



REPUBLIC OF KENYA



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**Republic v Waswa (Criminal Case E031 of 2022)
[2024] KEHC 11921 (KLR) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E031 OF 2022
AC MRIMA, J
OCTOBER 7, 2024**

BETWEEN

REPUBLIC STATE

AND

PHILIP WANJALA WASWA ACCUSED

JUDGMENT

1. The accused herein, Philip Wanjala Waswa, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were as follows: -

On the 22nd day of November 2022 at Weonia village in Kiminini Sub-County within Trans Nzoia County murdered Justus Waswa.
3. When the accused was arraigned and charged before Court, he denied committing the offence thereby prompting the hearing of the case against him.
4. After the close of the prosecution's case, the Court found that a prima facie case had been established against the accused. The accused was placed on his defense. The Accused elected to give sworn testimony and called a witness.

The Prosecution's case:

5. The Prosecution called a total of 5 witnesses.
6. PW1 was a boda boda operator who ferried the said Justus Waswa [hereinafter referred to as 'the deceased'] on the fateful day to his homestead and witnessed the attack on the deceased. PW2 was No. 54469 PC Joel Kipkurui who was attached at Weonia Patrol Base. PW3 was a Village elder for Weonia village and a neighbour to the deceased and the accused. She was Zainab Musuya Mang'oa.



- PW4 was Dr. Dennis Nanyingi, a Senior Medical Officer at the Kitale Teaching and Referral Hospital. No. 258643 PC Dickson Nzuki was the investigating officer attached at the DCI Kiminini Sub-County office.
7. The deceased was the father to the Accused and they both lived in the deceased's homestead in Weonia village.
 8. PW1 was an eye-witness. He testified on what happened to the deceased on the 22nd November 2022. He also hailed from the Weonia village. He knew both the Accused and the deceased.
 9. According to PW1, in the evening of the day in issue, he recalled ferrying two pillion passengers. One of them was the deceased and was headed to Weonia village and the other was heading to Sivembee area. That, the client to Sivembee alighted first. PW1 then proceeded to take the deceased to his home. He purposed to drop him and proceed to his home as he wished to retire for the day.
 10. PW1 testified that when he reached the gate to the deceased's home, the deceased requested that he takes him into the homestead. PW1 obliged and rode inside. He parked not far from the deceased's house. The deceased was to descend and pay for the services rendered. It was around 7pm and it was not yet dark. PW1 also stated that there was some fire just next to where he stopped and as such visibility was not hindered at all.
 11. As PW1 waited for his payment, he saw someone approaching them. He was a man and his hands were at the back. PW1 readily recognized him as the Accused who was also a fellow boda boda operator within the village.
 12. The accused did not speak to anyone. He passed PW1 and as he approached the deceased, the Accused suddenly attacked the deceased with a panga which he had hidden on his back. He cut the deceased severally. PW1 sped off from the homestead fearing for his life.
 13. On reaching his home, PW1 narrated the ordeal to his father who accompanied him to Weonia Patrol Base to report the incident. Upon informing the police of what he had witnessed, PW1 was asked to return to the Station the following morning to record a statement. He obliged.
 14. PW2 had retreated to his house after a day's work. His house, among others which were occupied by his colleague officers, was within the Weonia Patrol Base compound. At around 9:30pm, PW2 received an unexpected visitor inside his house. The person did not knock at the door, but instead ran inside. He was armed with a panga which was bloodstained.
 15. As PW2 was visibly shocked and was thinking on what to do as he feared being attacked, the person dropped the panga on the floor and said in Kiswahili 'Numemmaliza.....'. PW2 knew that the person had killed someone.
 16. PW2 managed to arrest the intruder and handcuffed him. He also recovered the panga. He called for reinforcement and led the person to the cells. While PW2 was in the company of other officers, they later visited the scene.
 17. PW2 recognized the intruder as the Accused. He knew him as he had been involved in a land dispute with his father and they used to visit the Chief's offices which offices were also situated within the same compound. PW2 also knew the deceased.
 18. PW3 testified on three issues. First, that he received information from a villager of the attack on the deceased and rushed to the homestead only to find the deceased beheaded near his homestead's main gate. Second, that the deceased and accused did not enjoy any cordial relationship. That, they were involved in a strenuous and acrimonious land dispute as the deceased wanted the accused to leave his



- home. On his part, the Accused refused to leave and vowed to either be killed by or to kill the deceased. Third, that the deceased was a very hostile person who quarreled with almost everybody and he had no regard to authority.
19. PW3 narrated how she had been chased away by the deceased at one time when she had gone to serve summons from the Chief upon the deceased. To PW3, the Accused was generally a quiet and peaceful person.
 20. PW5 was called by the DCIO Kiminini Sub-County in the evening of 22nd November 2022 at around 7pm. He was informed of the murder incident at Weonia area and that the suspect had been arrested and was held at the Weonia Patrol Base. He was to take charge of the investigations.
 21. PW5 and other officers proceeded to the Weonia Police Base where they met PW2 among other officers. They then proceeded to the scene. They found the body of the deceased lying near the main gate with his head chopped off. After documenting the scene, they collected the body and returned to the Weonia Police Base where PW5 was handed over the Accused and the bloodstained panga.
 22. The body of the deceased was escorted to Kiminini Cottage Hospital mortuary where it was preserved for further police action. The Accused was led to and held at Kiminini Police Station.
 23. PW5 interrogated several people over the incident. He also recorded witness statements.
 24. PW5 also organized for a post mortem examination of the body of the deceased. It was conducted on 26th November 2022 at Kiminini Cottage Hospital mortuary by Dr. Barasa. The body was identified by Martin Mulongo and Flora Wamana [not witnesses].
 25. According to Dr. Barasa, the head was chopped off from the rest of the body at the neck. The right thumb, index and middle fingers were amputated. There was a deep cut on the right mandible exposing the teeth. There were also bruises on the chest and abdomen. He opined that the cause of death was beheaded from assault. He filled in, signed and stamped a Post Mortem Report.
 26. The Report was produced by PW4 in evidence on behalf of Dr. Barasa.
 27. On completion of the investigations, PW5 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information dated 2nd December 2022. The accused was accordingly charged after undergoing a mental assessment which certified him to be mentally fit to stand trial.
 28. With the foregoing evidence, the Court found that the accused had a case to answer. He was placed on his defence.

The Defence:

29. The accused elected to give sworn testimony and called his mother one Metrin Naliaka Saikholi, who testified as DW1.
30. The accused denied the information and raised the defence of alibi. He stated that he spent the entire fateful day working as a boda boda rider at the market until around 7:30pm when, as he was preparing to return home, he was arrested by some officers and questioned about the events at their home, which he knew nothing about. He was then arrested and led to the Weonia Patrol Base where he was locked in the cells. He then learnt that his father had been killed.
31. The Accused further denied surrendering to the police, but insisted that he was instead arrested by the police at the market. He, however, affirmed the evidence of PW3 that the deceased was a very hostile



person who had even chased him from the home for around 8 years. The Accused admitted running bad-blood between the deceased and himself.

32. DW1 also testified on the hostile nature of the deceased. She stated that after living with the deceased for 8 years and having four children, she had to leave for her life since the deceased's hostility was heightening and that the deceased was always armed with a knife.
33. With the above evidence, the Accused closed the defence case.
34. The Court then directed parties to file their respective rival written submissions. Mr. Wekhuyi, Learned Defence Counsel filed his written submissions dated 13th February, 2024 wherein it was vehemently submitted that the offence was not proved as required in law.
35. While referring to some decisions, the Defence urged this Court to dismiss the information and acquit the Accused.
36. The Prosecution presented its written submissions dated 29th January 2024 wherein it submitted that the State had established all the required ingredients to the required standard of proof, being beyond reasonable doubt, against the Accused.
37. The State urged the Court to find the accused guilty as charged. It also referred to some decisions.

Analysis:

38. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
 - (a) the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
39. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death and its cause:

40. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
41. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased dead and a Post Mortem examination conducted on the lifeless body. The body was later released to its relatives and was subsequently buried.
42. The second way in which the death of the deceased was proved was through the evidence of the Medical Doctor who conducted the autopsy on the body of the deceased. He opined that the cause of death was the beheading from assault. That expert evidence was not contravened.
43. This Court, therefore, finds and hold that the death of the deceased and its cause in this case were proved to the required standard.



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

44. In this matter, there was direct eye-witness account on how the deceased met his death. That was the evidence of PW1, which evidence has already been captured above.
45. PW1 was, therefore, a sole identifying witness. Such evidence must comply with some principles as enunciated in various decisions. For instance, the Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the evidence of a single identifying witness as follows: -
13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, “No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.” Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi v Republic* [1986] KLR 198:
1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In *Mailanyi v Republic* (supra), the Court emphasized that:
- What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight.
- There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant’s aid or to the police.
46. In *R v Turnbull & Others* [1973] 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -
- “... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded



in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

47. In *Wamunga v Republic* [1989] KLR 426 the Court of Appeal stated as under: -

".... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

48. In *Anil Phukan v State of Assam* [1993] AIR 1462 the Court held as follows: -

"A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone."

49. PW1 knew both the Accused and deceased as his neighbours. The Accused was also a fellow boda boda operator within their locality. PW1 stated that the attack took place at around 7pm while it was still not dark. Further, there was a huge fire just next to where he was with the deceased. PW1 also stated that he saw the Accused approach them from a distance while holding his hands on the back. He passed near him and attacked the deceased with a panga as the deceased was still with him.

50. PW1's evidence was corroborated by PW2. It was PW2's testimony that the Accused surrendered to him at the Weonia Police Patrol Base with a blood-stained panga. He also told PW2 that 'he had finished him'. PW2 arrested and booked the Accused into the cells.

51. This Court observed the demeanor of PW1 and PW2 as well as the rest of the witnesses as they testified. The Court made no adverse remarks on any of them or their credibility. To this Court, the witnesses were forthright and withstood cross-examination. The Court believed them. Therefore, this Court does not agree with the Accused that the witnesses were untruthful. Further, this Court does not agree with the Accused that he did not surrender to the police, but was instead arrested at the market.

52. The defence did not, therefore, in any way whatsoever challenge the prosecution evidence. The defence did not create any doubt at all, leave alone a reasonable one, on the prosecution's case. The defence is, hence, for rejection.

53. In sum, this Court finds and hold that it was the Accused who attacked and cut the deceased with a panga. Indeed, the death of deceased was caused by the accused who inflicted the fatal wounds on the deceased. The evidence of the prosecution stands out well corroborated and deliberate as to the truthfulness of those facts.

Whether there was malice aforethought:

54. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.



55. Section 206 of the Penal Code defines 'malice aforethought' as follows: -
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.
56. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
57. In *Joseph Kimani Njau v Republic* [2014] eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v Republic* [1993] KLR 171, held as follows: -
- Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -
- i. The intention to cause death;
 - ii. The intention to cause grievous bodily harm;
 - iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
- It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (*See Hyman vs. Director of Public Prosecutions* [1975] AC 55". (emphasis added).
58. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -
- a. The nature of the weapon used; whether lethal or not;
 - b. The part of the body targeted; whether vulnerable or not;
 - c. The manner in which the weapon is used; whether repeatedly or not;
 - d. The conduct of the accused before, during and after the attack.
59. The deceased sustained one major injury. He was beheaded.



60. Such an injury was on a critical part of the human anatomy. It goes beyond any peradventure that once the head is chopped off the body, then death is eminent. Inflicting such an injury on someone can only be intentional. The rationale was apparent that it was to deprive the deceased of his life.
61. The accused must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. Furthermore, there was evidence of animosity between the Accused and the deceased resulting from a land dispute and that the Accused had refused any reconciliation. Instead, the Accused had vowed to either kill or be killed by the deceased. He told PW3 as much in the morning of the very day the deceased was killed.
62. By considering the cumulative circumstances of the matter and the actions of the accused more so in the manner in which the killing of the deceased was executed, it is without any shred of doubt that the accused purposed to kill the deceased.
63. The prosecution, therefore, proved malice aforethought in this case.

Disposition:

64. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
65. Drawing from the foregoing, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
66. The accused herein, Philip Wanjala Waswa, is accordingly convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.
67. Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Wekhuyi, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

