

REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO.E006 OF 2023

REPUBLIC.....PROSECUTOR

VERSUS

BRIAN SOITA WAFULA.....

ACCUSED

JUDGMENT

1. Brian Soita Wafula, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 12/2/2023 at Milele Village, Kiminini Sub County within Trans Nzoia County murdered Jairus Wanyonyi Khamala.
2. The accused person denied committing the offence and the prosecution has called a total of eight witnesses in support of the charge against the accused. The prosecution's case against the accused is hinged on circumstantial evidence. Below are the testimonies of the witnesses summoned to give evidence during trial.
3. Juma Evans Wafula (**PW1**), a Form 4 student at Mufutu Secondary School recalled that on 12/2/2023 at around 5pm was from school and though it was a Sunday, he clarified

that they used to go to school from 2pm to 4pm. He stated after playing some football he headed home and passed next to the home of the deceased which was by the road side. That he saw the deceased coming from his home to the road side. He stated that he asked him if he could get some milk but he answered that it was only possible to get some the following day.

4. He stated that he proceeded home and later he decided to visit his friend called Davy, a classmate, with a view to assisting him with school assignments. That when he was approaching the gate leading to Davy's home, he met the deceased and his brother Enock heading towards his home. That he told them to wait for him as he dropped a book to Davy. That they waited and later joined them as they walked towards their home. He stated that when they reached the gate of their home Enock waited at the gate as the deceased proceeded. That he left Enock waiting and he went inside the house and after a while he went back to Davy's home to collect his book and found Enock still stuck at the gate. That Enock told him he was waiting for the deceased and told him that the deceased had taken longer than usual. That he further told him that he had heard some noises and requested him to accompany him to go and find out what had happened to the deceased and he obliged.
5. He stated that as they walked they suddenly found the deceased lying in a trench beside a house belonging to

Amos. That the deceased was still breathing but with difficulty.

6. He stated that Enock showed him one Brian (accused) son to one Joyce walking away from the scene and saw him from a distance.
7. He stated that Enock went and fetched his brother named Isaac who had a motorcycle to help in carrying the deceased to hospital but the boda boda was faulty.
8. He stated that the deceased was later taken by Amos to hospital and two days later he was informed that the deceased had died.
9. He recalled that they found the deceased lying down injured at around 8pm and that the scene was just about 70 metres from his home.
10. He added that he saw the accused and recognized him from his dreadlocks and that though at the time of trial he had shaved, he was in dreadlocks when he saw him.
11. He further added that the deceased and the accused both wanted a girl known as Vivian who was a neighbour and also a cousin.
12. He further added that he did not notice any sign of struggle at the scene but the deceased was bleeding from his mouth and nose.
13. When pressed in cross-examination on how he recognized the accused when it was 8pm and dark, he stated that there was still some light which made it possible

for him to recognize him. He also stated that the deceased was lying down alone when they found him on the road.

14. Vivian Nasambu Misiko (**PW2**), a 17 year old student at Friends Mufutu Secondary School testified on 12/2/2023 between 6pm and 7pm she was at home when the accused went to her home with his sister. She stated that she had his phone which was charging. That she took the phone to him and switched the phone on and noticed that the accused had a black rubber tied around his stomach. That as she talked to the accused, she heard the deceased talking with Evans as they approached to where they were and she left and returned home.
15. She stated that shortly her brother Evans went to her and called her telling her that the deceased wanted to see her but she declined telling him that she was cooking.
16. She stated that after she finished cooking she went outside and saw Evans walking towards the river and asked him where the deceased was. That he told her he was going to look for him and keep her updated. That she told him to tell the deceased to go and find her near the latrine at their home.
17. She stated that Evans returned shortly and asked for a torch to go and find out if it was the deceased who had been assaulted and injured. That she went with her brother Antony and found Evans and Enock with the deceased. That Enock sent her to get some water and she rushed to the

house to get some water and returned with a container. That Enock told her to wash the deceased but she declined and Enock took the water and used his sweater to wipe the blood from the face of the deceased.

18. She testified that the deceased was bleeding from the head and mouth. That Enock went to her brother called Isaac who had a motorcycle to help carry the deceased to hospital but the motorcycle had no fuel.
19. She stated that Amos later arrived with his boda boda and took the deceased to hospital. That when the motorcycle lit the area with its head light, she saw the very pipe she had seen the accused having on the ground. That she told both Evans and Isaac about the pipe and Isaac picked the pipe and took it. She said that she later learned that the deceased had died in hospital.
20. She stated that both the accused and the deceased were her boyfriends and she dated both of them. She stated that she did not know if the two knew each other because she used to meet them at separate times. That on that night, the accused had gone to pick his phone from her and did not know where the deceased was at the time. She recalled that the accused went for his phone at around 7pm and it was dark.
21. She clarified that she began a relationship with the accused first before befriending the deceased. That the deceased was lying next to the house of Amos. She further

stated that at the time the accused had dreadlocks which he later shaved.

22. Isaac Sambula (**PW3**) on his part testified that on 12/2/2023 at around 7.30pm after arriving home from work, Enock went and requested him to take his brother, the deceased to hospital as he had been assaulted. That he could not help because his motorcycle was faulty. He stated that shortly Amos arrived with his motorcycle and assisted in taking the deceased to hospital accompanied by Enock. That 3 days later he learnt that the deceased had died. He stated that he lived next to where the deceased was found lying down injured.

23. Amos Namiti Wafula (**PW4**), a boda boda rider recalled that on 12/2/2023 at around 7.30pm as he approached his house at Milele he saw three people approaching him. He stated that he recognized Isaac who was also a boda boda rider and the deceased who used to work at a neighbour's farm. That the deceased was being held by his brother Enock who was crying. He stated that he was requested to ferry the deceased to hospital and carried him in the company of Enock and headed to Sarona Hospital where the doctor advised them to take the deceased to Cottage Hospital because of his condition which was bad.

24. He further stated that on arrival they were referred to Kitale County Hospital at Cottage Hospital and the deceased was taken by an ambulance to Kitale County Referral

Hospital. He stated that the scanning machines were lacking at Kitale Referral Hospital and they were referred to Moi Teaching & Referral Hospital in Eldoret. He added that from Eldoret he was asked to get money to have the deceased taken to Kenyatta Hospital but he did not have the money. That the following day he heard that the deceased had died and he proceeded to Eldoret where he confirmed that indeed he was dead.

25. He confirmed that the scene where the deceased was found was next to his house. That his wife was at home at the time but had given birth and did not say if she heard any commotion. He further stated that the distance between where the deceased was found and the home of accused is around 400 metres and that he was a neighbour. He stated that though he saw some people walk towards the river when he was proceeding home at around 7.30pm he did not recognize them.
26. When asked about the black pipe, he stated that the same was a black bladder and it belonged to him.
27. PC Aquinas Saleh (**PW5**) the investigating officer in the case stated that the incident was first reported as an assault at Matunda Police Patrol Base by deceased's brother. He stated that the reportee reported that the victim was admitted at Moi Teaching and Referral Hospital Eldoret and that he visited the facility and found the deceased in a life

support machine at Neuro Ward. That the doctor told him that the chances of survival were minimal.

28. The initial investigating officer in the assault case stated that he notified his boss and that on 17/2/2023 he got the information that the deceased had died.

29. He stated that the matter was then taken over by the DCI and that the name of the assailant was captured in the OB as Brian Soita.

30. Benard Khamala **(PW6)** the father to the deceased stated that on 3/3/2023 he went to Moi Teaching and Referral Hospital Eldoret to identify the body of the deceased before Post Mortem examination.

31. PC Robert Ngeno **(PW7)** an officer attached to DCI Kiminni stated that he was the investigating officer in the murder case and that on 17/2/2023 the CCIO called him and notified him that the deceased had succumbed to injuries at Moi Teaching and Referral Hospital Eldoret. He clarified that the case had initially been reported at Matunda Patrol Base as an assault case.

32. He stated that he proceeded to Matunda Patrol Base where the investigating officer Aquinas gave him a briefing on the case first reported as assault on 13/2/2023 vide OB No.4 by Enock who was a brother to the deceased.

33. He stated that he took over the matter and together with fellow officers visited the scene of the crime which was at Milele Area within Matunda. That the scene was a footpath

between the houses of Isaac (**PW3**) and Amos (**PW4**) and the same path led to a river.

34. He stated that the scene had been interfered with and did not get any exhibit. That he got statements from witnesses and the accused was arrested on 23/2/2023 with the help of “**mukasas**” (Village elders).
35. He testified that in the course of his investigations he established a love triangle between the deceased, the accused and Vivian Nasambu (**PW2**). That the girl possibly took off on the material time when she realized that the two boyfriends, the accused and deceased were going to meet.
36. He stated that though the accused was seen with dreadlocks when they arrested him, he had shaved.
37. He stated that though the accused was seen with a pipe, he did not recover the same but that the cause of death was blunt injury to the head adding that the deceased was found unconscious bleeding from the mouth and nose.
38. He further testified that the accused disappeared after the incident but later resurfaced and was arrested by village elders.
39. He further stated that Vivian had also reported to him that on 9/2/2023 there was an altercation between the deceased and accused at a ‘**matanga**’ event but the same was not reported to the police.

40. He insisted under cross-examination that the incident occurred at around 7pm and that there was still sufficient light for positive identification.

41. Doctor Benson Macharia (**PW8**) the doctor who conducted Post Mortem examination on the body of the deceased stated that he did so on 3/3/2023 at Moi Teaching and Referral Hospital. He stated that the deceased was aged 22 years. He stated that his findings were as follows;

A)Externally

- i) The eyes were pale.*
- ii) Bruise measuring 5x4cm on the chest wall.*

B)Internally

- (i) Lungs had mild fluid.*
- (ii) Extensive hematoma on the skin covering the head.*
- (iii) Fractures along where bones fuse at skull bone.*
- (iv) Bleeding on both right and left brain.*

He formed the opinion that the cause of death was severe head injury due to severe blunt trauma. He tendered the Post Mortem report as **PExhibit 1** and stated that he issued a Burial Permit No.0368899.

42. When placed on his defence, the accused gave unsworn statement stating that he was framed. He denied killing the deceased. He stated that on 12/2/2023 he was home and

that he went to pick his phone from Vivian (PW2). That the following day he heard rumours that he had killed someone. He stated that Vivian was a friend and that he did not see the deceased on the material day and that he is not the one who killed him.

43. Eliud Soita Wanyonyi (**DW2**) a father to the accused testified that he was with the accused on 12/2/2023 and did not see him leave that night and only heard the following day that his son had fought with his friend.

44. He stated that he did not know his son dated Vivian and that he could not possibly follow his son everywhere. That when he entered his house he could not tell if he remained in or left.

45. At the close of the defence case both sides filed their respective final submissions which I will consider in the disposal of this matter.

46. The accused as observed above is charged with murder contrary to section 203 of the Penal Code. It is now well settled that for a murder charge to be sustained the prosecution's case must establish and prove the following elements namely;

(i) Fact of death and its cause.

(ii) Actus reus or that the unlawful act of commission or omission of the accused caused or is linked with the death and

(iii) Malice aforethought or mens rea.

47. (i) Fact of death and its cause

The element of fact of death in this matter is well established through the evidence of **PW1, PW3, PW4, PW5** and **PW6**. That evidence was corroborated by the medical evidence tendered by Doctor Benson Macharia (**PW8**) who performed Post Mortem on the body of the deceased. The doctor noted and listed the serious injuries inflicted on the body of the deceased. He opined that the cause of death was severe head injury due to severe blunt trauma. He tendered the Post Mortem report as Pexhibit 1. The fact of death and the cause were therefore well proved in this case.

48. (ii) Actus Reus

The prosecution's case in regard to this crucial element is based on circumstantial evidence. Circumstantial evidence unlike direct evidence or eye witness account relies on inference being drawn from circumstances to connect it to a conclusion or fact. In the case of **Musili Tulo -vs- R (2014)eKLR** the Court of Appeal observed that when a prosecution's case is reliant on circumstantial evidence the court must ascertain the following factors before rendering a conviction;

- (i) That the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.***
- (ii) That the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.***
- (iii) That the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

49. In the case of **Sawe -vs- Republic (2003) KECA 182 (KLR)**, the Court of Appeal held that circumstantial evidence can be a basis of a conviction only if there are no other existing circumstances weakening the chain and the inference being drawn. The Court of Appeal made the following observations;

“(1)in order to justify on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

(2) That circumstantial evidence could be a basis of conviction only if there are no other existing

circumstances weakening the chain of circumstances relied on.

(3) The burden of proving facts which justified the drawing of inference from facts to the exclusion of any other reasonable hypothesis of innocence was on the prosecution.”

50. In this case the accused through written submissions dated 12/2/2026 by learned counsel Kiprop Rutto & Associates, contends that no prosecution witness properly identified him as the person who assaulted the deceased.

51. The State on the other hand submits that **PW1** and **PW3** knew the accused very well because to **PW1** he was a neighbour and to **PW2** the accused was a boyfriend. The prosecution contends that it was not too dark at the time for the witness to recognize the accused and that the accused was well identified from his dreadlocks.

52. This court has laid out the evidence of **PW1** with respect to identification of the accused. He says that it was Enock who saw the accused and pointed to him from a distance as he walked towards the river. That he recognized him from his dreadlocks.

53. However when pressed in cross-examination he stated that due to darkness it was not possible to recognize someone. That for me created an element of doubt. The other point which I find doubtful is when he says that, **“there was still some natural light at around 8pm.”**

Ordinarily at 8pm, it is difficult to say that one can still depend on natural light from the sun unless someone clearly states that there was a full moon at the time and the natural light he was speaking about was that from the moon. That fact is missing in this case.

54. This court finds that for identification or recognition to be positive and free from error particularly at night, the source and intensity of light must be ascertainable. It cannot be left to conjecture. In this matter **PW1** did not tell the court the distance between him and the accused at the scene. The proximity between him and the accused or the person in dreadlocks was not ascertained by the evidence tendered in this court. It is therefore difficult to say with certainty that **PW1** was able to recognize the accused from his dreadlocks and if the same were visible at that hour of the night and/or that the recognition or identification was free from error.

55. I have looked at the evidence of **PW2** (the lady that was at the centre of this case). Her evidence with regard to identification casts more doubts. In her evidence in chief she stated as follows;

“Evans came to call me for the deceased at around 8pm. It was dark. One could not see without any lights. Even at 7pm it was equally dark.”

56. It is quite apparent therefore that it was not possible for anyone without a torch or any other source of light to clearly see leave alone recognizing. When Evans went looking for the deceased at the request of **PW2** after she had finished cooking, **PW2** says that he went back to her in a hurry asking for a torch to go and confirm if the person he had seen lying down injured was indeed the deceased. That means without the torch it was difficult to see due to poor visibility or darkness.

57. I have considered the other crucial piece of evidence that could have positively connected the accused with the element of actus reus in this case.

58. Vivian Nasambu (**PW2**) who was a girlfriend to both the accused and the deceased in her own account says that when she saw the accused that material night at around 7pm, reportedly having gone to pick his phone from her, the accused had a black pipe tied around his stomach. When asked to elaborate about the pipe she stated;

“It was similar to the one used in lighting bunsen burners in the laboratory.”

PW2 was a student at Friends Mufutu Secondary School in Form 2 therefore one expects her to know the type of pipe she saw tied around the accused’s waist.

59. She further stated that when Isaac (**PW3**) arrived with a motorcycle, she was able to see the black pipe besides

where the deceased lay and told Isaac and Evans about it and that Isaac picked it and took it.

60. However, when Isaac (**PW3**) testified he did not mention anything to do with a black pipe. It was Amos Namiti Wafula (**PW4**) who stated under cross-examination that it was a black bladder not a pipe that was at the scene and that the same was his. This piece of evidence from **PW4** negated the inference being drawn that the pipe seen by **PW2** tied around the waist or stomach of the accused was the murder weapon used to inflict serious injuries to the deceased.

61. It did not also help the prosecution's case that the said "**black pipe**" was never recovered to be tendered in evidence in this case.

62. The other circumstantial evidence linking the accused with the element of actus reus and hence the murder of accused is the fact that **PW2** used to see him spotting dreadlocks which he spotted that night. **PW1** says he was able to recognize/identify him at the scene because of the same dreadlocks which he quickly shaved after the incident because the investigating officer says he had shaved the dreadlocks when he was arrested.

63. This court however has already discounted the possibility of positive identification/recognition of the accused by **PW1** because the circumstances obtaining at the material time were not ideal for positive identification.

64. The remaining circumstantial evidence that the investigating officer put some considerable weight in his evidence is in respect to the love triangle between Vivian (**PW2**), the deceased and the accused. **PW2** in her own account confirmed that she was dating the two men at the time and that possibly that is the reason why after the accused had left after picking his phone, she declined to go and see deceased immediately when Evans called her that the deceased was waiting for her. she could have been trying to avoid a confrontation but did not state it in her evidence.

65. The evidence adduced clearly shows that both the deceased and accused were near the home of Vivian (**PW2**) at the same time. It is possible that there was rivalry between the accused and deceased over Vivian who appeared undecided as to who between the two was the actual boyfriend. The investigating officer (**PW7**) testified that he established during his investigations that there had been an altercation between the accused and deceased at a '**matanga**' event on 9/2/2023 over the same Vivian. The only problem is that there was no direct evidence tendered in this court to confirm the said altercation and link it up with the instant incident where the deceased was seriously assaulted. No witness was availed to testify regarding '**matanga**' incident. That gap or missing link in my considered view was fatal to the prosecution's case because

the evidence tendered by the investigating officer in the absence of direct evidence of those who witnessed it, rendered the '**matanga**' incident hearsay and therefore inadmissible in this case. The prosecution failed to adduce this crucial evidence from Vivian (**PW2**) when she testified.

66. This court on the overall given the observations made above finds that the prosecution's case with respect to the element of actus reus hangs on a thin thread of suspicion. That is because of the love triangle and the fact that the accused spotted dreadlocks and had gone to see **PW2** almost at the same time that the deceased was also going to see her. The two probably met and accused decided to unlawfully '**eliminate**' competition by causing grievous harm. The suspicion is strong I must say but suspicion alone without cogent and from circumstantial or direct evidence cannot find a conviction.

This court finds that the prosecution's case with respect to the element of actus reus falls short of the requisite standard of proof which is beyond any reasonable doubt.

67. (iii) **Malice Aforethought**

There is no doubt that the prosecution's case clearly established that going by the serious nature of injuries inflicted on the deceased, malice can be inferred as provided under section 206 of the Penal Code.

68. This court also finds that given the established fact of a love triangle involving the deceased, accused and **PW2**,

motive could also be inferred. However in view of the absence of the lack of proof with respect to the element of actus reus, this court finds that the prosecution's case against the accused has failed the threshold required to render a conviction. This court finds that investigations and the prosecution of this case left gaps that left it hanging on a thin thread. One is left wondering why for example the key witness like Enock who is mentioned as being present with the deceased at the material time was not called as a witness. This court finds the prosecution's case against accused cannot be sustained. The accused is found not guilty and he is hereby acquitted.

DELIVERED, DATED and SIGNED at KITALE this27th day ofAPRIL....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mugun for the State

Brian Soita Wafula the accused

Duke/Chemosop- Court Assistants