used or the exact words used by the deceased or how far the deceased was from her
 20. Further PW 1 who was the only witness said that the deceased only mentioned the name "CHALO" but she did not know which Chalo he was referring to. Upto the close of the Prosecution's case, no witness was able to connect the accused with the incident.
 21. Like all evidence relied upon by the Prosecution, these allegations were only founded on the unfounded claims of the PW 1 who could not explain what really transpired on the material date.
 22. The element of malice aforethought was not proved beyond reasonable doubt
 23. The Prosecution relied entirely on circumstantial evidence. It is our humble submissions that the Prosecution must establish the elements laid down in *Joan Chebichii Sawe -vrs - Republic* [2003] eKLR, for the honourable court to solely rely on circumstantial evidence. In *Republic v Kelvin Mukuha Wambui* [2020]eKLR , *Joan Chebichii Sawe v Republic* [2003] eKLR

Whether the accused committed the unlawful act which caused the death of the deceased

24. According to the testimonies of All the witnesses, no one saw the Accused person commit the crime and all of them relied on the information given by PW 1, who was not even sure which Chalo was been referred to. The only thing that connected the accused with the crime in his name which name could



- have referred to anyone else, PW 1 was not even sure where the body of the deceased was whether it was in the shamba where she was digging trenches or in a maize plantation.
25. The investigating officer interestingly never testified, the photographs allegedly taken at the scene where never produced in court as exhibits, the blood-stained clothes, knife, cap grazing stick were also never produced as exhibits in court .
 26. The blood-stained clothes and the knife were allegedly taken to the government chemist for DNA profiling, they were neither produced nor was there a report on the outcome of the profiling of the same that was produced in court by the Prosecution.
 27. The Prosecution further was not able to displace the evidence of the defence. The Prosecution was not able to place the accused person at the scene of the crime at the time of the offence, there was no evidence that was adduced by the Prosecution placing the accused at the scene of crime.
 28. The law prior to the repeal of Section 235 of the *Criminal Procedure Code* required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the person with whom he was. The law today is that it is up to the Prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. See *Republic -v- John Kimita Mwaniki* [2011] eKLR.
 29. Both DW 1 and DW 2 in their evidence testified that the accused had travelled to their rural home and he only travelled back to Olkalou in the morning, and that by the time the crime was allegedly committed around 10am, the accused had already been arrested, that evidence was never displaced by the Prosecution and therefore the court should give the accused benefit of doubt.

Whether the prosecution evidence was free of any doubt and if any existed in whose favour the same should be resolved.

30. The burden is upon the state to prove beyond reasonable doubt that the accused the accused is guilty of the crime charged . It is a strict and heavy burden. The evidence adduced must overcome any reasonable doubt concerning the accused person's doubt. The State must prove each element of the charge crime by evidence that convinces you of the guilt of the accused. It is not enough for the State to show that the accused is probably guilty.
35. Section 107 (1) of the *Evidence Act* that:
 - i. "whoever desires any court to give judgment as to any court to give judgment as to any legal right or liability dependent on the existence of facts, which one asserts must prove those facts exists"
 - a. See case of *JOO vs. Republic* [2015]eKLR.
36. There were too many contradictions in the Prosecution's case. PW 1 Eunice Wangechi Ngige testified that she saw the deceased in the farm and he talked to her, that his clothes were soaked in blood, however the blood-soaked clothes were never produced in court as exhibits.
37. He stated that he recovered a knife and a black jacket that were blood stained but the same were not produced as exhibits in court. Further he stated that he took photographs at the scene but the same were not produced as exhibits. Further there was no entry of inventory of the exhibits in the Occurrence Book.
38. From the foregoing, we submit that there was no evidence that linked the accused person to the offence of murder in question. PW 1 only stated that the deceased mentioned the name CHALO, how did



the Investigating Officer who did not testify settle on the accused person just by one nickname, would there have been other "Chalo" in Olkalou Township?

ISSUES, ANALYSIS, AND DETERMINATION

39. After going through the evidence on record and the parties' submissions, I find the issues are:
1. Whether the Prosecution was able to prove its case beyond any reasonable doubt.
 2. Whether the accused committed the unlawful act which caused the deceased's death.
 3. Whether the prosecution evidence was free of doubt and if any existed in whose favour the same should be resolved.
 4. There is no doubt that the deceased succumbed to stab injuries; The only doubt is whether the accused persons committed the unlawful act.
40. It is trite law that the burden lies with the Prosecution to prove the charges against the accused person beyond any reasonable doubt. This burden does not shift to the accused person. In the circumstances, the Prosecution must adduce evidence to prove that three ingredients of murder under Section 203 of the Penal code. These ingredients are: the accused person carried out an unlawful act or omission; the execution of the unlawful act or omission caused injury to the deceased person causing the death of the deceased, and the accused person had formed the intention to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.
41. In the case of *Republic- versus- Andrew Omwenga* 2009 eKLR
42. Malice aforethought describes the mensrea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. In our laws Section 206 of the *penal code* provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established.
43. An intention to cause death of or to do grievous harm to any person whether that person is the person actually intended to be harmed or not.
44. The Prosecution called six (6) witnesses in total. None of the Prosecution witnesses saw the accused person kill the deceased. In fact, all witnesses stated that it is PW 1 who told them that the deceased had talked to her before he died. The said PW 1 testified that the deceased person came to where she was digging trenches for potato planting but other witnesses testified that they found the deceased's body at a maize plantation.
45. The said witness was not able to explain the language that the deceased used or the exact words used by the deceased or how far the deceased was from her
46. Further PW 1 who was the only witness said that the deceased only mentioned the name "CHALO" but she did not know which Chalo he was referring to. Upto the close of the Prosecution's case, no witness was able to connect the accused with the incident.
47. Like all evidence relied upon by the Prosecution, these allegations were only founded on the unfounded claims of the PW 1 who could not explain what really transpired on the material date.
48. The element of malice aforethought was not proved beyond reasonable doubt



49. The Prosecution relied entirely on circumstantial evidence. The Prosecution must establish the elements laid down in [Joan Chebichii Sawe -vs - Republic](#) [2003] eKLR, for the honourable court to solely rely on circumstantial evidence. In [Republic v Kelvin Mukuba Wambui](#) [2020]eKLR , [Joan Chebichii Sawe v Republic](#) [2003] eKLR the court held that the ingredients of murder to be established are;
50. whether the accused committed the unlawful act which caused the death of the deceased
51. According to the testimonies of All the witnesses, no one saw the Accused person commit the crime, and all of them relied on the information given by PW 1, who was not even sure which Chalo was been referred to. The only thing that connected the accused with the crime in his name which name could have referred to anyone else, PW 1 was not even sure where the body of the deceased was whether it was in the shamba where she was digging trenches or in a maize plantation.
52. The investigating officer interestingly never testified, the photographs allegedly taken at the scene where never produced in court as exhibits, the blood-stained clothes, knife, cap grazing stick were also never produced as exhibits in court .
53. The blood-stained clothes and the knife were allegedly taken to the government chemist for DNA profiling, they were neither produced nor was there a report on the outcome of the profiling of the same that was produced in court by the Prosecution.
54. The Prosecution further was not able to displace the evidence of the defence. The Prosecution was not able to place the accused person at the scene of the crime at the time of the offence, there was no evidence that was adduced by the Prosecution placing the accused at the scene of crime.
55. The law prior to the repeal of Section 235 of the Criminal Procedure Code required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the person with whom he was. The law today is that it is up to the Prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. See [Republic -v- John Kimita Mwaniki](#) [2011] eKLR.
56. Both DW 1 and DW 2 in their evidence testified that the accused had travelled to their rural home and he only travelled back to Olkalou in the morning, and that by the time the crime was allegedly committed around 10am, the accused had already been arrested, that evidence was never displaced by the Prosecution and therefore the court should give the accused benefit of doubt. See the case of [Erick Otieno Meda v Republic](#) [2019] eKLR.
57. The burden is upon the state to prove beyond reasonable doubt that the accused the accused is guilty of the crime charged . It is a strict and heavy burden. The evidence adduced must overcome any reasonable doubt concerning the accused person's doubt. The State must prove each element of the charge crime by evidence that convinces court of the guilt of the accused. It is not enough for the State to show that the accused is probably guilt.
58. Section 107 (1) of the [Evidence Act](#) that:
- 107 "Whoever desires any court to give judgment as to any court to give judgment
(1). as to any legal right or liability dependent on the existence of facts, which one asserts must prove those facts exist"

See also [JOO vs. Republic](#) [2015]eKLR, Mrima J.



56. There were too many contradictions in the Prosecution's case. PW 1 Eunice Wangechi Ngige testified that she saw the deceased in the farm and he talked to her, that his clothes were soaked in blood, however the blood-soaked clothes were never produced in court as exhibits.
57. He stated that he recovered a knife and a black jacket that were blood stained but the same were not produced as exhibits in court. Further he stated that he took photographs at the scene but the same were not produced as exhibits.
58. There is no evidence that linked the accused person to the offence of murder in question. PW 1 only stated that the deceased mentioned the name CHALO; how did the Investigating Officer who did not testify settle on the accused person just by one nickname, would there have been another "Chalo" in Olkalou Township?
59. Thus, the court finds that the Prosecution has not proved its case beyond any reasonable doubt, and thus court makes the following orders;
60. The charges are dismissed, the accused is acquitted, and the court orders that he be released forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 6TH DAY OF JULY 2023.

CHARLES KARIUKI

JUDGE

