



**Republic v Wambongo & another (Criminal Case 24 of 2015)  
[2023] KEHC 3494 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3494 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 24 OF 2015  
WM MUSYOKA, J  
APRIL 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANTONY TITO WAMBONGO ..... 1<sup>ST</sup> ACCUSED**

**CHARLES ODINGA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Antony Tito Wambongo and Charles Odinga are charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. Particulars of the offence allege that on the 9<sup>th</sup> day of March 2015, at Mulunyu Village in Sichirai Sub-Location, Sheywe Location, within Kakamega County, they murdered Silas Khadera, hereinafter referred to as the deceased. They pleaded not guilty to the charge on September 29, 2015. The hearing of the case for the prosecution commenced on January 27, 2016. 6 witnesses testified.
2. The first on the stand was Benjamin Mutumbwa Abukuse, who testified as PW1. He stated that on March 9, 2015, at 2.00 PM, he witnessed as the 1<sup>st</sup> accused and another man, who he did not know, assault the deceased. It was alleged that the deceased had stolen a hen. The mother of the 1<sup>st</sup> accused was also present, and assaulting the deceased. He said that he did not see the 2<sup>nd</sup> accused at the scene. He did not intervene, as he feared being assaulted also. He said that the deceased was still holding the hen, and that the 1<sup>st</sup> accused left him at the scene. Dorothy Sally Aviha testified as PW2. She was in the crowd that was witnessing the assault of the deceased. Among the assailants was the 1<sup>st</sup> accused and his mother, who she identified as Ayuma. She said that she did not see the 2<sup>nd</sup> accused at the scene. She said that the 1<sup>st</sup> accused hit the deceased with a cane, and the deceased was bleeding from the mouth.
3. Jacob Ochieng Onyango testified as PW3. He stated that on the material day, the 1<sup>st</sup> accused called him, as he was going to Ebwabwa Primary School. He was calling from his house. He said that they had



arrested a chicken thief. PW3 went to the place where the 1<sup>st</sup> accused was. He entered the house, and saw the deceased. The others were outside, being the 1<sup>st</sup> accused, Christine Matias and Njomo Barasa. He spoke to the 1<sup>st</sup> accused privately, warning him that the matter could take a different turn. They did not agree, and he left. He also met the mother of the 1<sup>st</sup> accused. A son of the 1<sup>st</sup> accused entered the house and began to assault the deceased. The mother of the 1<sup>st</sup> accused also assaulted the deceased, with a stick. The 2<sup>nd</sup> accused and Ezekiel Makina were also mentioned as assaulting the deceased. The 2<sup>nd</sup> accused was said to have used a bicycle lock to hit the deceased. He tried to intervene without success. He said that he was called at 9.30 AM, and the assault went on until 2.00 PM. The deceased was subsequently removed from the house. Michael Oduor Khayumbi and Michael Makina brought a tyre, and tied the deceased to the tyre, saying that they would burn him. A woman dissuaded them. The 2<sup>nd</sup> accused then hit the deceased on his private parts. He got the number for the local Chief, and he telephoned him. Ezekiel later bundled the deceased into the compound of one Makango.

4. Peter Shikanga Ichadera followed as PW4. He was a brother of the deceased. He was informed that his brother was being beaten by people who were accusing him of stealing a hen. He named the 4 people involved as the 2 accused persons, and Ezekiel Makina and the mother of the 1<sup>st</sup> accused. He rushed to the scene, and found the deceased had already died. He then made a report to the police. He did not witness the assault. Dr. Dixon Mchana Mwaludindi testified as PW5. He was the pathologist who conducted post-mortem on the body of the deceased. The body had swellings on the face, trunk and behind, and on both the upper and lower limbs. Internally, he had minor bleeding in the major organs, an indication of shock. There was also swelling of the brain. He opined that he died of excessive soft tissue injuries, secondary to assault. Corporal of Police Cyrus Njagi, service number 86381, testified as PW6. He was among the police officers who responded to the incident. He found a group of people surrounding the body of the deceased, which was tied with ropes, and was naked. They removed the body to the mortuary. They rescued the accused persons, who were the key suspects, and members of the public wanted to burn their houses. He stated that the report he got was a mob justice case. He could not tell whether the accused were in the crowd that he found at the scene.
5. The prosecution case closed thereafter, and the accused were placed on the defence.
6. The defence hearing happened on December 8, 2022. The 2<sup>nd</sup> accused was DW1. He said that he and the 1<sup>st</sup> accused did not kill the deceased. He said that he was a bode boda operator, and on the material day he came across the scene, where the deceased had been cornered, and was being beaten. He said that he did not join the persons beating him, but he just went to his house, and thereafter he went on with his chores. After 3 days he began to hear that he was a suspect in the killing. He said that he did not participate in the killing. He only peeped in and left. He said he was subsequently arrested by youths, who took him to the Chief. He said that he did not know the deceased.
7. The 1<sup>st</sup> accused testified as DW2. He said that he did not participate in the killing. He said that he knew the deceased. He said that he was at home, when he heard screams, and he got out. As he got out, the deceased ran into his house. Many people were chasing him. He closed the door to prevent the people getting into the house. He said it was about 9.30 AM. He telephoned Jacob Ochieng, asking him to get help from the police, to come and rescue the deceased. He said that he also called PW4. He said the crowd wanted to beat the deceased, but he prevented them. He said that several people came into help. He said that they got him out of the house, to take him to the police, but the crowd still followed. They did not get to the police station, as they met the relatives of the deceased, who said they would take over. He said that he did not see who hit the deceased, or caused injury to him. He said that he left and went home after that, and from there took his motorcycle and went back to his business. He said that some of the witnesses were relatives of the deceased. He said that he later learnt that the deceased had died. The relatives of the deceased later visited him in the evening and accused him of not stopping the



- crowd from beating the deceased. He was later arrested. He said that by the time the deceased entered his house, he was already injured. He said that the prosecution witnesses lied.
8. At the close of the oral hearings, the accused, through their Advocates, Mr. Ondieki and Mr. Shivega, made oral submissions, to which Ms. Kagai, for the Republic, responded.
  9. The elements of the offence of murder, as set out in section 203 of the Penal Code, are the fact of death, the cause of it, the role of the accused person in the causation, and the fact that the death is caused by the accused with malice aforethought.
  10. From the material before me there is proof that the deceased in fact died. PW4 was a brother of the deceased. He confirmed that he died. PW6 was among the police officers who responded to the incident. He said that when he got to the scene, he found that the deceased had died, and it was them who removed the body to the mortuary. PW5 was the pathologist who did an autopsy on the body of the deceased, after it was identified by relatives. As to cause of death, PW5 said it was the excessive soft tissue injuries, that he suffered due to the sustained assaults, that caused his death.
  11. So, who was responsible for the death of the deceased? The key witness was PW3, he said that the assault lasted from 9.30 AM to 2.00 PM, when the deceased died. The testimonies of PW1 and PW2 confirmed that. It appears that some of these witnesses came to the scene, witnessed the assault, and then left, but PW3 was there for a longer period. Their testimonies were consistent with the findings by PW5, that the deceased had soft tissue injuries all over the body, hence the conclusion that the soft tissue injuries were excessive, and it was the extensive soft tissue injuries that caused the death. From the testimonies, it was clear that the deceased was assaulted by several people. It was what is popularly known as mob justice. The question is whether the accused were complicit in it. Whether they participated in it. Whether they were among those who assaulted the deceased. Whether they were among the persons who caused the excessive soft tissue injuries that led to his death. The 1<sup>st</sup> accused was identified by PW1, PW2 and PW3. PW1 and PW2 said that they saw him beat the deceased. PW3 did not see him do anything to the deceased, but he found the deceased in the house of the 1<sup>st</sup> accused, and when he urged him to take steps to save the deceased, they disagreed. The 2<sup>nd</sup> accused was mentioned by PW3. He had a bicycle lock, with which he hit the deceased, and he saw him hit him on his private parts. PW1 and PW2 were clear that they did not see the 2<sup>nd</sup> accused, but the assault happened between 9.30 AM and 2.00 PM, and the witnesses came and went away, and, it would appear, the assailants also changed, came and went, and it would appear that the 2<sup>nd</sup> accused was not at the scene, when the 2 witnesses saw the 1<sup>st</sup> accused in action.
  12. Am satisfied from these testimonies that the accused persons were at the scene. Both, in fact, admitted to that fact, although denying complicity. I am also satisfied that they did assault the deceased. The question that I need to consider is whether their contribution played a part in the death. PW5 did not pinpoint any injury to any particular part of the body, as having been the cause of the death. He attributed the death to excessive soft tissue injuries, meaning the death arose from the cumulative soft tissue injuries inflicted all over the body. That then means that whoever contributed to the excessive soft tissue injuries would be complicit in the cause of death. PW2 saw the 1<sup>st</sup> accused hit the deceased with a cane, while PW3 said he saw the 2<sup>nd</sup> accused hit the deceased with a bicycle lock. Clearly, they contributed to the infliction of the extensive and excessive soft tissue injuries.
  13. The next consideration is whether they caused the death with malice aforethought. Did they have malice aforethought? Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought



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.”

14. Under section 206, malice aforethought is to be inferred an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from custody of a person and in the process a death is caused.
15. The fact that the accused persons participated in an assault that was carried on for a period of well over 4 hours, meant that they either had the intention that the victim dies, or to cause him grievous harm, or were indifferent as to whether the sustained assaults could cause death or grievous injury. Although 1<sup>st</sup> accused projected himself, in his defence, as a good Samaritan, who was turned into a villain, the facts paint a different picture. Although he claimed that the deceased ran into his house for safety, the 1<sup>st</sup> accused did not demonstrate that he took steps to secure the deceased, and prevent further assaults. He did not appear to have tried to reach out to the police or the Chiefs for assistance. Efforts to get that intervention came from PW3 instead. Indeed, according to PW3, the 1<sup>st</sup> accused resisted suggestions that he needed to do something before the situation escalated, as it eventually did.
16. Overall, I am persuaded that the prosecution was able to marshal sufficient evidence to establish beyond reasonable doubt, that the accused persons were complicit in the causing of the death of the deceased by their respective acts. Consequently, I do hereby find and hold that the accused herein are guilty of the offence of murder, of Silas Khadera, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I convict them accordingly, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya. For the purpose of sentencing, I do hereby direct the Kakamega County Director of Probation and Aftercare Services, to look into the antecedents of the accused persons, do a victim assessment, take the views of the community, and file a report within 30 days. The matter shall be mentioned thereafter.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS  
28th DAY OF APRIL 2023**

**W MUSYOKA**

**JUDGE**

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Shivega, Advocate for the 1st accused person.

Mr. Ondieki, Advocate for the 2nd accused person.

