



**Republic v Wambua (Criminal Case 14 of 2018)
[2024] KEHC 2756 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2756 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 14 OF 2018**

**RK LIMO, J
MARCH 18, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PETER KYENZA WAMBUA ACCUSED

JUDGMENT

1. Peter Kyenza Wambua, the accused herein is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars are that on the 20th April 2018 at Thitha Sublocation, Thitha village, Enziu location Mwingi Central within Kitui County murdered Marion Ngina Kimanthi.
3. The accused pleaded not guilty and the prosecution has called a total number of 13 witnesses in support of the charge against him. Below is the testimonies of the witnesses during trial as well as the defence case.
4. Ken Mwove Munyoki (PW1) stated that he operated a bar at Thitha town where the deceased worked. That on 19th April 2018, the accused went to visit the deceased at her place of work and the two left together when the bar closed down and they said they were going to spend the night at club junction. The witness stated that he expected the deceased at the bar the following day and when she did not turn up, he proceeded to Club Junction to look for her and give her the key to the club. That upon reaching club junction, he met the caretaker, Erick Kimanzi who led him to the room where the deceased had spent the night. He stated that he knocked but did not get a response and he returned to the caretaker and asked for his help in tracing them. That they returned to the room and noticed that although the door was closed, it was not locked and the two gained access upon which they saw the deceased lying on the bed facing upwards. He stated that he called her out but she did not respond, and when he moved closer to the bed he noticed that she was not breathing and she had some foam round her nose.



- Upon making the discovery, the witness stated that he proceeded to the police and made a report of what he had seen. On cross examination, the witness stated that the accused had visited the deceased at her place of work the previous evening and that the two left together.
5. Erick Kimanzi (PW2) testified that he was a worker at Club Junction and that the deceased and the accused had gone to the said establishment on the night of 19th April 2018 and booked one room to spend their night together. He stated that he allocated the two a room after payment and he left. He stated that he could not tell what transpired during the night in that room. He stated that his colleague Ken Mwove (PW1) went to the establishment on the morning of 20th April 2018 looking for the deceased who was an employee of PW1. He stated that PW1 asked him to go and wake up the two in the room they had booked the previous night and that when he went he found that the door to the room was not locked and when he pushed it open in the presence of PW1 he found the deceased lying on the bed with foam in her mouth. He stated that PW1 directed him not to touch the body as he rushed to call the police who responded promptly by coming to the scene.
 6. He clarified that when he pushed open the room, it is only the deceased who was in the room though in the previous night, both the deceased and the accused had checked into the room together which he described as Room 1.
 7. APC Scholastica Kyambi (PW3) testified that she was based at Mwingi Central at the material time and recalled that PW1 went and reported that he found his employee lifeless in a club. She stated that in the company of colleagues she proceeded to the scene and found the body of a woman lying on the bed with half her body dressed with a blouse but that the lower part (waist down) was naked. She recalled seeing a trouser and a pant besides a handbag. She stated that the police collected the items found in the room and the body. She further recalled that the body had no visible injuries but she found only foam oozing from the mouth. She further stated that the scene of crime officers took photograph of the body and where it lay before the body was removed. She stated that the bed where the body lay was not disturbed but well made and that the body lay on top of the bed and not covered.
 8. Mercy Munanu Kimanzi (PW4) a sister to the deceased testified that at the material time she used to stay with the deceased at Thitha Market. She stated that the deceased used to work at a club adding that on the material day (19.4.2018), her sister (the deceased) informed her that she would be going out with the accused whom she knew was her boyfriend, at a place known at Tintin. She stated that the deceased on that evening gave her the keys to where the two resided and that she left with the accused informing her that they were going to dance at Tintin Club. She stated that she went home and slept.
 9. The witness stated that the following day (20/4/2018) at around 11am, the boss of her deceased sister went and called her and asked her to accompany him to Mantone Junction club and on arrival she was informed by lady called Scholastica that her sister was dead. She stated that she was shocked at the news and that the police took the body to the mortuary. She also recalled that the police handed her a handbag which had last seen her sister carrying the previous evening. She stated that the handbag contained her deceased sister's mobile phone. She also acknowledged receiving a short trouser, a blouse, a brassier and an underwear belonging to her deceased sister.
 10. Evans Mwendwa John (PW5) a boda boda rider testified that on 20.4.2018 at around 9am, Ken Mwea (PW1) called him on his mobile phone and requested him to go and take him to club Junction where he was taking some keys to Carol (deceased) to go and wash some utensils. He testified that he was also sent to go and collect cellphones that had been taken for charging and that while there the accused called him and told him that Carol was sick and requested him to take her to hospital. He stated that he went and found PW1 who reported to him that Carol had died. He stated that police arrived shortly thereafter and recalled the deceased foaming from the nostrils with a lessa on her chest. He stated that



the accused was his regular customer and that he also knew Caro as she used to take her to the club. He also stated that he knew Caro (deceased) had a relationship with the accused.

11. IP Jason Kimutai (PW6) a Police Officer based at Mwingi Police Station testified that APC Scholastica (PW3) on the 20.4.2018 at around 11am rang him and informed that there was a lady found dead at a lodging at Mutuangombe shopping center. He stated that he informed the OCS and rushed to the scene where he was joined by the DCIO Mwingi.
12. He stated that photographs were taken at the scene and saw the body of the deceased lying on the bed covered with a bedsheet which was later removed. he stated that the body was half naked and was foaming from the mouth. He stated that the body had no visible injury. He clarified that the lodging was at Mutwangombe shopping Centre in a lodging at Junction club. He identified the photographs taken at the scene.
13. John Vonza Matubi (PW7) another boda boda operator testified that on 20.4.2018 at around 6am he got a call from one Esther Zungu who wanted to be taken to Makutano Junction and that he took and dropped her and after dropping her the accused person approached him looking worried and asked him to take him to Nguni. He stated that he told him that he was charging Kshs. 300 as fare though he conceded that they used to charge Kshs. 150/=. He told this court that the accused paid and he took him to Kawala and returned to the junction and when he returned one Katoo confronted him asking where he had taken the accused. He further stated that Katoo took him to Junction Club where he found the police who asked him whether he had dropped the accused.
14. Simon Kimanzi Nzude (PW 8) father to the deceased testified that he identified the body of her daughter to the pathologist before the post mortem was done on 26th April 2018.
15. Inspector Nicholas Mulei (PW9) testified that he received a memory card compact disk from Sergeant Warutere (PW11) of Mwingi Police Station for processing. He stated that he processed the photographs and prepared 8 photographic prints. He testified that the prints had not been interfered with and produced them as PEXH 2(a) to 2 (d) as follows;
 - i. PEXH 2 a photograph of a woman with discharge oozing from her nose
 - ii. PEXH 2 (b) a photograph of the same body lying on the bed with no pants
 - iii. PEXH 2 (c) a building with the name Club Junction
 - iv. PEXH 2 (d) same building with officer pointing at the door where the body was found
16. CPL Justus Kipchumba Bett (PW10) testified that he was stationed at Mwingi Police Station at the material time. He stated that he visited the scene and was among the officers who took the body of the deceased to the mortuary.

He further stated that the deceased body was lying on the bed facing up and there was no sign of any struggle inside the room. He stated that Tintin bar where the deceased and accused had been spotted together on the material night was about 500 metres away from Junction Club where the two had checked in together to spend the night.
17. Fredrick Warutere (PW11) DCI from Mwingi stated that he also visited the scene on the material day and drew a sketch map of how the scene was and produced the same as PEXH 4. He also stated that he learnt that the accused was with the deceased on the night of her death but he was nowhere to be found the following day. He stated that he was in the course of taking witness statements when he received intelligence that the accused was on his way to Mombasa. He testified that the police were able to identify the bus that the accused was travelling in and he was intercepted at Migwani area as



the bus headed to Kitui. He stated that he went to Migwani with someone who knew the accused and they were able to identify him in the bus and that upon conducting a search on him, they found a bus ticket which was tendered as PEXH 5 and a Voda phone imei no. 351534089650892 which allegedly belonged to the deceased. He testified that the sim card had been changed but also testified that the phone was not subjected to forensic examination. The same was produced as PEXH 1. The witness also produced the accused's ID card as PEXH 6. He proceeded that he interrogated the accused who informed him that he had differed with the deceased at Tintin club but that the two made up but fought again when they arrived at Club Junction. He testified that the accused did not tell him whether he had left the deceased dead or alive. He also testified that he prepared an exhibit memo for samples extracted during the post mortem and the same was produced and marked PEXH 7. He also testified that he prepared another exhibit memo for compact disk containing photographs taken at the scene and the memo was produced as PEXH 8. On cross examination, the officer testified on the state of the scene when the police visited. He stated that he did not observe any injuries on the deceased save for the foam that had formed on her mouth and nose. He also maintained that he recovered the phone belonging to the deceased from the accused upon his arrest.

18. James Welian (PW12) an expert from Government Chemist testified and confirmed that on 30.4.2018, he got samples from investigating officer Fredrick Warutere (PW11) which were marked as follows;

- A. Vitreous humour
- B. Blood sample
- C. Kidney, liver, and lungs
- D. Stomach

He stated that his brief was to subject the samples to toxicity and that when he carried out the tests he found vitreous humour and the blood had methanol at levels he opined was high. He also found that the blood had alcohol (ethanol) which he found to be a minimum intake and stated that the deceased could have either taken half litre of beer or one tot of whiskey.

19. The witness further stated in cross examination stated that illicit drinks usually contained unacceptable level of methanol which put consumers at risk such as loss of sight, vomiting and other health complications.

20. Dr Lilian Bosire (PW 13) from Kitui Referral Hospital stated that she was the pathologist who conducted a post mortem on the body of the deceased on 26th April 2018. She gave the general observations of the body of the deceased which she indicated was in good condition. She also indicated that internal examination of the head revealed right subarachnoid hemorrhage (bleeding in the brain) extending from the right parietal to occipital area. Her expert opinion was that the cause of death was head injury due to blunt force trauma awaiting toxicology. She testified the following samples were submitted for toxicology analysis;

- a. Blood
- b. vitreous humour
- c. stomach and contents
- d. kidney
- e. liver
- f. lungs



DNA samples

- a. nail chippings
- b. vaginal swabs

21. When placed on his defence, the accused stated on oath that he knew the deceased well and that she was his girlfriend. He stated that he does not know how the deceased died and that he used to work in Mombasa as a boda boda rider.
22. He stated that he used to go home in Mwingi from time to time to visit his girlfriend who used to work at a club known as Headquarters base club in Thitha. He stated that he went home from Mombasa to Mwingi on 15.4.2018 and stayed with the deceased to 17.4.2018 at Thitha.
23. He stated that he left the deceased at around 8pm on 17.4.2018 with her sister (PW4) and proceeded to his home in Nguni. He stated that he stayed there until 20.4.2018 when he decided to go back to Mombasa. He stated that he tried calling his girlfriend (the deceased) but his call was not going through. He stated that he proceeded to Mwingi Town where he booked a bus to take him to Mombasa and while on the way at around 2pm he got a call from Mercy (PW4) informing him that his girlfriend (deceased) was seriously sick. He stated that he shortly thereafter received another call from a police officer known as Warutere (PW11) who inquired from him where he was and he told him he was headed to Mombasa. He stated that when the bus he was travelling in reached Migwani it was stopped by the police and he was arrested adding that that is when he learnt that his girlfriend was dead. He stated that he was told that his girlfriend was found dead in a lodging.
24. He insisted that he was with the deceased from 15th to 17th April 2018. He stated that he did not know with whom the deceased was with and when she died and insisted it was not him.
25. The accused however under cross examination conceded that he was with the deceased at Tintin club after leaving Headquarters club but insisted it was on 17.4.2018 and not on 19.4.2018 as per his cautionary statement. He also conceded that he used to spend the night with the deceased in a room at Headquarters.
26. He further conceded under cross-examination that he came from Mombasa to visit his girlfriend (deceased) on 20.4.2018 and left her at 8.30 pm at Tintin bar but denied harming her saying he had no differences with her. He further claimed that he was beaten by the police when he was making the Charge and Cautionary Statement.
27. In his written submissions through learned counsel dated 11th January 2024, the accused submits that the cause of death was not established as the post mortem report differed with the testimony from the government chemist who testified that the levels of methanol found in the blood and vitreous humour could have led to the death of the deceased. Counsel submits that the blunt force trauma on the head of the deceased could have been caused by a fall either from the bed due to her drunken state or a fall enroute to the lodging. The position taken by the defence is that the deceased died as a result of a fall due to intoxication or due to toxicity of the methanol concentration found in her body.
28. The defence submits that the element of malice afterthought was not established because there was no evidence tendered showing that the accused harbored ill intentions of killing the deceased.
29. The state on the other hand through the Office of the Director of Public Prosecution contends that they have proved their case against the accused to the required standard. The state contends that the cause of death was a blunt injury to the head and that there was no other probable cause of death ruling out poisoning or alcohol.



30. The state submits that the accused person was the last person seen in the company of deceased when alive and contends that the doctrine of “last seen” applies.
31. The state further submits that the conduct of the accused after the incident points to a guilty mind pointing out that he was arrested as he tried to flee to Mombasa.
32. This is a case of Murder. In a case of Murder, the prosecution is required to prove that the deceased died as a result of unlawful acts of omission or commission of the accused person and secondly that the action was actuated by malice either express or implied as stipulated under Section 206 of the Penal Code.
33. In order for a conviction to be sustained in a case of murder therefore, the following elements must be proved beyond reasonable doubt;
 - a. The death of the deceased and the cause
 - b. That the accused committed the unlawful act which caused the death (Actus reus)
 - c. That the accused had malice aforethought (mens rea)

34. **(a) Death of the deceased and its cause**

There is no dispute that the deceased lost her life. The body of the deceased was discovered on 20th April 2018. The Doctor PW13 carried out the post-mortem on the deceased’s body on 26th April 2018 and the body was identified by the father (PW8).

35. On the cause, the position taken by the defence is that the prosecution led two conflicting versions on the cause of death of the deceased. That whilst the prosecution maintained that the cause of death was head injury due to blunt force trauma, there was also evidence tendered by PW12 to the effect that toxic levels of ethanol and methanol were found in the samples taken from the body of the deceased. On the other version, the Doctor (PW13) told the court that upon conducting a post mortem on the body of the deceased, she found that she had suffered a head injury resulting to bleeding in the brain. Her scientific definition of the condition was “right subarachnoid haemorrhage” extending from the right parietal to occipital area. Her testimony was that the head injury caused the bleeding which resulted to the death of the deceased. In cross examination she testified that the bleeding in the brain was not an emergency due to the age of the deceased but she maintained that the cause of death was due to head injury and produced a post mortem report dated 26th April 2019 and marked PEXH 10. The doctor testified that she sent samples for toxicology due to the circumstances of the death but her opinion on the actual cause of death did not change. She maintained that it was due to head injury and not methanol poisoning as alleged by the defence. The prosecution was therefore able to establish the element of death and its cause.

This court finds that the prosecution proved beyond reasonable doubt that the deceased died and that the cause of death was a blunt injury to the head which means that someone caused it.

36. **(b) Actus reas- That the act that caused the death of the deceased was caused by the accused person herein**

The defence has contended that there are conflicting versions on what caused the death of the deceased as observed above and that the accused cannot be held to be responsible in the circumstances. This court has already discounted that contention that the death of deceased could have been caused by Methanol or alcohol taken and established through forensic analysis done by PW12. The evidence tendered by Dr. Lilian Bosire (PW13) clearly showed that the deceased died due to head injury. The



good doctor only submitted samples for toxicology analysis out of abundance of caution to rule out poisoning or any other cause.

37. The uncontroverted facts from the evidence tendered clearly shows that the accused and the deceased were lovers and were seen together on the 19th April 2018. The evidence of Ken Mwova Munyoki (PW1) the proprietor or the owner of the bar known Club Junction stated categorically that the deceased also known “carol” and accused were at the club of the night of 19th April 2018 and he saw them leaving together. He stated that he even shared a meal together with accused before the two left.
38. It is apparent from the explanation given to him by Erick Kimanzi (PW2) that the two (deceased and accused were in Tintin club) and later came back where they spent the night in a room that the deceased was found lying down dead the following day. The evidence of PW2 (Erick Kimanzi) the caretaker of Club Junction is consistent. The accused and the deceased were last seen together at Club Junction. PW2 stated that he booked them in Room One where the following day he pushed open the door and discovered the body of the deceased lying on the bed with the accused missing.
39. Mercy Munanu Kimanzi (PW4) also gave corroborative evidence. She stated that the deceased whom was her sister handed her the keys to the house the two shared and left with the accused. PW4 stated that it was around 11pm on 19.4.2018 when the two left for Tin Tin club to dance. PW2 stated that he met the deceased and the accused at a disco at Tintin club and that they asked him for a room. He went to the club using a boda boda and gave them a room and left them in the room.
40. The accused in his defence conceded under cross examination that he was with the deceased on the material night though he stated that he left her at 11pm and went to Tintin club at Mutwangombe. The accused in his testimony was inconsistent because on one he stated that the events he had narrated which appears to reflect the narratives of PW1, PW2 and PW4 occurred on 17.4.2018 and that he was beaten up by police to change the date to 19.4.2018. But when pressed to explain if he complained of any beatings when produced in court he stated he did but the record does not show any complaint being registered from either the accused in person or through counsel. The allegations of beatings therefore are an afterthought. This court noticed from the demeanor of the accused during cross-examination that he was evasive in answering questions regarding the alleged beatings and also when trying to raise alibi. He even seems to suggest that the deceased died due to kidney problems which in my view appeared to have been an attempt to cling on the findings by the expert (PW12) doctor regarding the methanol and ethanol found in the samples tested from the blood, kidney, liver and stomach of the deceased.
41. The accused person also conceded that he had no issues with prosecution witnesses and in particular PW2. This court finds no reason why the prosecutions witnesses could collectively decide to lie that they saw the accused with the deceased together on 19.4.2018. I also find that the accused during the cross examination conceded to that fact when he stated;

“The deceased was not sick... I was with her at Thitha. We went with her to Tintin bar at Mutyangombe which is about 1km to Garissa Mwingi Highway. We left her at 8.40pm”

42. This court finds that the prosecution’s contention that the accused person was the last person seen with the deceased when she was alive was proved beyond any reasonable doubt.
43. The doctrine of last seen therefore applies in this case. In the case of Republic v EKK [2018] Eklr Lesit J (as she then was) made the following observations about the doctrine of “last seen”



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.”

In yet another Nigerian case the court considering the same doctrine, in the case of *Stephen Haruna v The Attorney-General Of The Federation* [2010] 1 iLAW/CA/A/86/C/2009 opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

44. Under Section 119 of the *Evidence Act*, the court is entitled to presume certain facts where a reasonable explanation is not given. The section provides as follows;

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

45. This court finds that the prosecution’s contention that the conduct of the accused after the incident gave him away is correct. John Vonza Malubi (PW7... wrongly captured in the proceedings as PW4) stated that he picked the accused at 8am at the Makutano junction and took him to Nguni on 20.4.2018. According to him the accused appeared nervous and when he noticed it he doubled the fare to Kshs. 300 from the normal Kshs. 150/= but the accused paid nevertheless. That in my considered view points to one thing. The accused wanted to flee from the scene of crime because he knew what he had done. He stated in defence that his home was Nguni and that he left Nguni on the 20.4.2018 at around 1pm intending to go to Mombasa and could have gotten away had PW11 not intercepted him and arrested him at Migwani. This court finds that the prosecution proved the element actus reus through the doctrine of last seen which applies in this case. The accused was her boyfriend and he was the only person who was with the deceased in the evening and the night of the material date and an inference is made that he and no one else is responsible for the blunt injury on the head of the accused that caused her death.

46. **(c)Whether the accused had malice afterthought (menrea)**

The defence submits that the prosecution’s case against him lacks this element. He contends that he harbored no motive to harm his deceased girlfriend.

47. While it is true that the prosecution tendered no express evidence showing motive or ill will by the accused, malice afterthought can be implied from the actions of an accused person.



48. Section 206 of the Penal Code defines Malice aforethought as follows;

“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”.

49. This court has carefully considered the evidence tendered and finds that the deceased certainly died from a blunt trauma to the head. The murder weapon was not discovered and the only evidence available that seems to infer guilt on the part of the accused is his conduct after the incident, why would he try to hide or run away from the scene if say the injury to the head of deceased was accidental?

50. The evidence of Evans Mwendwa John (PW5) though appears confusing appears to give the accused some thread to hang on his contention that he harbored no ill intention. This is because PW5 stated that the accused called him on the 20.4.2018 and asked him to take the deceased to hospital for treatment. There is also evidence from the witnesses who first saw the body of the deceased that the body had no visible injury apart from foam oozing from the mouth and nostrils.

51. In *Mishi Tulo v R* CR Appeal No. 30 of 2013, *Sande v R* [2003] 2 KLR and the Court held the above sentiments on the significance of circumstantial evidence as proof of facts in issue in a criminal offence. For circumstantial evidence to point to accused persons that they were perpetrators of the crime, the following criterion was laid down by the courts for consideration by a trial court before conviction for the offence. When a case rests on circumstantial evidence, the following three primary tests of evidence must be satisfied: -

- “(i) The circumstances from which an inference of guilt is sought to be drawn must cogently and firmly be established.
- (ii) Those circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused.
- (iii) 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.”

52. The accused person certainly had a hand to the cause of blunt injury on the head of the deceased which caused her death. If the accused had acted quickly by taking the deceased for treatment, she could have perhaps been saved. But the accused walked away and left her to die. This court finds that though the evidence tendered cannot hold water in the charge of Murder, the evidence is sufficient for



manslaughter. This is because the element of mensrea has not been established and besides that the evidence of PW5 negates that element as I have observed above.

In the premises, this court finds that the prosecution case cannot sustain the charge of Murder because the element of *mensrea* is lacking but there is sufficient evidence to sustain Manslaughter Contrary to Section 202 of Penal Code and the accused is convicted as such.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE

