



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Wamboka & 3 others (Criminal Case 45 of 2020)
[2022] KEHC 12075 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 45 OF 2020**

SN RIECHI, J

JUNE 30, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

JAMES WAMUKOTA WAMBOKA 1ST ACCUSED

RODGERS NYONGESA WANYONYI 2ND ACCUSED

TOM WEKESA 3RD ACCUSED

DAVID THEURI MAINA 4TH ACCUSED

JUDGMENT

1. The accused James Wamukota Wamboka (accused 1), Rodgers Nyongesa Wanyonyi (accused 2), Tom Wekesa (accused 3) and David Theuri Maina (accused 3) are charged with offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence in Count 1 are that on the 8th day of September, 2020 at Mapera “B” village, Tabani Sub-location in Bungoma North Sub County within Bungoma County murdered Victor Maruti.
3. The particulars of the offence in Count 2 are that on the 8th day of September, 2020 at Mapera “B” village, Tabani Sub-location in Bungoma North Sub County within Bungoma County murdered Reuben Luvai.
4. The case for the prosecution is that PW1 Richard Kubai Ndayala who is the father of Reuben Luvai the deceased in Count 2 on 8.9.2020 in the evening he was in his house when he heard screams of Mwizi! Mwizi! (Thief! Thief!). He came out and saw Victor Maruti the deceased in Count 1 who is a son of his neighbour being beaten. Victor while being beaten mentioned the name of Reuben his son. Some people left to look for Reuben who they brought after a short time. He saw Wamukota (accused



- 1) who is a village elder, Rogers (accused 2) who is a Youth Winger and David (accused 4) who is his neighbour present. He tried to shield his son Reuben from the beating but was kicked by accused 3 Tom Wekesa on the back. Accused 4 David Thuri then called for a motor cycle and then tied the 2 deceased and took them to the road. Police were called and the 2 deceased were taken to Ndaluhospital where they were admitted. The next day he went to the hospital and spoke to Reuben the deceased in Count 2 who asked for water but the nurses said he cannot do so unless the doctor has authorized. He had him transferred to Ndaluhospital where he died the same day.
5. Upon being cross-examined by Okile for accused 1 and 3 he confirmed the incident occurred at night around 9 p.m. and that it was Sonko and Charles who brought Reuben to the scene. He also stated that he saw 2 heads of cows which had been stolen and recovered. One belonging to his neighbour Luton Busolo. The other head of cow belonged to Muiruri.
 6. On being cross-examined by Makali for accused 4 he confirmed that his son Reuben was a suspect of stock theft. He stated that his son sustained injuries on the head and legs. He stated that accused 4 was at the scene as he heard him make telephone calls.
 7. PW2 Benson Mwanje Mulama who was a friend of Reuben (deceased in Count 2) was with the deceased at Ndaluhospital when they went to his (witness) home and had supper. They then parted at 9.30 p.m. and deceased in Count 2 went to his home. He then received a call from Reuben sister to tell Reuben not to go home as it was dangerous. He followed him to inform him but did not find him. He then saw torches on the road and went there. He found Reuben and Victor lying on the road having been beaten. He suggested that they be taken to police but Emmanuel hit him. He then went home.
 8. On being cross-examined by Okile he stated that he arrived and found deceased had been beaten. He saw accused 3 Tom armed with a whip and small axe and in total there were about 7 people surrounding the deceased. He also confirmed that in his statement to police he did not mention the names of the accused.
 9. PW3 David Lidodo Agola the son of James Luvai (PW1) and brother of deceased in Count 2 Reuben was in his house when he heard screams. He ran there and found Victor (deceased in Count 1) being beaten and being asked about a head of cow and who he was with. He told the people where the head of cow was and also mentioned Reuben as an accomplice. People left to get the motor cycle and Reuben whom they brought to the scene. He saw Emmanuel Wamukota and Wanjala who are not in court beating him. The people removed the deceased to the road. He saw accused 1 James, accused 2 Rodgers armed with rungu, accused 3 Tom was armed with small axe and accused 4 with a slasher.
 10. Later police came and took the deceased to hospital where they died.
 11. Upon cross-examination by counsel for accused, he confirmed that the incident occurred at night and it was dark and they used mobile phone flashlights to see. He stated that accused 1 James the village elder made several telephone calls and that there were about 10-20 people present.
He confirmed that Reuben was brought while being beaten by people who are not in court.
 12. PW4 Concepta Nekesa Namunyu testified that Victor (the deceased) in Count 1) is her sister's son. On September 8, 2020 at 9.30 p.m. he was with Victor who then went out while using a Delight lamp. She saw people outside and saw it was Rogers Nyongesa and 6 Other people screaming and running towards her pit latrine. They apprehended Victor and took him towards a maize farm. He recognized the people as James (accused 1, Rogers (accused 2) Tom (accused 3) and Emmanuel Wamukota who is not in court.



13. The persons were armed with assorted weapons and beating Victor at random. Some people then went and brought Reuben (deceased in Count 2) and they threatened to set them on fire but were restrained. They brought a motor cycle with which they carried the 2 deceased away. Police came and took them to hospital and next day she received information that Victor had died. Later she learnt that Victor's phone was found with accused 2 Rodgers.
14. Upon being cross-examined by counsels for the accused she stated it was at night and there was no moonlight. She testified that she saw accused 1 James hit Victor with a club, accused 3 Tom hit him on the head. She confirmed that she received information that heads of cow had been stolen and that the accused were village elders and Nyumba Kumi officials.
15. PW7 Samwel Juma Simiyu the brother of Victor (deceased in Count 1) was with Victor when they had supper and he left to go and sleep. Shortly after he heard noise of footsteps and people shouting Mwizi!Mwizi!. He recognized the voice as that of Rodgers (accused 2) who is their neighbour. They dragged Victor from the pit latrine and took him to a neighbour's farm where he was beaten. He saw Tom (accused 3) cut him on the back of head. The people then brought Reuben (deceased in Count 2) and beat him. Accused 2 Rogers took Victor's phone. Police came and deceased were taken to hospital where they died while undergoing treatment.
16. Upon cross-examination he admitted he had been previously arrested and charged with the offence of house-breaking and stealing and was arrested by accused 1 James. He stated there were about 10-11 people but only identified the 4 accused using a mobile torch light.
17. PW8 John Lusimba was in his house when he heard people shouting Mwizi!Mwizi! outside. He went out and found it was nyumba kumi officials who had apprehended Victor near the toilet. He saw the people beating Victor who included accused 1 James, accused 3 Tom and Accused 2 beating Victor.
18. PW6 Segt samwel Wangatia attached to Tongaren Patrol base was directed by the OCS C.I Nyagah to visit a scene of mob injustice. On arrival he met nyumba kumi officials who led him to the scene where he found 2 boys who had been assaulted by a mob and their motor cycle damaged. They took the boys to the Ndalu Health Centre.
19. PW9 NO. 70715 Segt Joseph Gatimu the investigating officer testified that from the investigation he found that the deceased were stock theft suspects and were arrested by the village elder James Wamukota (accused 1) Rodgers Nyongesa (accused 2) and Maina (accused 4)
20. One of the suspect Victor had a mobile telephone which Rodges (accused 2) took and kept. He covered the phone from accused 2. He was informed that Victor had a motor cycle KMEK 979 which belonged to Lydia June. He later recorded statements of witnesses. He found out that accused 2 – James is a village elder, and accused 2-4 are members of Nyumba Kumi. After investigations he recorded that they be charged as they failed to protect the deceased.
21. PW10 Dr. Achiyenza Shikunzi who produced the post mortem report prepared by Dr. Palma Musiti testified that upon examining the body of Victor (deceased in Count 1) he found he had bruises on the head and legs, fracture of left leg, haematoma on right fore-arm, fracture of back of neck which was loose. He formed opinion that cause of death was due to head and neck injury due to blunt trauma.
22. In respect of Reuben (deceased in Count 2) he saw abrasions on forehead, lacerations on legs, fracture of 9,10,11 ribs, flexible neck with fracture of vertigo. He formed opinion that cause of death was due to multiple head and neck fracture and chest trauma.
23. All the accused gave sworn evidence in their defence. Accused 1 James Wamukota Wamboka testified that during the period June-August 2020 there were several cases of stock theft within the area. On



- September 8, 2020 he received information that 3 heads of cow which had been stolen had been found. They took the heads of cow to police who took photographs and then he took them to the owners. Among the people he took cows to was Luton Busolo. While at the home of Busolo he heard screams outside and he ran there. At the scene he found 2 people being beaten by a mob of about 100 people. The 2 people were the deceased and members of public went armed with assorted weapons.
24. He called the OCS but he did not come. He left and went to the house of Emily Khaemba. He stated that the witnesses who testified for prosecution had a grudge with him in particular Conceptor (PW4) whose child he had arrested for breaking into a school and stealing and were charged in Kimilili Cr. 915/2019 and she is the mother of Victor (deceased in Count 1). He had also arrested the children of John Lusimba (PW8) and David Akola (PW3) were arrested by police for offences he reported to police. In cross examination he confirmed he is a village elder and the co-accused were present at the scene.
 25. Accused 2 Rogers Nyongesa Wanyonyi testified that he is a member of nyumba kumi and on September 8, 2020 he was invited by accused 1 James and together with accused 3 Tom Wekesa when they took a cow which had been stolen and recovered to the home of Lynton Busolo. While there they heard screams and they left and went to where the screams were from. On arrival they found Victor and Reuben having been beaten by a mob of about 100 people. He went to assist Reuben who was his relative but was hit by someone. Gabriel called police who came at 2 a.m. and took the deceased to hospital.
 26. Accused 3 Tom Wekesa Okora testified that he is a member of nyumba kumi and on September 8, 2020 he received a telephone call from accused 1 the village elder to go to Mutangara police station where recovered heads of cow had been taken. He went there and cows were photographed and they took the cows to the owners. While there they heard screams and ran to where the screams were from. On arrival they found the 2 people had been beaten. They left and went to the house of Emily Khaemba where they stayed until 12 a.m. when they left. He testified that the 2 deceased had been previously arrested for breaking into a school and also home of Timothy.
 27. Accused 4 David Theuri Maina testified that on September 8, 2020 he was patrolling he maize farm of Nganga at 9.20 p.m when he heard screams across the river. He went there and found 2 young men being beaten on the road. He recognized them as Victor and Reuben. He called the OCS but he did not pick his call. He then went home.
 28. DW5 Emily Tumaini Khaemba was at her home when accused 1 James and accused 3 Tom came and informed her that her cow had been recovered and she should send a person to identify it. They stayed and left at 12 a.m. the next day she went to the chief's office where she recovered her cow.
 29. DW6 Celestine Mwajuma Kisiangani was in her house when she heard screams. She went out and saw many people beating a boy about 60 meters from her house. She noticed the body's were Victor and Reuben whose parents were also at the scene. Accused 1, 2,3 who are Nyumba Kumi officials called police. In cross examination by M/s Omondi for state she stated that the deceased were beaten using sticks and clubs.
 30. DW7 Patrick Barasa Simiyu on the material day heard screams and ran there. On arrival he found 2 boys being beaten by many people who he approximated to be 100. He saw the accused who are Nyumba kumi officials present. DW8 Gabriel Wanjala Wanyonyi who is a trainer for nyumba kumi testified that accused 4 is not a nyumba kumi official. He testified that he heard screams and ran there and saw 2 boys lying down. He called the AP commander who sent officers at 12 a.m. and the 2 boys were taken to hospital.



31. Counsel for the accused filed written submissions. Counsel submitted that from the evidence, this was a case of mob injustice and it has not been proved that it is accused who inflicted the injuries on the deceased.
32. The accused are charged with the offence of murder contrary to section 203 of the Penal code. Section 203 provides:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
33. The ingredients of the offence of murder which the prosecution must prove are:
 - (a) The fact and cause of death.
 - (b) The unlawful act or omission causing the death
 - (c) That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - (d) That the accused committed the unlawful act with malice aforethought.
34. In this case there is no dispute that the 2 deceased persons sustained injuries on the night of August 9, 2020 and it is from these injuries that they died. Indeed PW 10 confirmed the fact of death and issued death certificates to that effect. He also from the post mortem examination found that they died as a result of multiple injuries inflicted on them. They therefore died as a result of assault and therefore the killing was unlawful.
35. Both the prosecution witnesses and accused in their defence do not contest the issue of both death and the unlawful act causing death. PW1 James Kubai, PW2 Benson Mwangi, PW3 David Lidodo and PW4 Concepta Nekesa who were all related to the 2 deceased respectively in their evidence summed up the sequence of events of that material night as follows:
36. That there had been rampant stock theft in the area, that some cows had been recovered, that 1st deceased Victor was arrested first as a suspect; on interrogation he mentioned Reuben (2nd deceased) as a member of his squad and the motor cycle they were using belonging to Lydia. Upon Reuben being mentioned, some people including alias Sonko and Charles went and brought Reuben who now together were beaten. Police were called and took them to Ndaluh Health Centre where they died while undergoing treatment. The witnesses confirmed that the accused were present and participated in the beating of the deceased. They however confirmed too that the accused 1 is a village elder and the others are nyumba kumi officials. These witnesses agree that the incident occurred at night and there was rains and the night was dark necessitating the use of torches or mobile phone flashlights.
37. The accused’s defence which is identical does not differ materially from the prosecution evidence. They admit they were present at the scene by virtue of their positions in the local security as village elder and nyumba kumi officials. They denied that any of them individually or collectively assaulted the deceased as alleged and they were there to rescue the deceased and as evidenced by them calling police officers who took the deceased to hospital. While admitting their presence, they stated that their attempt to restrain the mob was repulsed and were even attacked themselves.
38. The prosecution witnesses stated that they saw accused assaulting the deceased. They also admit that there were many people and the night was dark. This calls into question the issue of positive identification of each of the accused as the people who inflicted the injuries.



39. Positive identification of an accused as the person who committed the unlawful act that led to the death of deceased is an important ingredient of the offence of murder which must be proved beyond reasonable doubt. This ingredient of the offence is so vital that whenever the question on positive identification arises the court must satisfy itself that conditions for positive identification existed and that the identification is free from possibility of error. The condition the court would consider would include the nature and intensity of light, the distance between the witnesses and the accused, whether the accused was alone or was picked from a group of people and an assessment on the veracity of the witness's observation.
40. In this case it is concern ground that the incident occurred at night; that the night was dark punctuated by rain; that there were many people present and the circumstances were chaotic with beatings and interrogations of the deceased. These conditions were such that the prosecution witnesses ability to identify how each of the accused inflicted injuries on the deceased was greatly compromised and therefore their identification of the role each of the accused played and how they were armed was greatly compromised.
41. In the case of State of *Punjab v Jagir Singh Baljit Sign* reported in (172)3 SCC277. The honourable supreme court of India held as follows:-
- “A criminal trial is not like a fairy tale wherein one is free to give flight to ones imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in a real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charge with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, it's intrinsic worth and the animus of witnesses.....”
42. Upon considering all the evidence carefully, I find that the prosecution did not prove the charge of murder against the accused 1,2,3,4 beyond reasonable doubt on Count 1 and 2. I therefore find the accused 1 James Wamukota Wamboka, accused 2 Rodgers Nyongesa Wanyonyi, accused 3 Tom Wekesa and accused 4 David Thuri Maina not guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Count 1 and 2 and acquit each one of them accordingly.
43. I direct that accused 1 James Wamukota Wamboka, accused 2 Rodgers Nyongesa Wanyonyi, accused 3 Tom Wekesa and accused 4 David Thuri Maina be hereby set at liberty unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 30TH DAY OF JUNE, 2022

S.N RIECHI

JUDGE

