



**Republic v Kwanda & another (Criminal Case E006 of 2022)
[2024] KEHC 12030 (KLR) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E006 OF 2022**

DK KEMEL, J

OCTOBER 7, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

JACOB NALIANYA KWANDA 1ST ACCUSED

PAUL WANJALA ALIAS MUCHE 2ND ACCUSED

JUDGMENT

1. The accused persons herein Jacob Nalianya Kwanda And Paul Wanjala Alias Muche were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 2nd day of March 2022 at Nawanga village of Mbakalo Location, Bungoma North Sub- County within Bungoma County, jointly with another not before Court, murdered Zablon Khisa Wekesa.
2. The Prosecution called nine (9) witnesses in support of its case which was as follows: -
3. PW1 Mildred Nekesa Wamboka testified that the deceased herein was her husband and that on 1st March 2022 at 9.00 Pm while at home and the deceased in the bedroom, they heard noises outside and saw the 1st accused herein with a hoe and an axe storming towards their home and issuing a threat saying “Leo ni Leo”. She told the Court that the 1st accused also had a hammer while the 2nd accused was armed with a panga and a metal rod. The deceased tried to protest but the 1st accused hit him on the head with a hammer and turned to her ready to deliver a knock on her head but she shielded herself with her right hand. That the accused persons later proceeded to destroy the items in her home and dragged the deceased outside. She managed to escape with her children screaming for help as she headed towards her brother-in-law’s house. She later proceeded to Mbakalo Police Post with her brother-in-law wherein they lodged a report. The Police rushed to the scene to investigate the report and found the deceased lying on the ground with severe injuries. They rushed him to Naitiri hospital where he



died. She told the Court that on arriving with the Police, they found their house set on fire with her husband lying outside.

On cross-examination, she told the Court that the incident took place at 9.00 pm and that she was at the scene. She noted that the assailants were two in number and that one of her daughter's also witnessed the incident. She told the Court that the 1st accused wore a striped T-shirt with white and yellow colours and a blue trouser.

4. PW2 Khisa Bristerpeler Nakhungu testified that she is 17 years and 4 months old and a student. According to her, on 1st March 2022, at 9.00 pm while at home, her sister, Esther, arrived home without her child. She told the Court that her sister Esther is the wife to the 1st accused person and that she had lodged her complaint to the deceased about the 1st accused actions of refusing to release their child to her custody and that she needed his help. The deceased proceeded with her sister, Esther, to the home of the 1st accused and after talking to him, the 1st accused released the child to their custody. She told the Court that later on, the 1st accused person showed up at their home while making noise and threatening to kill somebody. He kicked down their door and that the commotion prompted the deceased who was in the bedroom to wake up. The 1st accused person approached the deceased with a panga, cutting him on the head making him to collapse. She told the Court that this occurred while the deceased was still in the bedroom on his bed as they sat in the sitting area. The deceased demanded to know why he was being attacked yet he did not do anything wrong and that the 1st accused person informed him that he was not the same person he knew. She told the Court that the two accused persons were in the company of one Protus Nasiaki and that the 2nd accused had a hoe while Protus had a hammer. They raised alarm and that the deceased informed PW1 to run away with the children. They rushed to one Mzee Makokha who accompanied them to Mbakalo Police Station where they lodged their report. On rushing back to the scene with the Police officers, they found the deceased lying under a tree within the compound, soaked in blood and that the assailants had torched their house but nowhere to be found. She told the Court that during this incident they had on three solar powered lighting bulbs and that the two accused persons are brothers and their neighbours.

On cross-examination, she told the Court that three assailants stormed into their home and that the 1st accused person stormed the deceased's bedroom and attacked him using a panga. She stated that she witnessed the incident and further testified that the 2nd accused had a hoe while one Protus had a hammer.

5. PW3 Naliaka Phylis Khisa testified that she is 18 years old and a student. According to her, on 1st March 2022 while at home with PW2 her, sister, Esther, who is married to the 1st accused herein arrived crying while claiming that the 1st accused had withheld her child. They rushed to her home, successfully picked the child and returned back to their home. Suddenly, the 1st accused showed up at their home threatening to do something that no Police Station will do anything about it and that they will never forget. He kicked down their door and stormed into the deceased's bedroom and attacked him. The deceased fell down and instructed PW1 to take the children and run. She told the Court that the 1st accused was armed with a panga and a hoe. She testified that all that time the 2nd accused and one Protus were busy demolishing their home from outside and that the 1st accused after failing to catch up with PW1 went back to drag the deceased outside. She told the Court that while she was still hiding inside the house, the accused persons assaulted the deceased outside and that she saw the 2nd accused hit her father's left leg while the 1st accused smashed his ribs as the deceased pleaded for his life. She told the Court that the accused persons also had hammers with them and when they left she quickly rushed to the deceased who was weak and placed him under a tree. She noticed the 1st accused was still at the scene and who threatened to slit her throat prompting her to seek refuge in a nearby banana plantation.



She told the Court that the accused persons came back and stepped on the deceased's body and head in turns and that the 1st accused hit the deceased on the cheek with a hammer while the 2nd accused threw something towards the house and that the 1st accused struck something which caused the house to catch fire.

On cross-examination, she told the Court that three assailants were involved in the incident and maintained that the deceased never visited the 1st accused's house on that material day. She told the Court that the 1st accused had a Somali Sword while the 2nd Accused Person had a panga. She told the Court that on that day the 1st accused wore a short-sleeved T-shirt with a bluish coloured trouser and was not able to identify what the 2nd accused wore.

On re-examination, she told the Court that the 1st accused was the first one to attack the deceased and that the 2nd accused hit the deceased on the leg and demolished their house.

6. PW4 Joseph Sifuna Mukhwai testified that the deceased herein was his father and that on 1st March 2022 at 10 pm he learnt that the deceased had been seriously attacked. He told the Court that he woke up and rushed to the scene and on the way, he met a group of people trying to head to the scene claiming that the attackers were very hostile. One of the villagers agreed to accompany him to the scene and on the way, they met one Protus whose clothes were stained with blood. The police arrived and that the said Protus took off and disappeared into a sugarcane plantation. At the scene, they found the deceased lying on the ground outside his house with serious injuries. They rushed him to Naitiri Sub-County hospital. According to him, the 1st accused herein joined them at the hospital and they managed to lock him in one of the rooms until the following day when police came to pick him up. He told the Court that the 1st accused's t-shirt had fresh bloodstains and identified the person on the dock in Court as the one they apprehended. He told the Court that he did not see any injuries on the 1st accused and that he had known him before as he was married to the daughter of the deceased by the name Esther. He told the Court that the 2nd accused is also known to him as they hail from the same village and that the two are blood brothers.

On cross-examination, he told the Court that one Daniel Mukhwai called and briefed him about the incident and that he rushed to the scene. He told the Court that the deceased herein was his brother. He told the Court that he arrived at the scene at 10.30 pm and it was at night but could not recall the names of the villagers he found near the scene. That he did not witness the accused persons assaulting the deceased. He insisted that the 1st accused herein came to the hospital.

7. PW5 NO. 71272 CPL Dickson Langat testified that he is based at Mbakalo Police Station and that on 1st March 2022 at 9.40 pm while on night patrol with other officers, the OCS CIP Salome called him and alerted him of a fight at Namwanga village. They rushed there and on arrival established that it was the home belonging to one Zablon Khisa Wekesa (deceased). They found a large crowd was already there and one of the suspects named Protus had already been apprehended but later managed to escape. They proceeded to conduct their investigations by accessing the compound where they found the house had been torched while the deceased lay outside. They found that the deceased had been cut on the forehead and that his right leg had been broken. They also observed that the deceased's daughter also had injuries on left thumb and upper limb. They proceeded with them to Naitiri Sub-County hospital and then went back to the station. The following morning at 6.00 am, the OCS informed him that the deceased had succumbed to his injuries and that one of the suspects was being held by the chief at Naitiri hospital. In the company of a colleague, they proceeded to the hospital and picked up the suspect named Jacob Nalianya and escorted him to Mbakalo Police Station where he was booked in the cells as they waited for CID officers from Mukuyuni to come and pick him up. On 3rd March 2022 in response to a tip off that another suspect was in hiding within Ndivisi area, they proceeded



there and were directed to Lutacho village where they arrested Paul Wanjala Wafula alias Muche, the 2nd accused herein. They escorted him to Mukuyuni DCI for processing. He identified the persons as the suspects he apprehended and who are the accused persons in Court.

On cross-examination, he told the Court that he did not witness the incident and that he was not the investigating officer in the case. He told the Court that they rushed to the scene immediately after receiving the report and that no weapons were recovered at the scene. He noted that the house of the deceased had been torched and that no exhibits were recovered from the scene.

8. PW6 Redempta Asuga Murunga testified that she works at Naitiri Sub-County Hospital. According to her, they received a letter from the DCI requesting certified copies of the medical records in respect of Jacob Nalinya Kwanda and Esther Khayanga Masinde which had been used during their admission and treatment. They managed to get the medical notes and P3 form for Esther Khayanga who had cuts on lower lip and bruises on her left arm.
9. Due to none supplication of the above evidence and objection of production of the said documents by the defence, PW6 was stood down to another date. This Court directed the Prosecution to supply the defence with the said documents. The said witness apparently was not recalled by the prosecution.
10. PW7 Patrick Wekesa Simiyu testified that on 2nd March 2022, he received a call that his brother, Zablon Khisa Wekesa had been attacked and was receiving treatment at Naitiri hospital. He rushed to Naitiri Hospital where he learnt of the deceased's demise and that his body was taken to Lugulu Mission Hospital. He told the Court that he witnessed the post mortem examination that took place on 9th March 2022 and that he was able to identify the body of the deceased herein.

On cross-examination, he told the Court that he did not witness the incident and does not know the cause of death.

On re-examination, he reiterated that he was present during the post-mortem examination.

11. PW8 DR Reuben Nyongesa Kere testified that he was the one who conducted the post-mortem examination on the body of the deceased herein and that he was in Court to present the post mortem report. According to him, he conducted the autopsy at Lugulu Mission Hospital on 9th March 2022. He observed inter alia; that there were wounds on both arms; there was a closed fracture on right leg of the deceased; there was an injury on his spleen; there was accumulation of blood in the abdomen; there was a wound on the deceased's head plus a fracture on frontal part; there was bleeding in the brain. He concluded that the cause of death was as a result of cardio pulmonary arrest due to critical head injury, spleen injury grade three, and right tibia fibula fracture due to physical assault secondary to a blunt object. He noted that the probable weapon used was a blunt object. He produced the post-mortem report in Court as Exhibit 2.

On cross-examination, he told the Court that deceased died four hours prior to his body being brought to the mortuary and that the cause of death was due to assault due to blunt object.

On re-examination, he reiterated that he is the one who conducted the autopsy and that the injuries on the deceased were due to assault by blunt a object. He testified that the injuries on the arms of the deceased were as a result of the deceased defending himself from an attack.

12. PW9 NO. 82208 PC Fredrick Omondi testified that he is based at Bungoma North DCI and that he is the investigating officer herein. According to him, on 2nd March 2022 the DCIO directed him to investigate this matter and in which a suspect was already in custody at Mbakalo Police Station by the name Jacob Nalinya (1st accused herein). On investigations, he established that the 1st accused had stormed the home of his father-in-law on the night of 1st March 2022 and broke the doors and attacked



the family of the deceased. Further, he established that the 1st accused had disagreed with his wife Esther Khayanga Masinde earlier in the day on 1st March 2022 and that the house of the 1st accused is about 500 meters from his in laws. He testified that the wife of 1st accused had left her child with the 1st accused and that in the company of the deceased they went to fetch the child. Later on, the 1st accused ganged up with his brothers and stormed the home of the deceased. He interviewed the witnesses and recorded their statements and who implicated the two accused persons herein plus another one still at a large. He told the Court that when he found the 1st accused he was wearing clothes which had blood-stains. He ordered him to change the clothes and that he kept those with blood stains as exhibits. He produced the following exhibits in Court:

- a. Exhibit 1-blue /white stripped T shirts (blood stained) and Navy blue long trouser with bloodstains on the fly area.
- b. Exhibit 4 - One navy blue/orange stripped T- shirt (blood stained)

On cross-examination, he told the Court that 1st accused's t-shirt and trouser were removed for purposes of DNA analysis and that his statement is silent on the recovery of the t-shirt and trouser from the 1st accused. He concurred that he is the investigating officer herein and that he did not avail photographs of the scene. He told the Court that when he visited the scene he established that deceased's home had been burnt down. He told the Court that the recovered 1st accused's clothes and that of the deceased were taken to the Government Analyst/ Chemist for analysis. He told the Court that he had the report of the Government analyst and that the same will give expert advice on the exhibits. He testified that the results of the hair and nail samples collected from the deceased are not out yet. He testified that some of the officers who responded to the report did bump into the third suspect who was then armed with a hammer and whose clothes were blood stained.

13. After close of the prosecution's case, the Court found that the accused persons herein had a case to answer. They were placed on their defense.
14. DW1 Jacob Nalinya Kwanda testified that he is the 1st accused herein and that on 2nd March 2022 at 6.30pm in the company of his wife, Esther Khayanga Masinde, he was visited by some guests who happened to be his in-laws with regard to his child. He claimed that they appeared drunk and alleged that they had come to investigate why he resided with their sister for one year without paying dowry. According to him, they demanded for the dowry of Esther or they would take away their sister. He told the Court that he was not ready for the dowry payment and as a result a disagreement arose whereupon they ordered his wife to pack up her things and accompany them home. Reluctantly, his wife heeded to their demands. Joseph, one of the guests, was armed with a metal rod which he used to injure his wife on her left hand and mouth. He tried to intervene only to be hit on the head and was overpowered. He told the Court that he raised alarm attracting the villagers who came and stopped the ensuing chaos and apprehended the assailants. According to him, the father of the assailants, Zablun Wekesa Khisa, arrived at the scene and organized for him and his wife to go for treatment as he led the assailants home. He told the Court that they were treated at Naitiri Sub-County Hospital and while at the hospital another patient was brought in from Mbakalo Police Station who turned out to be his father in-law who had serious injuries. He told the Court that he does not know how the incident involving the deceased occurred and only came to know about it in Court. He denied ever visiting his in-laws on 2nd March 2022.

On cross-examination, he told the Court that Esther Masinde is his wife with whom they got married in 2020 and were blessed with one female child. He insisted that he was not at the scene of crime as he was in police custody. He refuted the allegations that he disagreed with his wife and that he assaulted her. He insisted that he was assaulted by his brother in-laws.



On re-examination, he told the Court that he never had any disagreements with his wife prior to the incident and that his brother in-laws came to his house to demand for the dowry of his wife. He reiterated that he did not disagree with his wife as alleged and that the truth was that they were injured by their in-laws. Finally, he told the Court that he had not disagreed with the deceased herein.

15. DW2 Paul Wanjala Alias Muche Alias Paul Munjala Nasiaki testified that he is the 2nd accused herein. According to him, on 1st March 2022, he woke up from his house and proceeded to his workplace at Namawanga Secondary School where there was an ongoing construction. He told the Court that he worked up to 6.00 pm and then passed by his wife Rebecca Nabumba's place of work which was a certain hotel to pick her up and that they went home. He told the Court that on 2nd March 2022, he reported to his usual work place and at 10.00am he received a call from a friend who informed him that his brother, who is the 1st accused herein, had been held up at Mbakalo Police Station. At 5.00 pm he proceeded to Mbakalo Police Station where he met corporal Langat at the crime office and enquired on the whereabouts of his brother. He told the Court that he later learned that the issue had to do with an assault case. On 3rd March 2022, he returned to Mbakalo Police Station where he was informed that the 1st accused was at Mukuyuni Police Station. He told the Court that corporal Langat requested for a bribe of Kshs. 15,000/= for the release of his brother and on disagreeing he was arrested. He told the Court that the charges against him are fabricated and that this Court should acquit him of the charges.

On cross-examination, he told the Court that the 1st accused herein is his brother and that Esther is his wife. He insisted that on the date of that incident he was working at Namawanga Secondary School and that one Pius Wekesa was the foreman at the construction site. He told the Court that he left work at 5.30 pm and went to pick his wife from her place of hustle. He insisted that corporal Langat demanded for 15,000/- in order to release the 1st accused. He told the Court that he has never differed with the deceased.

16. After close of the defence case, parties were directed to file and exchange submissions. It is only submissions by the defence which are on record.
17. I have considered all the evidence availed in this case as set out above as well as the submissions filed. I find the singular issue for determination is whether the Prosecution has proved its case beyond the requisite threshold of proof.
18. Section 203 and 204 of the Penal Code under which the accused persons are charged provide for the offence of murder and the punishment therefor. They require that the Prosecution must prove beyond reasonable doubt that the accused persons by an unlawful act or omission caused the death of the deceased through malice aforethought.
19. The sections read as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person who is convicted of murder shall be sentenced to death.”

The death of the deceased

20. The postmortem form PEXH.2 filled by PW8 Dr. Ruben Nyongesa Kere on 9th March 2022, reveals that the deceased died of cardiopulmonary arrest due to critical head injury, spleen injury grade three, right tibia fibula fracture due to physical assault secondary to a blunt object. I find that the prosecution proved this ingredient of the offence beyond reasonable doubt.



Proof that the accused persons committed the unlawful act which caused the death of the deceased

21. PW1, PW2 and PW3 identified accused persons as the assailants that attacked the deceased and hit him on the head, ribs, and legs with a panga, hammer and hoe. The accused persons were well known to the three witnesses as they are in-laws. The incident took place around 09.00 pm where the house and compound were lighted by three solar powered bulbs. I find that there existed conducive conditions for recognition of the accused persons.
22. According to PW1, PW2 and PW3 the 1st accused in the company of the 2nd accused stormed their compound threatening the deceased and his family with actions that even the Police would do nothing about it and threatening to kill the deceased herein.
23. It is imperative to note that according to the evidence by PW2 earlier that day, they accompanied the deceased and her sister, Esther, wife to the 1st accused herein to the house of the 1st accused to take the physical custody of Esther's child and that they had a disagreement with the 1st accused herein.
24. Also, according to PW3 she witnessed how the accused persons and another not before the Court beat up the deceased after the 1st accused dragged him out of his bedroom to the compound outside their house. She told the Court that she witnessed the 2nd accused hitting the deceased on his left leg while the 1st accused smashed his ribs.
25. From the foregoing, i find that the 1st accused's defense that he was the one who was attacked by his in-laws and the 2nd accused's defense that he was being framed did not cast doubt on the well corroborated prosecution's case that the accused persons were the ones that caused the severe injuries that led to the death of the deceased. It is instructive that the accused persons lived about 500 metres away from the home of the deceased and that they were neighbours and that the 1st accused had married one of the daughters of the deceased. It came out clearly that the 1st accused had had some disagreement with his wife and which forced the deceased to go there and intervene only for the accused persons who are brothers to issue threats and thereafter followed the deceased to his house where the viciously attacked and his family. There is therefore no doubt about the identity of the accused persons as the perpetrators as they were squarely placed at the scene of crime. I find the alibi defence of the accused persons to be unworthy of belief and which did not cast any doubt on the prosecution's evidence regarding their involvement in the death of the deceased. I am thus satisfied that both accused were placed at the scene of crime and that the said ingredient has been proved by the prosecution beyond any reasonable doubt.

Malice aforethought

26. Having found that the Prosecution has proved the actus reus of the offence, the issue for determination is whether malice aforethought can be inferred now that a single blow to deceased's head as well as myriad injuries caused his death.
27. The offence of murder is complete when, "malice aforethought" is established if, pursuant to Section 206 of the Penal Code evidence proves 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.”

28. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under Section 202 Penal Code which is punishable under Section 205 of the Penal Code by a term of imprisonment extending up to life imprisonment.

29. In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*), the Court of Appeal cited the case of *Rex Vs Tubere S/o Ochen (1945) 12 EACA 63* with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.”

30. In this case, there is substantial evidence of repeated assault on the deceased. It was the evidence of PW2 that after the 1st accused dragged the deceased outside and left the compound for a brief while she rushed to her father dragging him to a spot under the tree. It was only then that she noticed the 1st accused standing by the wall of the house and who threatened to attack her forcing her to flee to seek help. PW3 testified that he saw both the accused persons further assaulting the deceased at that spot outside with the 2nd accused hitting the deceased on his left leg while the 1st accused was smashing the ribs of the deceased. This factor leads me to believe that the assault on the deceased was not an isolated one and was with malice aforethought on the part of the accused. In other words, it was obviously intention of the accused persons and another who is still at large to kill the deceased or that the injuries inflicted would lead to his death. It is instructive that the deceased died soon after arrival at the hospital. It is also instructive that the 1st accused while in company of the 2nd accused had threatened the deceased and his family over their conduct in taking away his child and that it took only a few hours before they actualized the threat.

The evidence as adduced by the Prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused persons herein with malice aforethought.

48. In the premises, it is my finding that the prosecution proved the information of murder contrary to Section 203 as read with Section 204 of the Penal Code as against both the accused persons herein beyond any reasonable doubt. Consequently, I find the accused persons herein, Jacob Nalianya Kwanda And Paul Wanjala Alias Muche, guilty and convicted accordingly of murder pursuant to Section 322(2) of the Criminal Procedure Code.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF OCTOBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Jacob Nalianya Kwanda 1st Accused



Paul Wanjala alias Muche 2nd Accused

Nabibia for both Accused

Miss Kibet for Prosecution

Kizito Court Assistant

