



**Republic v Simiyu alias John Wambulwa Simiyu (Criminal Case
E037 of 2023) [2024] KEHC 14989 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E037 OF 2023**

DK KEMEL, J

NOVEMBER 29, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

LUKA WALUBENGO SIMIYU ALIAS JOHN WAMBULWA SIMIYU .. ACCUSED

JUDGMENT

1. The accused herein Luka Walubengo Simiyu alias John Wambulwa Simiyu is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence as per the information dated 13th September 2023, are that on 12th August 2023 at Buteywa Village, Milo Sub-Location, Shitikho Location in Webuye West Sub-County within Bungoma County, jointly with others not before Court, he murdered Gabriel Wanyonyi.
2. The Prosecution called seven (7) witnesses in support of its case which was as follows: -
3. PW1 was Situma Wanyama Francis who testified that the deceased herein was his son and that on 12th August 2023, he had hired workers to assist him clear his farm especially at the area where there was a boundary as he needed to put up a fence. He told the Court that he later learnt that on arriving at the farm that they were ambushed by a mob who attacked them leading to the death of the deceased. He told the Court that he received a call from his other son, Douglas, who briefed him on what had happened and that he urged him to rush to Webuye Hospital. He told the Court that the accused herein is a neighbor who had sold land to him and learnt that he was at the forefront of the people who attacked the deceased. He told the Court that the accused and his other neighbours had been harassing him over the land and that he took the matter to Court and won. He told the Court that he never saw the accused attacking the deceased and that there exists a dispute between him and the father of the accused herein and who had erected a structure on his land. He identified a copy of the land that he had bought namely LR Ndivisi/Muchi/679.



On cross-examination, he stated inter alia; that he did not witness the incident; that it is accused' father who erected a structure on the land; that the land dispute was between him and the accused's father; that he won in the court case and that the trespassers were to be evicted; that he had hired about fifteen people to carry out the eviction.

4. PW2 was Vincent Wekesa Wanyonyi who testified that the deceased herein was his friend and that on 12th August 2023 they had travelled to Webuye to work on the farm of PW1 herein. Their role was to fix a fence and that they were about 15 people. According to him, on arriving at the farm, the deceased proceeded to issue out instructions and suddenly a lady raised alarm claiming that they were thieves. A large mob emerged and assaulted them and as the deceased tried to escape by rushing towards where his motorbike had been parked, the accused herein attacked him, cutting him on the head with a panga. He told the Court that he managed to escape and proceeded to alert his colleagues. He told the Court that they did not carry any tools to the workplace.

On cross-examination, he stated inter alia; that it is not true that he ran away for twenty minutes before coming back; that his statement is silent about witnessing the accused assaulting the deceased; that he had not known the accused before; that it is true that he fled for his dear life; that he did not participate in a police identification parade.

5. PW3 was Rodgers Wanyonyi Mateni who testified that PW1 is his neighbor and that the deceased herein was his friend. According to him, on 12th August 2023, PW1 sent him to visit his farm at Webuye and have it fenced. He told the Court that they were about 15 people and that they used their respective motorbikes to get to the place of work. On arrival, they started preparations to commence their work when some neighbours raised alarm claiming that they were thieves. A large mob emerged armed with pangas, stones and clubs and that the accused herein was on the forefront. He told the Court that at the scene, they were forced to retreat from the farm but the deceased was unfortunately caught up in the attacks. The deceased sustained cuts on his face and that they had to rush him to the hospital. He confirmed before the Court that he saw the accused attacking the deceased.

On cross-examination, he stated inter alia; that they left behind the deceased as they took off from the scene; that they came back to the scene after ten minutes and found the deceased had been injured badly; that he saw the accused assaulting the deceased; that he has not been called to participate in a police identification parade; that everybody was running for his life but in the same direction.

On re-examination, he stated that he saw the attackers and that they took about ten minutes to return back to the scene.

6. PW4 was Douglas Wafula Wanyama who testified that the deceased herein was his brother. According to him, on 12th August 2023, his father sent him and the deceased to visit their farm in Webuye and on arrival they found several homes erected there but without occupants. He told the Court that even before they commenced their work a large group of people with crude weapons appeared and descended on them. The deceased rushed to pick his motorbike as the rest of them ran away in fear for their lives. The deceased was overpowered by the attackers and who were being led by the accused herein. He told the Court that the accused had a Panga and a Club and who viciously attacked the deceased herein. When they later returned to the scene, they found the deceased and rushed him to the hospital. He told this Court that the accused was the son to the man whose remains were buried on PW1's land and that he and his family were claiming ownership to the said land.

On cross-examination, he stated inter alia; that the land case was between his father and those who had sold the land to him; that the accused was residing on the land in question and that an order of eviction had been made by the court; that he knew the accused quite well; that they ran away and came back later to the scene; that he witnessed the accused assaulting the deceased.



7. PW5 was Timothy Napui Mikisi who testified that on 12th August 2023 in the company of the deceased herein and others they were sent by PW1 to go and fence his farm situated in Webuye area. On arriving at the farm and starting to plan out how the work would be done, they suddenly heard screams from around with chants referring to them as thieves. Later, a crowd of people emerged from nowhere with clubs and pangas aiming to attack them. As he was scared, he took refuge inside a certain lady's house only to return to the scene later to find the deceased severely injured. He told the Court that the accused herein was one of the attackers as he was the one who commanded the other attackers. He told the Court that he did not witness the accused attacking the deceased herein but he identified him as one of the attackers.

On cross-examination, he stated inter alia; that many assailants chased them away from the scene; that they ran in different directions; that he saw the accused herein among the crowd; that he did not see the accused attacking the deceased; that there is a land case between his family and that of the accused; that the accused's family are behind the incident due to the land dispute.

8. PW6 was No. 64752 Sgt Adan Ali who testified that he was the investigating officer in this matter and is stationed at Webuye Police Station. According to him, on 13th August 2023, while at the office his boss alerted him of an incident that occurred within Muchi area where PW1 had sent farm aides to put up a fence on his land only for them to be attacked by residents. He rushed to the scene and found some people and upon investigations, he established that the accused had mobilized villagers to attack the deceased and his group of workers. He proceeded to the hospital where the deceased was rushed for medical attention and established that he had died. He told the Court that he went back to the scene but found nobody and later on the accused presented himself at the Police Station. He told the Court that he conducted his investigations and recorded witness statements and established from PW3 that there was a land dispute between PW1 and the family of the accused herein.

On cross-examination, he stated inter alia; that those who came to work on the farm ran away only to come back and find the deceased already killed; that no parade was conducted; that the family of the deceased had a land dispute with the family of the accused and thus he was suspected and also due to his occupation of the land.

On re-examination, he stated inter alia; that the attackers comprised a gang of many people; that the accused is the one who resides on the disputed land; that the accused mobilized villagers to attack those people; that the two changaa dealers were released due to lack of evidence; that the case is one of murder and not a land dispute.

9. PW7 was Dr. Elly Kiplimo Kosgey who testified that he was in Court to produce the post mortem report of the deceased herein dated 18th August 2023. During his examination, he observed that there was a shortened cut on the deceased's right eye which was stitched; rigor mortis had formed. External appearance showing swollen dorsum of the hands; fracture of ulna and radius; redness of the eyes; penetrating injury of the eye as a result of a cut on the left femoral region; depressed parietal bone fracture with massive subdural hematoma; torn brain tissue. His prognosis was that the cause of death of the deceased was severe head injury from blunt trauma with penetrating injury to the eye. He produced the post mortem report dated 18th August 2023 as PEXH.4.

On cross-examination, he told the Court that there was a possibility of someone sustaining such injuries as captured from a fall while riding or being ferried on a motorcycle.

10. After close of the Prosecution's case, the Court found that a prima facie case had been established against the accused who was thus found to have a case to answer and was subsequently placed on his defense. He opted to give a sworn testimony.



11. DW1 Luka Walubengo Simiyu alias John Wambulwa Simiyu testified that he is the accused herein. According to him, on that material date he was at Maraka farm from 8.00 a.m. to 2.00 p.m. removing tree stumps on the farm of one Protus Masinde and that at 2.30 p.m. when he got home, he found several of his houses had been demolished. He insisted that he was not at the scene of the crime and referred to the case that was between his family and that of the deceased's family over land. He told the Court that his wife can vouch for his alibi and that he was working with his wife at the time of the incident. He denied killing the deceased herein. He produced a copy of decree in Bungoma High Court ELC No. 81 of 2022 as well as the statements of Douglas Wafula (PW4), Vincent Wekesa Wanyonyi (PW2) and Situma Wanyama Francis (PW1) as exhibits. He maintained that he was not at the scene of crime as he was then away.

On cross-examination, he stated inter alia; that it is his wife who could vouch for his alibi; that the Plaintiff in the case had sued his father; that he knows nothing about the alleged incident.

On re-examination, he stated inter alia; that he did not kill the deceased; that he was working for one Protus Masinde but who declined to come in as his witness due to his work as a police officer.

12. After close of the defence case, parties were directed to file and exchange submissions. It is only counsel for the defence who complied.

13. I have considered all the evidence availed in this case as set out above as well as the submissions filed. I find the issue for determination is whether the Prosecution has proved its case against the accused beyond any reasonable doubt.

14. Section 203 and 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment therefor. They require that the Prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.

15. The sections 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.”

a. The death of the deceased.

16. The postmortem form (PEXH-4) filled by Dr. Elly Kiplimo Kosgey (PW7) on 18th August 2023, reveals that the deceased died of severe head injury from blunt trauma to the head with penetrating injury on the eye. This ingredient was proved beyond any reasonable doubt by the prosecution.

b. Proof that the accused committed the unlawful act which caused the death of the deceased.

17. PW2, PW3, PW4 and PW4 identified accused as one of the assailants as he was leading the mob towards them with clubs, stones and pangas. It was the testimony of PW2 that the accused descended on the deceased herein cutting him on the head with a panga while PW4 told the Court that when the attackers being led by the accused descended on them, they all ran for their lives watching from a distance as the assailants viciously attacked the deceased who wanted to get to his motorbike and flee. PW4 and PW5 told the Court that the accused was well known to them because of the land case involving PW4's father and that of the accused. The incident took place around 10.00 AM as per the evidence of PW5 where the sun was shining bright. I find that there existed conducive conditions for recognition of the accused. It transpired that there had been a land dispute between accused's family



and the deceased's father (PW1) and in which PW1 had won the case and obtained an order to evict the accused and others from the land in question and hence the witnesses had come to know the accused prior to the incident. Further, the witnesses were clear that it was the accused who was leading the villagers in attacking the deceased. The accused, having lost the land case, was not prepared to leave the land and thus he was out to resist any eviction or entry by the registered owner or his agents. I find the accused was placed at the scene of crime.

18. The accused's defense raised the defence of alibi that he was not at the scene of crime as he was with his wife working at the farm of one Protus Masinde from 8.00 AM to 2.00 PM. The alibi was not supported by any witness. His defence evidence seemed to suggest that he had been charged with the offence yet he was not at the alleged scene of crime.

19. Alibi is defined in Black's Law Dictionary, 10th Edition as:

“ A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time”.

20. The principle has long been accepted that an accused who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the Prosecution an opportunity to investigate the truth or otherwise of the alibi. In Republic v Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa held that:

“ If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

21. It is trite that once an accused raises an alibi defence, the onus is on the Prosecution to displace the defence of alibi. The Court of Appeal in the case of Wang'ombe v Republic [1980] KLR 149 held as follows:

“ In Ssentale v Uganda [1968] EA 365, 368 (Sir Udo Udoma CJ) said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion..... The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible”.

22. In this case, it is noted that this defence of alibi was raised at the defence hearing and not at the beginning of the trial. Accused was not only placed at the scene of the crime by PW2 and PW4 but that PW2 further identified the accused as the person who descended on the deceased herein cutting him on the head with a panga while PW4 told the Court that the attackers were being led by the accused when they descended on them prompting them to run for their lives, watching from a distance as they viciously attacked the deceased who wanted to get to his motorbike and flee. Consequently, it is my finding that the defence of alibi raised by accused to be an afterthought and that the same must fail. It is not in dispute that the accused's family and the father of the deceased had had a land case at Bungoma law courts wherein the accused and his family had been ordered to move out of the land or be evicted



therefrom. It is clear that the accused and his family were not ready for the impending eviction and thus resisted the same and that when the deceased and his team arrived, the accused and his group ganged up and repelled them and that in the process the deceased was fatally injured while his companions managed to flee to safety. It was the accused herein who was on the forefront in ejecting the deceased and his team from the land in question. The actions of the accused and his fellow villagers in opting to take on the deceased and his team instead of engaging the local administration for a solution and which led to the demise of the deceased is clear proof that the death was not accidental but was unlawfully caused by the accused and his group.

c. Malice aforethought

23. Having found that the Prosecution has proved the element of actus reus, the issue for determination is whether malice aforethought can be inferred now that a single blow to the deceased's head caused his death.
24. The offence of murder is complete when, "malice aforethought" is established if, according to Section 206 of the Penal Code, evidence proves 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."
25. In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*), the Court of Appeal cited the case of *REX VS TUBERE S/O OCHEN (1945) 12 EACA 63* with approval where it was stated as follows:

"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case, we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late."
26. In this case, there is substantial evidence of repeated assault. It was the evidence of PW2-PW5 that the accused who was leading the mob arrived suddenly at the farm brandishing weapons. PW2 stated that he saw the accused cut the deceased herein on the head while PW4 stated that as the deceased tried to run to where his motorbike had been parked so that he could escape, the accused viciously attacked him with a club and a panga. This factor leads me to believe that the assault on the deceased was not an isolated one and was with malice aforethought on the part of the accused. In other words, it was likely that the accused did intend to kill the deceased and any other member of the group that had visited the land in question. It is instructive that the accused and his family had lost the case vide Bungoma ELC No.81 of 2022 that had been lodged by PW1 and that he was not ready to vacate from the land in question. He was out to repulse any attempt by PW1 to take over the land. As soon as the deceased and his group arrived at the land, the accused embarked on inciting the villagers and leading them to



repulse them. I find that the accused had malice aforethought. It is instructive that the deceased and his group did not attack the accused and his group to suggest that the accused was defending himself from attack. Indeed, the deceased was killed in cold blood.

27. The evidence as adduced by the Prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused herein with malice aforethought. The prosecution witnesses, even though cross-examined at length, came out steady and unshaken. The defence evidence and alibi did not shake the evidence of the prosecution which is overwhelming against the accused.

48. In the premises, this Court finds and holds that the Prosecution proved the information of murder contrary to Section 203 as read with Section 204 of the Penal Code against the accused beyond reasonable doubt.

48. In the result, i find the accused herein, Luka Walubengo Simiyu alias John Wambulwa Simiyu, guilty and convicted of murder pursuant to the provisions of Section 322(2) of the Criminal Procedure Code.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY NOVEMBER, 2024

D. KEMEI

JUDGE

In the presence of:

Luka Walubengo.....Accused

Sabwami for Wattangah for Accused

Munishi.....for Prosecution

Kizito/Ogendo.....Court Assistant

