



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Wasike (Criminal Case 80 of 2015)
[2025] KEHC 9093 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 80 OF 2015**

**FR OLEL, J
JUNE 26, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIUD SUKUBALI WASIKE ACCUSED

JUDGMENT

A. Introduction

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) of the Laws of Kenya. The particulars of the offence were that on the night of 23rd day of October, 2015, at Malaa Mukengesya sub county, Koma Location in Matungulu sub county within Machakos County, he murdered Peres Aloo Oyanago.
2. The accused person denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling seven (7) witnesses in support of their case.

B) Prosecution Case

3. PW1 Godfrey Oloo stated that the deceased was his cousin and had previously resided with her in the same house for several years, thus knew and could recognized her body. On 23.10.2015, they went to Kenyatta National Hospital mortuary and, though bandaged, he identified the deceased body through facial recognition.
4. PW2 Onchagwa George Machogu confirmed that in 2015, he was a resident of KBC Malaani, within Machakos county, and on the material day (23.10.2005) at about 1.00 a.m, was asleep in his rental house, when he heard some commotion within the said residential plot, which also housed other tenants. He rushed out to find that one of the neighbours' house was on fire and joined in putting out the fire. He found young men trying to break the metallic door, which was locked from inside,



- and advised them to break the window and pour in water to douse the fire as they tried to access the burning house.
5. Eventually, they managed to break down the door and found the deceased, who had suffered extensive burn wounds slumped behind the door. They removed her outside her house, and he advised the crowd to cover her with a blanket as they searched for means to rush her to the hospital. She also revealed to them that her husband was in the other room, and they proceeded and broke into the said room and found the accused unconscious therein. He noted that the fire had engulfed the house seats, and it seemed as if petrol had been poured onto them, while inside the other room, there was only smoke and no fire.
 6. After removing both the deceased and the accused from the inferno, he assisted in having the two rushed to the hospital and also called the police to the scene. PW2 identified the accused on the dock as the person they rescued from the inferno and confirmed that he was a person well known to him. Under cross-examination, he confirmed that they were not immediate neighbours with the accused and stated that it was the deceased who had mentioned to them that the fire was started by petrol.
 7. PW3 Paul Kagiri Kuria, was sworn, but stated that he could not testify as he had received threats from the accused relatives. He was stood down and was never recalled.
 8. PW4 Lillian Atieno, stated that she was a businesswoman operating her kiosk at Joska. On 22.10.2015 at around 3.00 am, she got a call from a strange phone number 0724624225, and it turned out it was her sister, the deceased, who was calling her. She informed her that she was admitted at Kangundo level 4 hospital as the accused had set her on fire after dousing her with petrol and further directed PW4 to go pick her clothes and belongings from her residence.
 9. The following morning, she went to the deceased's residence and discovered that the house was mostly burnt down in the sitting room area. She also met PW3 at the scene, and he, too narrated to her what had transpired during the night incident. Due to the critical injuries sustained, the deceased was transferred to Kenyatta National Hospital and later succumbed to her injuries. PW4 also confirmed that she had met the accused person before and identified him on the dock.
 10. Under cross-examination, PW4 confirmed that the deceased had called her on the material night and told her that the accused had burnt her using petrol, and she had recorded her statement with the police confirming the same. She was shown her recorded statement and confirmed that therein she did not mention that the deceased had been burnt using petrol, but clarified that she had stated that the accused had burnt the deceased. She further confirmed that she did not talk to the deceased after she was transferred to Kenyatta National Hospital.
 11. PW5 Denis Owino Onyango, confirmed that he worked with the government chemist- criminal section (Gazetted as No 6934 of 12th July 2012) and had 20 years' experience under his belt . He had a report prepared by his colleague Mariam Njeri Chege, who unfortunately had passed on and was allowed to present the same pursuant to provisions of Sections 33 and 77 of the *Evidence Act*, Cap 80.
 12. On 04.11.2015, his colleague Mariam Njeri Chege had received a 5-litre plastic jerrican, which had some liquid therein and was requested by the investigating officer to examine the same and establish its content. She examined the same using a VV Visible spectrometer and determined that the substance contained therein was petrol mixed with diesel, which were both flammable products. She prepared her report, signed on 09.11.205, which, together with the exhibit memo form, was produced into evidence by the said witness.
 13. Under cross-examination, PW5 confirmed that at the laboratory, they had a standardized way of receiving and labelling the exhibits, though the colour of the jerrican was not indicated in the report.



He also confirmed that the machine used to examine the liquid had a certificate of maintenance and was in good order. Under re-examination, he confirmed that the exhibit memo had indicated the colour of the jerrican as white, and the same was also initialized with his colleague's initials.

14. PW6 Dr Bernard Owino Midia, stated that he was a forensic pathologist based at Kenyatta National Hospital and also lectured in the department of human pathology at the University of Nairobi. On 29.10.2015, he carried out an autopsy on the deceased body, which was positively identified by Godfrey Oloo and Evans Oloo before the said process. On external examination, the deceased had suffered extensive burns which covered about 75% of her body surface area. The burns were both second-degree and third-degree deep. Internally, there was soot in her trachea airway, but the other internal organs were essentially normal.
15. The soot in her airway was an indication that the deceased sustained the injuries while she was still alive, and he concluded that the cause of death was due to complications arising from 2nd and 3rd-degree burns, which consumed 75% of the deceased's body surface. Under cross-examination, PW6 stated that it was not possible to determine how long she survived after the said burn injuries, but it was evident that the deceased had initially survived and had been given therapeutic intervention in hospital before she died.
16. PW7 Pc Charles Otieno Odour, stated that he was formally attached to KBC police station and was the investigating officer of this crime. On 22.10.2015, he was asleep in his house, when at about 1.00 am he heard his door being knocked by his neighbours who were shouting that a fire had broken out in one of the neighbouring houses within their plot. He got out, rushed to assist and heard a lady screaming for help, while trapped inside the house. They tried to break down her door, but it was locked from inside. The other neighbours also broke the window panes and poured water to put off the fire.
17. After a while, they managed to break in and found the injured lady slumped behind the door. He helped to evacuate her outside, and he confirmed that she was still able to speak. He thereafter left the scene to go alert his colleagues and also sought to get transport to take the injured lady to the hospital.
18. Both the accused and the deceased were rushed to Kagundo level 4 hospital, and while there, the deceased called PW4 and explained to her what had occurred. He also recorded her statement at the hospital, and the deceased had informed him that after the accused had come from work, she had prepared supper, after which she had gone to bathe. After bathing, her husband's attitude suddenly changed, and when she asked him what the problem was, he declined to respond. She later went to bed and was awoken by fire in the sitting room. She tried to dash outside but unfortunately found the sitting room door locked with a padlock.
19. PW7 further testified that it was the deceased who informed her neighbours that her husband was in the other bedroom, and he, too, was rescued and the jerrican containing petrol recovered. After conclusion of the investigation, he arrested the accused and preferred the charge he faced before the court.
20. Under cross-examination, PW7 confirmed that he stayed with the deceased within the same plot and was amongst the neighbours who helped in rescuing her from the fire, though he was not there when the accused was removed. He also confirmed that he recorded the deceased's statement, while she was in hospital, but she could not tell how the fire started nor did she mention about having any disagreement with the accused on the material night.
21. Further, he did confirm that he was not present when the jerrican was recovered, and therefore did not prepare an inventory for the same. He did not know what cause of the fire, and as regards the conversation the deceased had with PW4, he was not present but was informed of the same. Under reexamination, PW7 was referred to the government chemist's report, and he confirmed that the liquid



inside the jerrican was confirmed to be petrol. He also clarified that the deceased woke up to a burning house, and attempted to dash out, but found the sitting room door closed with a padlock.

22. The prosecution closed their case at that point, and the accused was placed on his defence. He opted to give sworn evidence.

C. Defence Case

23. The accused gave sworn evidence and stated that he was a tailor by profession and used to reside with the deceased/his wife, at KBC Malaa. He recalled that on the material day, 22.10.2015, he went to work and returned home at about 9.00 pm -10.00 pm, showered and took tea before retiring to bed. Later, when he woke up, he found himself in hospital and could not recall how he landed in the hospital. Later, the police informed him about the fire incident and placed him under arrest.
24. He categorically denied dozing the house with petrol and lighting the fire that consumed his wife and averred that they had stayed peacefully for about 3 years without any domestic dispute. Under cross-examination, the accused stated that he was 60 years old and had married the deceased, who had two adult children from her previous marriage. Further, his first family resided in Eldoret, and though he was estranged from his first wife, he contributed towards his children's education.
25. The accused affirmed that as a couple, they did not have any dispute on the material night and therefore he did to have any reason to plot and kill his wife. He could also not remember who closed the door before they slept, nor did he see any jerrican with fuel within their house on the material evening. He reiterated his innocence and urged the court to acquit him

B. Submissions

26. The accused's counsel submitted that the evidence tendered by the prosecution was weak and was not sufficient to warrant the court to convict the accused person. While the fact of death was proved, it remained doubtful that it was the accused who lit the fire, which consumed the deceased, as no direct evidence and/or circumstantial evidence was adduced to confirm the same.
27. The court was also urged to note that PW4 evidence could not amount to a dying declaration as she was not physically in hospital with the deceased and her evidence was further contradicted by the evidence of PW7 who affirmed that during investigations, the deceased did not mention to him that it was the deceased who was responsible for the crime committed. PW7 had also failed to prepare an inventory of the recovered jerrican, which created doubt as to how it was recovered. The said jerrican also had no unique mark connecting it to the accused person.
28. In summary, it was their submission that there were too many evidential gaps in the prosecution's case, raising material doubt as to the veracity of the evidence adduced. This court was therefore left with no option but to acquit the accused person. Reliance was placed on *Roba Galma Wario vrs Republic* (2015) eklr, *Republic vrs Mohammed Dadi Kakane & 7 others* (2014) eklr, *H L Woolminton Vrs DPP* (1935) A.C 462 PP 481, *Republic Vrs Danson Mgunga* (2016) eklr & *Pius Arap Maina Vrs Republic* (2013) eklr.
29. The prosecution did not file any submissions in this matter and opted to rely on the evidence adduced during the trial.

C. Determination

30. I have considered the evidence adduced by both parties and given due consideration to the submissions made by the accused's Counsel. The question that arises before this court is whether the prosecution



has proved beyond reasonable doubt that the accused person herein murdered Peres Aloo Onyango, the deceased herein.

31. Section 203 of the *Penal Code* defines the offence of murder as follows:

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

50. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs 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”.

32. 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 and its cause;
- b. that the accused committed the unlawful act which caused the death of the deceased; and
- c. that the accused had malice aforethought.

33. I will now proceed to interrogate each issue.

i. The death of the deceased and its cause.

34. It is common ground that Peres Aloo Onyango, sustained 75% second and third-degree burns when their house was consumed by fire in the early morning of 23rd October 2015, and this was confirmed by PW6, who conducted the post-mortem examination. This court therefore finds as a fact that the deceased died as a result of severe body burns sustained in the fire that engulfed their house on the material night.



ii. Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:

35. PW2 and PW7 were the deceased's immediate neighbours, and when they heard screams and commotion, they both woke up and helped in rescuing the deceased break free from the house fire, but this took time because her sitting room door had been padlocked from inside, preventing a quick rescue. Through their collective effort, they finally managed to break down the door and rescued the deceased, whom they found curled up behind the door and had suffered extensive burn injuries all over her body.
36. The deceased was still alive when pulled out of the inferno and informed the crowd that her husband was still within the said house, and he too was rescued from the bedroom while unconscious. The deceased was rushed to Kangundo level 4 hospital and was able to call PW4 (her cousin sister) at about 3.00 am using a borrowed phone (0724624225) and informed her that the accused had doused her with petrol and set her on fire. PW4 later visited the deceased while admitted at Kenyatta National Hospital, but by then, due to the severity of the burn injuries sustained, she could not talk and eventually passed on.
37. PW5 produced the government chemist report, which confirmed that the liquid contained inside the jerrican recovered from the couple's burnt house was a mixture of petrol and diesel. The accused in defence vehemently denied lighting the fire that burnt down their house and maintained that they did not have any differences with the deceased and had no reason to set their house on fire. He pleaded his innocence and prayed to be acquitted of the charges faced.
38. From the evidence adduced, nobody saw the accused harm the deceased, but the deceased did call PW4 and told her that it was the accused who lit the fire that burnt down their house. In the process, she sustained severe burn injuries that eventually led to her death. The question that arises is whether the confession made to PW4 amounted to a dying declaration.
39. Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, Choge V. Republic [1985] KLR1, Kihara V. Republic [1986] KLR 473 and Nelson Julius Karanja Irungu V. Republic, CR. APP. NO. 24 of 2008. Under section 33(a) of the *Evidence Act*, Cap 80, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence.
40. Section 33[a] of the *Evidence Act*, Cap 80 provides as follows:
33. Statements by deceased person, e.t.c.,
- when. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases
- a. Relating to the cause of death
- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question.



41. Under the said provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements.
42. Notwithstanding section 33(a) of the *Evidence Act* Cap 80, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned the victim to suffer confusion and surprise so as to render his/her perception to be questionable. While it is not a rule of law that a dying declaration must be corroborated to found a proper conviction, nevertheless, the trial court must proceed with caution and get the necessary assurance that a conviction founded on a death declaration is indeed safe. The Court expressed itself as follows in *Choge V. Republic* (supra):

The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person

43. There is no doubt whatsoever that the 3.00 am call the deceased made to her cousin sister using a stranger's phone on the material night immediately after being rushed to Kangundo level 4 hospital was a "dying declaration" and the deceased statement to PW4, was that, "kalulu has set fire on her using petrol and she was at Kagundo". Further, during her examination in chief, PW4 clarified that "I knew kalulu as her husband. I knew him for months. We never disagreed with him. I can see kalulu in court. He is the accused person". This evidence directly implicated the accused as the culprit.
44. While the deceased's dying declaration evidence must be admitted with caution, in this instance, it was corroborated by the evidence of PW5, the government chemist, who confirmed that the fuel found inside the jerrican retrieved from the house was a mixture of petrol and diesel, which without doubt was used to ignite the fire.
45. Considering the nature of evidence adduced by the prosecution, and given that the accused, as the last person in the company of the deceased, he had a legal obligation to give a proper explanation based on provisions of Sections 111 & 119 of the *Evidence Act*, Cap 80, as to what may have transpired and lead evidence to exonerate himself.
46. In defence, the accused strenuously denied committing this offence, but it is my finding that his defence consisted of mere denials and was evasive. He failed to explain himself and stated that he was asleep and found himself at Kangundo level 4 hospital. This explanation cannot hold as the heat emanating from the housefire, generated commotion, and neighbours' noise as they tried to put out the fire, at some point, must have jolted him to wake up from his slumber.



47. Also, there was the unexplained fact that the front door was purposefully locked with a padlock, thereby preventing/ stopping a quick exit by the deceased, while the accused had also locked himself in the bedroom, going by the evidence of PW2, who stated that;

“She told us that she was with her husband who was inside who was inside the other room. We broke the other door and found the man inside the room unconscious. The fire was on the seats with petrol poured on them. Inside the other room, there was no fire apart from smoke.”

48. The evidence presented points to the fact that the deceased was purposefully locked in the sitting room, where the seats had already been soaked with petrol. The fire was then deliberately lit, and such an act was done by someone already inside the house, as no intruder accessed the said house on the material night.

49. In summation, based on the dying declaration and the circumstantial evidence adduced, the inculpatory facts proved herein are incompatible with the innocence of the accused person and incapable of any other explanation/ reasonable hypotheses other than that of his guilt as the person who without doubt dozed their sitting room with petrol and lit the fire which gravely burnt/harmed the deceased and subsequently cause her death.

iii. Malice Aforethought

50. Having found that the prosecution has proved actus reus, the other issue for determination is whether malice aforethought can be inferred from the prosecution's evidence presented. The offence of murder is complete when “malice aforethought” is established. Section 206 of the *Penal Code*, provides that:

- “(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.”

51. It is sufficient to say that the mental element required by section 206 of the *Penal Code* can be equated to broad guidelines set out in the case of Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

52. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered as to whether the appellant foresaw the real or substantial risk and the consequences of targeting the part of the body that may result in the fatal injuries suffered by the deceased.



53. A similar statement of Law was made in the persuasive authority of *S. vs. Sigwahla* 1967 4 SA 566 in which the court stated:

“The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result. This form of intention is known as a *dolus eventualis* as distinct from *dolus directus*.”

54. The accused deliberately doused the house with petrol mixed with diesel and locked the front door with a padlock to prevent any escape route for the deceased, and this led her to suffer fatal burn injuries, which covered 75% of her body.

55. From the analysis of the injuries inflicted, it is clear that the accused did not have any other intention other than to inflict grievous harm upon the deceased. It is my finding that the accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of injury inflicted on the deceased that the accused person's action was premeditated.

56. In the circumstances, I am persuaded beyond reasonable doubt that the prosecution has proved their case and specifically, the presence of malice aforethought on the part of the accused, too, has been proved.

D. Disposition

57. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject herein, Eliud Sukubali Wasike, beyond reasonable doubt and convicted him accordingly under section 215 of the *Criminal Procedure Code*.

58. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.

59. It is so Ordered.

JUDGMENT, SIGNED AT MARSABIT THIS 26TH DAY OF JUNE, 2025.

FRANCIS RAYOLA OLEL

JUDGE

JUDGMENT READ AND DELIVERED IN OPEN COURT ON THIS 26TH DAY OF MARSABIT 2025.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of:-

.....Accused

.....For O.D.P.P

.....Court Assistant

