



**Republic v Wangila (Criminal Case E021 of 2021)
[2024] KEHC 15589 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E021 OF 2021**

DK KEMEL, J

DECEMBER 6, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ALFRED WANGWE WANGILA ACCUSED

JUDGMENT

1. The accused herein Alfred Wangwe Wangila has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 26th day of September, 2018 at T- Junction area within Webuye Township in Webuye West Sub- County within Bungoma County, he murdered Phoebe Nanjala Wangila.
2. The accused denied the charge and the trial commenced with the prosecution calling six (6) witnesses in support of its case.
3. Wanjusi Muliro Kasaya (PWI) testified that the deceased herein was his fourth born child who was married to the accused herein and were blessed with two children. He stated that the accused and deceased had a troublesome marriage with frequent assaults on the deceased leading her to abandon her marriage. According to him, the deceased later secured some employment within Webuye Township. He stated that upon receiving the report of the incident, he rushed to Webuye District Hospital where he found the body of the deceased which had multiple stab wounds. A postmortem was later conducted and thereafter the body was buried. He added that the accused went underground for a long period before being arrested.

On cross examination, he stated that he did not witness the incident and that the accused's family had agreed to compensate the family of the deceased with 16 cows but that the same did not materialize. On re-examination, he told the Court that it was the accused's family that wanted to compensate their family.



4. Fanuel Walubengo Lichuma, (PW2) testified that he received a report from one Chemiat that the accused who is husband to the deceased had stabbed her. He rushed to Webuye District Hospital where he saw the body which had several stab wounds. He added that the accused had a troubled marriage and that the deceased had left the marriage and secured some employment in Webuye Township only for the accused to trace her and kill her.
5. Dr Edward Vilembwa (PW3) testified that he worked at Webuye District Hospital as a doctor. He produced a post mortem report on behalf of Dr Haji Museve who is based in Garissa currently and could not be procured easily. He stated that he was quite familiar with the said doctor's handwriting and signatures. He testified that the body of the deceased had three stab wounds on the chest which penetrated the heart. There were also bruises on left humerus and both knees. He added that the cause of death was penetrating chest injury leading to heart injury due to stab wounds. He produced the post mortem report dated 2nd October 2018 as PEXH1.

On cross examination, he stated that Dr. Haji Museve had been his student at the time of the examination. He denied that the injuries had been inflicted by a mob.

On re-examination, he confirmed the existence of a pattern on the stab wounds.

6. Catherine Khavagali Simiyu (PW4) testified that she used to reside together with the deceased for one year and that on the material date the accused arrived at her work place and spoke with the deceased and later stepped outside with the deceased. She later learned that the duo left the hotel and that frantic calls to the deceased did not bear any fruit. That she decided to go home and that later in the night she received a report from her father that the deceased had been killed. She rushed to Webuye District Hospital and joined other relatives. She added that the deceased had separated with the accused prior to the incident.

On cross examination, she stated that the accused had been the deceased's husband, and that the deceased had moved on after separating with the accused and that she had gotten engaged to another man.

7. No. 236196 CIP Peter Ramogi (PW5) testified that on 12th October 2019 he recorded a confession from the accused herein in the presence of his father Musa Wangila and his brother Ezekiel Wangila. He produced the same as PEXH 2.

On cross examination, he stated that he translated the confession into English language but did not indicate the language the accused chose in making the statement. He also stated that he informed the accused that his statement may be used against him. He finally added that the accused claimed that he had stabbed the deceased by mistake.

On re-examination, he told the Court that nobody indicated that they did not understand the statement as they signed it.

8. No. 236173 CIP, Josephine Andia (PW6) testified that she received a report of the incident that took place on 26th September 2018 and that she rushed to Webuye District Hospital where she found the body of the deceased herein. She commenced investigations by recording statements from witnesses. That at the time accused's phone had been switched off and that he went underground only to resurface on 11th June 2021 and was promptly apprehended. That she organized for recording of a confession from accused by CIP Peter Ramogi. She produced three photographs taken of the body of the deceased. She also produced a certificate thereof. He produced in Court the three photographs marked as PEXH 3 (A-C) and the certificate as PEXH 4.



On cross examination, she stated that she does not know how the accused was identified when he resurfaced. She added that she is not aware that both families had entered into a reconciliation and that the case was reactivated after the negotiations failed. She also stated that the accused had been at large all that time until he was arrested. She finally stated that she did not know the person who tipped the police about the presence of the accused leading to his arrest.

On re-examination, he told the Court that the accused was at large and he did not know anything concerning reconciliation as they were not notified.

9. At the close of the Prosecution's case, the accused herein was found to have a case to answer and was thus put on his defence. He opted to tender a sworn testimony.
10. Alfred Wangwe Wangila (DW1) testified that he is the accused herein and he denied the charges he is facing before this Court. According to him, on 26th September 2018, he woke up at 5.30 a.m. to prepare breakfast for the children who were to head to school. He told the Court that prior to his separation from the deceased, the deceased left his home in August 2018 due to epilepsy illness and that he made attempts to salvage his union with the deceased by visiting the hotel where PW4 worked to see her but PW1 advised that the deceased remain with them until the following day and he headed home to his children. He stated that he was alerted the next day that there were allegations that he had killed his wife and that he was apprehended after two years. He denied recording any confession statement insisting that he was threatened and assaulted by the police and subsequently ordered to sign the confession. He denied the allegations that the deceased left him over some disagreement and that when he visited the hotel where the deceased worked, he was with one Kevin. Finally, he testified that PW1 threatened him over a farm he was allowed to farm on.

On cross-examination, he told the Court that the deceased was his wife and that she developed epilepsy in 2017. He told the Court that he never paid dowry to the family of the deceased and that the deceased left in search of treatment for the epileptic issue. He denied exhibiting any cruelty towards the deceased forcing her to seek shelter at her parents' house. He told the Court that during the three weeks the deceased was away from him, he did not suspect that she was having an affair with another man. He termed the confession statement before Court to be false and claimed that he never lodged any report on the assault on him and that despite being assaulted on the knees, he did not provide any treatment notes. He told the Court that he suspected the deceased's brother who was the last one to be with the deceased but he had no evidence that Peter killed the deceased.

On re-examination, he told the Court that the deceased was not living with PW1.

11. At the close of the defence hearing, parties were directed to file and exchange their respective written submissions. However, none of the parties complied.
12. I have considered the evidence of both the Prosecution and defence as presented. I find the only issue for determination is whether the Prosecution proved its case against the accused beyond any reasonable doubt. The offence of murder is provided for under Section 203 of the Penal Code as follows;

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

13. To secure a conviction for the offence therefore, the following ingredients ought to be established beyond reasonable doubt; (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased; (c) and that the accused had harboured malice aforethought.



14. In establishing its case, the Prosecution is under obligation to prove each of the ingredients beyond reasonable doubt. It is trite that the burden of proof lies on the Prosecution in all cases save only for a few statutory offences. Proof of beyond reasonable doubt has however been stated not to mean beyond any shadow of doubt. The standard is discharged when the evidence is so strong that only a little doubt is left in his favour. (See *Miller Vs Minister of Pensions* [1947] ALL ER 372.)
15. The fact of the death of the deceased is not in doubt. There is ample evidence from the testimony of PW3, the doctor who conducted the post mortem on the deceased's body. The said PW3 produced in Court a post mortem report dated 2nd October 2018 as PEXH 1. The cause of death was given as penetrating chest injury leading to heart injury due to stab wounds. This ingredient of the offence was duly proved by the Prosecution.
16. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic -vs Boniface Isawa Makodi* [2016] eKLR that referred to the case of *Guzambizi Wesonga -vs- Republic* [1943] 15 EACA 65 where it was held;

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property”.
17. The deceased herein was found to have died from penetrating chest injuries leading haemopericardium causing cardiac tamponade as a result of stab wounds. As stated, there is no doubt that the death of the deceased was caused by the injuries that she sustained to her respiratory and cardio-vascular system as was detailed in PEXH 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before Court irresistibly points to an unlawful act that led to the death of the deceased following an attack. Accordingly, I find and hold that the death of the deceased was caused by an unlawful act.
18. On whether the Prosecution have proved beyond reasonable doubt that it was the accused herein who committed the unlawful act which caused the death of the deceased, the accused has denied committing the unlawful act leading to the deceased's death. The question is, who caused the unlawful act that led to the demise of the deceased?
19. As to whether the accused is linked to the death of the deceased, the summation of the evidence drives to only one conclusion, that there was no eye witness who could account of how the deceased met her death. However, what is not in doubt is that the accused was the last person to have been with the deceased before she died since he and deceased stepped outside a hotel where she worked but that she did not return. The principles applicable in criminal cases predicated on circumstantial evidence have been laid down in several authorities of this Court. For instance, in *Rex v Kipkering Arap Koske & 2 Others* [1949] EACA 135, *Simoni Musoke v R* [1958] EA 71, *Abanga alias Ogango v Republic Criminal Appeal No 32 of 1990 (UR)*, and *Joan Chebichii Sawe v Republic* [2003] eKLR. They are that; to justify the inference of guilt, the evidence must irresistibly point to accused as the perpetrator of the crime; inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his or her guilt; and, the chain of events must be so complete that it establishes the culpability of the accused and no one else.



20. Regarding the “last seen with” doctrine, its applicability has been explained by various courts. For instance, in the Nigerian case of *Moses Jua vs The State* (2007) LPELR-CA/IL/42/2006 it was held as follows:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

21. In the case of *Ramreddy Rajesh Khanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

22. Subsequently, section 111(1) of the *Evidence Act* states that:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: -

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt to the guilt of the accused person in respect of that offence.”

23. In this case, the genesis of the doctrine of ‘last seen with’ is hinged on the evidence of PW 4. According to PW 4, is that on 26th September 2018, the deceased came to meet her up at her work place at 8.00 p.m. so that they could proceed home together as it was their norm. She told the Court that she resided with the deceased for about a year. It was her testimony that the accused showed up in the company of another man and they sat behind the hotel where she used to work. The strange man left leaving behind the deceased and the accused and she continued with her work. Later on, she went outside in search of the deceased but could not find her and her attempts to reach through to her over the phone proved futile. She decided to head home alone and at about 10.00 p.m. her father called her to inform her that the deceased had been assaulted and her hand broken. She rushed to Webuye District Hospital, where the deceased was admitted only to find she had passed on and that her body taken to the mortuary. She told the Court that the accused was the last person to see the deceased on that day.

24. When placed on his defence, the accused told the Court that in an attempt to salvage his union with the deceased he visited the hotel where PW4 worked to see the deceased and convince her to return to him and his children, but PW1 advised that the deceased remain with them until the following day and he proceeded to head home to his children. He stated that he was alerted the next day that there



were allegations that he had killed his wife and that he was apprehended after two years. He denied the allegations that he assaulted his wife and that he even caused her to flee from her home and seek shelter at her parents' home. The accused shifted the blame to one Peter who was a brother to the deceased and he alleged that the deceased was last seen with him and that it was Peter who killed the deceased.

25. The chain of events, more so from the account of PW6 and the evidence of PW6 that the incident occurred on 26th September 2018 and that the accused went underground only to resurface on 11th June 2021, dislodged the assertion that the accused was not aware of the assault that led to the demise of the deceased on that material date. No other inference other than that the accused had a hand in the death of the deceased can be conclusively drawn. In any event, the confession made by the accused and which was produced as Exhibit 2 is conclusive evidence that he is the one who murdered the deceased. Even though the accused attempted to challenge the said confession in his defence, I find the same did not have any force since the confession had already been admitted into evidence. The accused ought to have challenged the production of the confession by the witness who prepared the same and if the court was sufficiently convinced, then a trial within a trial could have ensued regarding the manner in which the said confession was arrived at. In the absence of such a procedure, the confession statement stood as a sore thumb in the proceedings and pointed to the accused as the person who killed the deceased. It is instructive that the accused went underground for a period of three years after the incident and was arrested when he resurfaced. For that period of disappearance, the accused became a fugitive from justice. His defence evidence did not shake that of the prosecution which is quite overwhelming against him.
26. In light of the foregoing, I am satisfied that the Prosecution proved that it was the accused and not any other person who caused the death of the deceased.
27. As regards whether the appellant had malice aforethought, Section 206 of the Penal Code provides that:

“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.”
28. The post mortem conducted by PW3 revealed that the deceased died from penetrating chest injuries leading to haemopericardium causing cardiac tamponade as a result of stab wounds. I find that there was malice aforethought since it is evident that the attacker's intention was to completely damage her respiratory and cardio-vascular system which led to the unfortunate death of the deceased. PW3 noted



the said stab wound bore an explicit pattern. That is clear from Section 9(3) of the Penal Code which provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”

It is clear that the accused had visited the deceased that day to eliminate her after he learnt that she had moved on and had gotten hitched to another man. Indeed, the deceased had moved on after staying away from the accused for one year at her parents' home. This must have angered the accused to the point of plotting to eliminate her. He ought to have approached her parents for reconciliation and not to kill her. I am satisfied that the accused had the requisite malice aforethought.

29. On the alibi as raised by the accused, the accused in his defence evidence alleged that he was not at the scene at the time of the attack on the deceased as he was at home with his children.

30. In the case of *Kiarie v R* {1984} KLR The Court of Appeal laid down the following principle:

“An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.”

31. In *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 held:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

32. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See *Nyakundi J IN Charles Kasena Chogo v Republic* [2019] eKLR.

33. I have perused the trial Court record and find that the accused raised the alibi defence during his defence evidence and thus the plea of alibi was never even part of the cross-examination of the prosecution witnesses. In *R v Mahoney* {1979} 50 CCC it was held:

“The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it.

34. Subject to the foregoing, the Prosecution could not have started investigations during defence hearing. Had the accused disclosed his defence of alibi prior to the said defence hearing, the prosecution would have investigated it. I must find that the said alibi did not dislodge the overwhelming evidence presented by the prosecution against the accused herein. Indeed, the evidence of PW4 who was sister to the deceased clearly placed the accused at the scene of crime. The said witness was cross-examined at length



and that she was quite steady in her evidence. Further, the confession made by the accused in the presence of his father and brother paid put his feeble alibi.

35. In the end, I find and hold that the Prosecution has proved all the elements of the offence of murder against the accused beyond reasonable doubt.
36. Accordingly, I find the accused Alfred Wangwe Wangila, guilty of the offence of murder as charged contrary to Section 203 as read with Section 204 of the Penal Code. I convict him accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D K KEMEI

JUDGE.

In the presence of :-

Alfred Wangwe Wangila..... Accused

M/s Wakoli..... for Accused

M/s Kibetfor Prosecution

Kizito/Ogendo..... Court Assistant

