



**Republic v Wasonga (Criminal Case 23 of 2020)  
[2022] KEHC 15809 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15809 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE 23 OF 2020  
KW KIARIE, J  
NOVEMBER 23, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SALMON OBUDHO WASONGA ..... ACCUSED**

**JUDGMENT**

1. Salmon Obudho Wasonga is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the June 3, 2020, at Nyabomo village, Rangwe East sub location, Suba South Sub County of Homa Bay County, murdered Rodgers Ouma.
3. The prosecution contends that when the accused heard the deceased talking in his compound, he hit him with a stone. The deceased fell down and the accused went and armed himself with a spear and a machete. He used the spear to pierce him.
4. In his defence the accused argued that he acted in self defence when the deceased and his brothers attacked him in his home. The deceased was stabbed by his (deceased's) brother when he intended to spear him [accused]
5. The issues for determination are:
  - a. How did the incident occur;
  - b. Whether the accused acted in self defence or not;
  - c. Whether the accused caused the death of the deceased or not; and
  - d. Whether the offence of murder was proved.



6. According to the eye witnesses who testified, the incident was triggered by an incident where the deceased found his wife having tied their chickens. When he was told that they had been tied for the accused had threatened to kill them, apparently the accused heard the deceased speak and told him that he was looking for him. This is what Esther Akoth (PW1) testified to. The accused threw a stone and hit the deceased on the head. When he fell down, the accused ran to his home and returned with a spear and a machete. He pierced the deceased with the spear. This was the gist of the evidence of Linda Achieng (PW2) and that of Kevin Ooko (PW3).
7. The evidence of these three witnesses was that the incident took place in the home of the deceased.
8. Salmon Obudho Wasonga, the accused herein contended that the deceased went to attack him in his home in company of his brothers. The deceased hit him on the forehead with a stone and he fell down. The brothers of the deceased descended on him with sticks. They overpowered him. Kevin Ooko (PW3) attempted to pierce him with a spear but missed. Instead it pierced the deceased.
9. Section 17 of the Penal Code addresses the issue of self-defence as follows:

Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

10. The Court of Appeal in the case of *Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR* stated as follows:

What are the common law principles relating to self defence' The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in *Palmer v R [1971] AC 814*. The decision was approved and followed by the Court of Appeal in *R v McInnes, 55 Cr App R 551* Lord Morris, delivering the judgment of the Board, said:

' It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary.

But everything will depend upon the particular facts and circumstances. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.'



11. Though the accused pleaded self-defence, this was not supported by the evidence on record. The prosecution witnesses were not confronted with it. Kevin Ooko (PW3) who allegedly stabbed the deceased in an attempt to spear the accused was not confronted with this evidence. He was categorical in his evidence that it was the accused who stabbed the deceased. I therefore dismiss the defence of the accused as an afterthought.
12. There were undertones that the accused and the deceased fought. However, looking at the evidence in totality, I am satisfied that the two did not fight. The prosecution has therefore established malice aforethought against the accused. The offence of murder has therefore been proved beyond any reasonable doubts. I find him guilty and convict him of the offence of murder.

**DELIVERED AND SIGNED AT HOMA BAY THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

