

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE (MURDER) NO. E011 OF 2023**

**REPUBLIC.....PROSECUTOR**  
**R**

**VERSUS**

**LEWIS WAFULA WANYONYI.....**  
**ACCUSED**

**JUDGMENT**

1. Lewis Wafula Wanyoni , the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; on the night of 6<sup>th</sup> and 7<sup>th</sup> March 2023 at Chelebi village Changeywo Location, Kopsiro Sub-County within Bungoma County jointly with others not before Court murdered Violet Chemwor alias Kimota.
2. The accused denied the offence, and the prosecution called 9 witnesses to support its case, namely Pw1 Jackie Kibet (Pw1), Masibo (Pw2), Doctor Wekesa Arnold Kisangani (Pw3), Bernard Wekesa (Pw4), No. 236984 C.IP Jillo Komba (Pw5), Polycarp Kweyu (Pw6), Tobias Sichangi (Pw7), Eliud Kiptalam (Pw8) and Oscar Barasa (Pw9).

**PROSECUTION CASE**

3. On 6.3.2023, Pw1, Pw2, and Pw3 were at Pw1's home. Pw1 is the deceased's sister. Pw3 is Pw1's husband. Pw1 brews

and sells busaa. Pw2 went to Pw1's home to collect busaa. The deceased was also at Pw1's home and was helping Pw1 serve the busaa. Pw7 was at Pw1's home and was also accused. According to Pw1, they had a chama meeting. Some people left at 4.00 pm. Pw2, Pw7, and the deceased remained. When the accused entered, he appeared upset. The accused asked for Pw2. The accused took some busaa and threw it on Pw2. The accused left after Pw1 asked him to leave. He left with a panga. Pw7 was the last to leave. Pw9, the son of Pw1 and Pw4, returned home and found his parents' home, Pw2, and the deceased. After they had supper, her children told her that the deceased had left. The deceased and Pw7 had an affair. The next day, on 7.3.2023, Pw1, Pw2, Pw4, Pw7, Pw8, and Pw9 were told that the deceased had been murdered. At the scene, they found the deceased's body lying on the ground, with slippers, a black notebook, and her pant nearby. She was half-naked. Pw2 called the area chief. Pw8 visited the scene. Pw1 and Pw2 recalled that, when they saw the accused on the 6th, the black notebook was in his pocket. Pw8 recalled that he went to the accused's home, and the accused took the black notebook. Pw5 visited the scene after receiving a call from the OCPD of the area. They found the deceased's body lying on the ground. Pw5 and his team recovered the slippers, the black notebook, the deceased's pant, a panga from the accused's house, a pair of jeans, and a T-shirt. The panga and clothes recovered from the accused's

home had blood stains. Pw5 also rearrested the accused. Pw5 had the accused taken to the government analyst for his specimen to be taken.

4. On 13.3.2023, Pw3 conducted a post-mortem (Pext2) on the deceased. The deceased was a female of African origin. On external examination, the significant injury was three deep penetrating injuries to the left side of the neck, the largest measuring approximately 8 cm by 5 cm with a depth of 6 cm. Pw3 did not observe any defensive marks or injuries on any other part of the body. As a result of his examination, he formed the opinion that the cause of death was excessive bleeding secondary to penetrating trauma.
5. Pw 5 completed an exhibit memo form (Pext) on 15.3.2023, listing various samples which he submitted to the government analyst on 15.3.2026. The items were; a panga marked A, a pair of blue jeans to users marked B, a torn red/black/white sleeved T-shirt marked C, a torn sleeveless blue/black t-shirt marked "Orland Howard 12" marked D, a torn yellow petticoat marked E, a pink biker marked F, a multi-coloured kitenge skirt marked G, a vaginal swab from Violet Chemwor marked H, a blood sample from Violet Chemwor, a buccal swab sample from Tobias Sichangi, and a buccal swab sample from Lewis Wafula. Pw6 was requested to examine the items and determine the presence and origin of biological evidence. Pw6 carried out the necessary examination and wrote a report dated 13.6.2024 (Pext 11), noting the following; the

stains on the vaginal swabs tested negative for seminal fluid; the stains on the t-shirt (C) and the biker (F) tested negative for human blood; the panga (A) and jeans (B) were lightly stained, while the t-shirt (D), petticoat (E), and skirt (G) were heavily stained, all with blood of human origin. His opinion was as follows; the DNA profiles generated from the blood stains on the panga, t-shirt, petticoat, skirt, and the stains on the biker and vaginal swab are identical and match the DNA profile of Violet Chemwer. The DNA profile generated from the blood stains on the jeans was a mixed DNA profile of Violet Chemwer (the deceased) and Lewis Wafula (the accused). The DNA profile generated from the stains on the t-shirt (C) was partial and inconclusive. The DNA profile of Tobias Sichangi did not match any of the profiles generated from any of the items.

### **DEFENCE**

6. The accused gave a sworn statement. He did not call any witnesses. He lives in Chelebi. He was not at the boma where the murder took place. On the 6th, he was at home and was arrested. He did not go to the boma, as stated by Pw1 and Pw6. He was arrested in the morning while preparing to go to his shamba. He was arrested with Jackline Chebet, Masibo and Tobias. He did not meet the deceased. There was no blood of the deceased on his clothes. They took a panga and his clothes. The clothes were not his; he had left the door open. The panga

produced in court is not his. He does not know the clothes produced in court. They did not take any clothing from his house. The notebook is his, and it was in his house. His wife had written his name and that of his wife.

### **SUBMISSIONS**

7. The prosecution submitted that it had proved its case. The death of the deceased was established by Pw2, Pw7, Pw8, and Pw9, who found the deceased's body lying on the road, and the post-mortem report indicated the cause of death. Regarding the unlawful act causing the deceased's death, it was submitted that Dr Wekesa conducted an autopsy on the deceased's body on 13.3.2023 and confirmed that the deceased succumbed to excessive bleeding secondary to penetrating trauma. The doctor clarified that the deceased's family members declined to have the deceased's head opened for internal examination, and, based on the doctor's explanation, the cause of death was established as the only injury was on the neck. Regarding proof that the accused was the perpetrator of the unlawful act, it was submitted that the evidence adduced confirmed that the accused murdered the deceased by stabbing her in the neck. The prosecution relied on the evidence of Pw1, who had earlier seen the accused with a panga and a black notebook, which was found beside the deceased. It also relied on the evidence of the government analyst and Pw8, who went to arrest the accused and recovered the blood-stained panga,

which he handed over to the police. Regarding malice aforethought, it was submitted that the accused had malice aforethought when he stabbed/cut the deceased in the neck. Regarding the accused's defence, it was submitted that the defence was a sham, full of flaws and inconsistencies, and lacked any factual basis. It was submitted that although the accused denied that the clothing items were recovered from his house, he could not substantiate why officers who testified to the recovery would fix him for the deceased's murder, and that, in his defence, he confirmed that the black notebook was his property.

8. The defence submitted as follows; the burden lies with the prosecution to prove the ingredients of the charge beyond reasonable doubt and that there is no duty on the accused person to prove anything of the allegations of a criminal nature filed by the state in a court of law ( see Mwangi vs Republic( Criminal Appeal E009 of 2023) [2024]KEHC 4728 (KLR), Moses Nato Raphael vs Republic (2015)eKLR and Woolmington vs DPP (1935)A.C 462. On the death of the deceased the defence conceded that there was death. On the cause of death it was submitted that Doctor Wekesa did the post-mortem on the body of the deceased but he was categorical that he did not examine the internal part of the body because the family members present did not want him to open up the body. That during cross-examination, he confirmed that there would be no conclusive medical opinion as to the cause of death unless

there is an internal examination of the body, and that he could not conclusively state the cause of death. On whether the accused caused the death of the deceased it was submitted the accused did not cause the death of the deceased neither was he a party to any preparation, commission or omission leading to the unfortunate death. There was no eye witness and therefore the evidence is purely circumstantial. Reliance was made on the following cases Victor Owich Mbogo vs Republic [2020], Republic vs RMM [2018] and Republic vs Victoria Mueni Kioko. It is further submitted that the testimony of the prosecution witnesses and evidence is based on suspicion, conjecture, speculation and far-fetched evidence as there was no eye-witnesses who testified in court. The defence argued that suspicion, however strong, cannot provide a basis for inferring guilt, which must be proved by evidence. That the prosecution attempt to link the accused to the death of the deceased is solely based on the allegation that a notebook suspected to belong to the accused was found besides the body of the deceased and that the blood stains on the jeans was a mixed DNA profile of the deceased and the accused in court. The defence argued that the evidence of Pw1, Pw2 , Pw4 and Pw7 Tobias are of no significant evidential value considering that they recorded their statements when they were arrested in respect of the murder of the deceased. None of them pointed out the unique mark of the notebook produced in court. On the DNA analysis it is submitted that the Investigating Officer

confirmed that there existed no unique identification marks placed on the items that were collected from the scene of crime and there was a high chance of mix having been kept in the exhibit store where all other exhibits were kept. The samples extracted from the deceased were kept in a hospital but the prosecution failed to produce any documentary evidence showing where they kept under whose custody and under what conditions to avoid mix-up and contamination before the examination. Further the government analyst confirmed that he was not the person who took the samples from the accused and Pw7 and he could not conclusively differentiate the samples since they did not have unique identification mark. The exhibit memo supplied to the court was faint and illegible. Thus the accuracy of the finding is highly questionable and should not be relied on. That Pw1, Pw4, Pw7 and Pw9 testified that they were the last persons to be seen with the deceased on the fateful night. The defence urged this court to invoke the doctrine of last person to be seen with the deceased on the fateful night ( see Klnani Vs Republic ( Criminal Appeal 41 of 2022) [2023]KECA 1390(KLR). It was further submitted that there were too many inconsistencies in crucial evidence and too many doubtful gaps to hold a conviction against the accused. On malice aforethought it was submitted that the prosecution cannot infer malice aforethought where the accused is a stranger to the offence and its particulars. None of the witnesses testified to the existence of any

malice aforethought by the accused. Reliance was placed in the decision of the Court of Appeal in the case of ***Nzuki vs Republic [1993] KLR*** 171, where the court declined to sustain a murder conviction where the prosecution's evidence, though suggestive, left material gaps regarding intent and circumstances of the fatal act.

### **ANALYSIS AND DETERMINATION**

- 9.** In a charge of murder, the prosecution has the duty of proving the following 3 ingredients to secure a conviction; that the death of the deceased has occurred; that the death was caused by an unlawful act of commission or omission by the person accused of the offence; and that the accused had malice aforethought as he committed the said act. (see *Chiragu & Another vs. Republic (Criminal Appeal 104 of 2018) [2021]KECA 342 (KLR)*)
- 10.** The fact that a death occurred is not disputed. Pw1, Pw2, Pw4, Pw5, Pw7 and Pw8 confirmed seeing the deceased. A post-mortem performed on the deceased's body confirmed that the deceased had three deep penetrating injuries on the anterior left side. The largest measured around 8 cm by 5 cm, with a depth of 6 cm. The smallest measured around 6 cm by 0.5 cm, with a depth of 5 cm. Doctor Wekesa concluded that the cause of death was excessive bleeding secondary to penetrating trauma. The defence argues that the court cannot rely on an inconclusive report. Pw3 informed the court that the

report could be termed inconclusive because the family members present were agreeable to him opening the deceased, but he noted the external injuries. The deceased was cut in the neck region, and the injuries led to excessive bleeding. Any sharp cut in the neck that leads to excessive bleeding will most likely cause one to die. Further, death is not disputed. I find that the fact that the doctor stated that the report was inconclusive is not necessarily fatal to the prosecution case.

**11.** On whether the accused caused the death of the deceased. I am in agreement with the defence's submission that the evidence led by the prosecution was circumstantial evidence. In the case of Musili v. Republic CR A No.30 of 2013 (UR), the court stated that , "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else, without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on", and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. A conviction on such evidence must unerringly point to the deceased. There is evidence that on the 6<sup>th</sup> the accused was seen with a panga. Pw1 and Pw2 saw the accused with a panga, he carried as he left Pw1's place. A

panga stained with blood and his jeans and t-shirt that had blood were recovered the next day early in the morning, Pw5 recovered a note book jeans , a T-shirt and a panga with blood stains from the accused's house. The deceased was alive on the 6<sup>th</sup> and was found murdered the next day.

**12.** The government analyst's evidence was that the items from the accused's house had blood stains belonging to the deceased. Pw6 was categorical that if the exhibits were contaminated, he would not have carried out the examination. I believe him. Further, the evidence of Pw5 was also very clear about what was recovered from the accused's house; he narrated each item as recovered. Pw8 was also present when the panga and clothes were recovered. In my view, the fact that no evidence was led on how the blood was stored is not fatal to the prosecution. The chain of events was not broken, and I find no other co-existing circumstances that weaken the chain of circumstances relied on. The evidence unerringly points to the guilt of the accused. The recovered items clearly point to the accused as the one who caused the injuries the deceased sustained. In my view, the evidence adduced shows that the accused caused the unlawful death of the deceased.

**13.** Under Section 206 of the Penal Code, malice aforethought constitutes the following;

- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
- (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
- (c) An intent to commit a felony.
- (d) An intention to facilitate the escape from custody of a person who has committed a felony.

14. In *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, the Court held that, in determining the existence or non-existence of malice, one must look at the facts showing the weapon used, the manner of its use, and the part of the body injured. The deceased was cut on the neck. It is obvious that the intention was to cause grievous harm. In my view, this evidence proves that there was malice aforethought on the part of the accused. This was not a case of mere suspicion, as submitted.

**14.** I therefore find that the prosecution has proved its case beyond reasonable doubt. I find the accused person guilty of the offence of the murder of Violet Chemwor and convict him accordingly as charged.

**Dated, signed and delivered virtually this 2<sup>nd</sup> Day of  
April 2026.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Lewis Wafula Wanyonyi/ accused**

**Miss Gacua For the State**

**Miss Wakoli For the Accused**

**Wilkister - C/A**

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