



**Republic v Wangila (Criminal Case E016 of 2022)  
[2024] KEHC 2178 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E016 OF 2022  
REA OUGO, J  
FEBRUARY 27, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**EDWARD WANGILA ..... ACCUSED**

**JUDGMENT**

1. Edward Wangila was charged with the murder of Edwin Wanjala contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 12<sup>th</sup> June 2022, at Masaek village, Chongeywo location, Kopsiro Sub-county within Bungoma County murdered Edwin Wanjala.
2. The prosecution to prove its case called 6 witnesses. Justus Wafula (Pw1) is the accused person's father and the grandfather to the deceased. The accused person is married to Catherine Temuko (Pw2) and they have children together including the deceased and Centrine Nelima (Pw4). Bernard Kipsisei (Pw3) is Pw2's brother. No. 236984 Chief Inspector Gilokomba (Pw5) is the investigating officer and Dr. Elly Kiplimo Kosgei (Pw6) conducted a post-mortem on the accused person.
3. Pw2 testified that the deceased had visited his uncle, Pw3, and stayed with him for 3 days before returning home. When the deceased returned home, the accused asked him 'Unatoka nyumbani kwa nani?'. The deceased told him that he was from Pw3's house and the accused asked him not to return to his uncle's house. Pw3 testified that she was not in the house when the accused killed the deceased as she had gone to the river for water. She was back home at 6:00 p.m. and found the deceased unconscious near the toilet. Pw4 told her that the accused had beaten the deceased. Pw3 called to the sister's home and found Pw2 holding the deceased. Pw3 observed that the deceased was breathing slowly. Pw2 and Pw3 took the child to the hospital but were told that the child was already dead.



4. The accused person's daughter (Pw4) testified that she does not know why her father was arrested. She testified that she was not home that day as she had gone to visit her aunt and when she returned, she was informed that her parents had gone to the hospital.
5. After the death of the deceased a post-mortem was conducted. The deceased grandfather, Pw1, was present during the post-mortem. Pw6 who conducted the post-mortem testified that she is a graduate of Kampala International University holding a bachelor's degree in Medicine and Surgery and works at Bungoma County Referral Hospital with 7 years of work experience. She observed that the deceased had widespread hematoma on the body with evidence of beating from a blunt object. The deceased had a dislocated shoulder joint. On the spinal column had a cervical, he had a spine fracture and on the spinal cord, he had a complete core transaction. Pw6 formed the opinion that the cause of death was spinal shock from a cervical spine fracture. She produced the post-mortem report as Pexh1.
6. The investigating officer (Pw6) testified that on 12/6/2022 he received information from OCPD Kopsiro that there was a murder at Kipsigon. He proceeded to the area and found the body of the deceased. The deceased's mother and his sister were present. They took their report and proceeded with the body to the mortuary. The accused person surrendered himself at Kipsong police station and they transferred him to Cheptais Police Station. He took statements from witnesses and concluded that the accused person had the intention of killing the child. He beat the boy before they slept. He also woke up and beat him some more. He used a fimbo to beat the deceased and he also kicked and gave the child blows. He produced the fimbo as Pexh3 and the statement from Pw4 as Pexh2.
7. The accused was placed on his defence and testified as Dw1. He testified that on 7<sup>th</sup> June 2022, the deceased went to school and did not return home. He looked for him and asked whether he was with relatives. On the 11<sup>th</sup> the uncle Allan brought him back home after he found the deceased at the market. The uncle told him that the child was sickly and he canned the child on the legs with a small cane and the child did not cry.

### **Submissions By The Parties**

8. The prosecution relied on the evidence on record and the accused person through counsel, Miss Komora, filed written submissions. Miss Komora identified the following as the issues to be considered by the court:
  - i. Whether the elements of the offence of murder have been established by the Prosecution.
  - ii. Whether the Accused person murdered the deceased.
  - iii. Whether the Prosecution has established their case against the Accused person beyond a reasonable doubt.

#### **a. Whether the elements of the offence of murder have been established by the Prosecution.**

9. It was submitted that the Prosecution availed 6 witnesses who appeared to contradict each other's testimony as far as the causation of the death of the deceased is concerned. It was not clear whether the cause of the said death was unlawful and whether the accused person committed the said offence. According to the evidence of Pw2, Pw3 and Pw4 they were not at home when the incident took place. On the other hand, the accused person gave a candid defence and explained what transpired. It was submitted that the element of malice aforethought is proved not only when the Accused purpose is to use death or grievous bodily harm but when he carries out the killing with the knowledge that his acts or commission will cause death. The accused relied on the decision of *Republic v Juma Kituko Mwambegu* [2020] eKLR and argued that it's evident from the facts that the Accused person had no



intention of harming his son. The State has failed to establish any ill motive or intention on the part of the Accused person.

**b. Whether the Accused person murdered the deceased.**

10. It was submitted that having failed to establish malice aforethought, the Accused person cannot be held guilty of the offence of murder. They urge the court to consider the fact that there were 3 days between 7/7/2022 and 11/7/2022 where the whereabouts of the deceased were unaccounted for.

**c. Whether the Prosecution has established their case against the Accused person beyond a reasonable doubt**

11. In a criminal trial the onus of proving and establishing a case against an Accused person rests with the Prosecution. The burden of proof can never be shifted to the Accused person and the Accused should not be held to prove his innocence. (See *Stephen Nguli Mulili v Republic* [2014] eKLR). The Prosecution has not established their case against the Accused person to the required standards.

**Analysis and Determination**

12. I have considered the evidence adduced herein by both the prosecution witnesses and the defence proffered by the accused person. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt. The accused is charged under sections 203 and 204 of the *Penal Code* which read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

13. The prosecution is required to prove the death of the deceased, that the accused person caused the unlawful death and that he was actuated by malice.
14. The death of the deceased was proved by the prosecution. Pw2 and Pw3 testified that the deceased was pronounced dead at the hospital. Pw1 testified that he went to Bungoma mortuary and was present for the post-mortem. The post-mortem Form, Pexh1, filled by Pw6 reveals that the deceased died as a result of spinal shock from cervical fracture. The death of the deceased was sufficiently proven to the required standard.
15. I now turn to consider whether it was the accused person who caused the unlawful death. In this case, there was no direct witness who saw how the crime was committed. Pw2 and Pw4 testified that they were not at home when the accused person beat the deceased. The whole of the prosecution case was based on circumstantial evidence. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial’ evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way



back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

16. The prosecution relied on the evidence of Pw2, Pw3 and Pw4 to prove that it was the accused person who committed the unlawful act. However, Pw4 refuted the evidence in her statement and the prosecution did not seek to have her declared as a hostile witness. The evidence of a hostile witness is usually considered to have little probative value. The process of declaring a witness as a hostile witness was discussed in the case of *Edusei Asili Malema v Republic* [2007] eKLR:

“Regarding the correct procedure for declaring a witness to be hostile at the instance of the party who has called him, sections 161 and 163 (1) (c) of the *Evidence Act* are relevant. Section 161 gives the court discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 163 (1) categorizes the evidence which may be called by an adverse party or, with the consent of the court, by the party who calls him for impeachment of his credit. Such evidence which may be called to impeach the credibility of the witness includes proof of former statements whether written or oral inconsistent with any part of the evidence which is liable to be contradicted.”

17. Pw4 testified that she was not at home on the day of the incident and returned home after the deceased was taken to hospital.
18. However, Pw2 was clear in her testimony. She did not witness the accused beat the deceased but left the two at home as she went to fetch water from the river. She testified that before she left the house, the accused person scolded the deceased and asked him ‘*Unatoka nyumbani kwa nani?*’. She came back and found the deceased unconscious. The deceased was therefore last seen with the accused person. The doctrine of last seen with the deceased was discussed in *Republic v EKK* [2018] eKLR where the court stated:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua v. The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“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.”

19. The accused person’s defence was that he canned the deceased on the legs with a small cane. However, the post-mortem reveal that the beating was forceful. According to the report, the deceased sustained a dislocated shoulder joint and cervical spine fracture. These injuries could have only been inflicted by



the accused person when Pw2 left to fetch water. I therefore find that the prosecution proved beyond reasonable doubt that it was the accused person who caused the unlawful death.

20. Lastly, regarding the issue of whether the accused harboured malice aforethought, I am of the view that the accused applied excessive force while disciplining the deceased which led to the fracture of the cervical spine causing the death of the deceased. I am guided by the decision of the Court of Appeal in *Musa Kiplangat Biegon v Republic* [2012]eKLR when faced with a similar situation:

“By section 206 of the *Penal Code* malice aforethought is deemed to be established by evidence proving, among other things, an intention to cause death or to do grievous harm to any person or knowledge that, the act or omission causing death will probably cause death of or grievous harm to some person.

In this case, there was evidence from Leah and Zeddy that the appellant subjected the deceased to a prolonged and vicious assault when he had already locked him inside the house and tied his limbs. As the injuries that the deceased sustained indicate the appellant caused serious head injuries including a fracture of the skull and also caused serious spinal injuries to a child. No wonder that the child died a few hours after the cruel punishment. In the circumstances of this case, the appellant knew that his actions will cause grievous harm to the deceased and in fact intended to cause grievous harm to the deceased. This was an extreme case of child abuse and raises an inference of malice aforethought in law.”

21. In the circumstance, I find that malice aforethought was established as the accused person knew that his actions would cause grievous harm to the deceased. I find that the prosecution has proved their case beyond reasonable doubt. The accused, Edward Wangila, is guilty of the murder of Edwin Wanjala and he is convicted accordingly as charged.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:-

Edward Wangila / Accused- Present

Mr. Ayekha For the Prosecution

Miss Komora For the Accused person

Ms Wilkister C/A

