



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL CASE NO. 10 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**EDWIN WASIKE BARASA.....ACCUSED 1**

**GEOFFREY OKIRU ODIONYE.....ACCUSED 2**

**JUDGMENT**

The accused **EDWIN WASIKE BARASA** (accused 1) and **GEOFFREY OKIRU ODIONYIE** (accused 2) are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.

The particulars of the offence are that **EDWIN WSIKE BARASA** (accused 1) and **GEOFFREY OKIRU ODIONYIE** (accused 2) on the 27<sup>th</sup> day of January, 2016 at Misanga village, Misanga sub location, in Bungoma North District within Bungoma County jointly with others not before court murdered **ALLAN WANYONYI SIMIYU**.

The prosecution case is that on 27.1.2018 PW1 Gladys Nakuminja Wanjala the assistant Chief of Musangi sub-location received information that some Boda Boda riders had arrested one Allan on allegation of stealing a motor cycle and wanted to set him on fire. She went there. On arrival she found many boda boda riders at the scene. She found the accused 1 Edwin Wasike who is the chairman of bodaboda and Kefa the Chairman of the Market present.

He saw the deceased Allan tied on the hands. She inquired from the accused what was the issue and Kefa told him the deceased had stolen a motor cycle. She spoke to the deceased who told her she had borrowed the motor cycle from Geoffrey Okiru accused 2. She left them to call the OCS and saw accused 2 Geoffrey Okiru beating the deceased. She then saw the deceased running away. He was chased by bodaboda riders. He fell down and the riders among them one Constance beat him with stones. She then saw a fire burning. Police came and took the body away. In cross examination she stated she did not see accused 1 among the people who beat the deceased, but saw accused 2 who was controlling the crowd beating deceased.

PW2 Mark Simiyu Masika met the deceased on 27.1.2016 at 12 p.m. who asked him if he had seen one Fred with whom he (deceased) had gone to Kitale with accused's 2 motor cycle. Witness told him he had not seen Fred. Deceased left. Later he learnt that decease was being beaten. He went there. He spoke to deceased who told him the motor cycle had been recovered. He found accused 2 beating the deceased with fists and kicks. The deceased then started running away and the riders beat him with stones and set the body on fire. On being cross examined by Were for accused, he stated that he only saw accused 2 beating him. He further confirmed that the crowd was estimated at 100 people and they hit deceased with stones when he attempted to run away.

PW7 No. 236508 IP Evans Kipsang received information that some bodaboda riders wanted to administer mob injustice to a suspect. He went there and found the deceased had been set on fire. They removed the body and photographs of the scene were taken. PW10 Dr. Soita Francis produced the post moterm report of the deceased performed by Dr. Geoffrey Obala. His findings were that there was 100% burns on whole body, cut wound on back middle of head leading to a skull fracture. He formed opinion that the cause of death was due to 100 % burns. He then produced the post moterm report Exhibit 1.

The accused gave sworn evidence and called witnesses. Accused 1 David Wasike Barasa, testified that on 27.1.2016 at 8.a.m he was informed that the daughter of one Anna had died. He assisted to take the body to Kiminini Cottage hospital. He went back to Brigadier market. On the way on reaching Misanga he found a man had been burnt on allegations of stealing motor cycle.

He was later called by DCIO and asked about the incident as a bodaboda leader. He explained and later he was charged with the present offence. He called DW5 Ann Aoko Ocholla who testified how accused 1 had gone with her to Kiminini Cottage and on coming back found many people but did not see the body of the deceased. DW6 Gilbert Laisikwa Mukenya testified how he drove accused 1 and Ann to

Kiminini Cottage Mortuary and on going back saw many where upon accused 1 left the vehicle and went to check. He came back and informed him that people had set fire to a suspect.

Accused 2 Geoffrey Okiru Odionye testified that on 23.1.2016 his motor cycle Reg No. KMDR 141Q got stolen. He reported the matter to the police station. On 27.1.2016 he received a telephone call from Kefa that the motor cycle had been found. Kefa was the chairman of the market. He went to Misanga market where the motorcycle had been found. On arrival he found a group of about 100 people and was informed police had taken the motorcycle to the police station. He went where the suspect had been burnt. On 16.3.2017 he was arrested. He confirmed the motor cycle had been stolen at the market when he parked it and went to a hotel.

Accused 2, called David Kisandi Sokoi who confirmed that accused 2 had reported to him the theft of his motor cycle as the chairman of the bodaboda at Luguru stage. DW3 Emmanuel Wafula testified how he had carried accused 2 on his motor cycle to Misanga where he found many people screaming. The accused 2 then alighted.

Mr. Were for the accused filed written submissions. He submitted that the circumstances under which the deceased was killed, it is not possible to pin point the accused as the culprits. He submitted that from the evidence of the prosecution witnesses, there were about 100 members of the mob and the purported identification of accused would be mistaken. He submitted that the accused had tendered an alibi defence which had not been displaced.

Mr. Thuo for state submitted that the accused together with others had a common intention to lynch the deceased on allegation of being a thief. He submitted that the requisite Mens rea was spread among them to inflict injury which they fatally did. He submitted that the accused were placed at the scene of the crime, had a common intention and lynched the deceased a prove that they committed the offence of murder.

The offence of murder is created by Section 203 of the Penal Code which provides:

**203. Murder Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

For the prosecution to secure a conviction on a charge of Murder, it must prove by evidence the 4 ingredients of the offence.

- a. The fact and causes of death
- b. The unlawful act or omission that caused the death or actus reus
- c. The existence of Malice aforethought or mens rea.
- d. That it is the accused who caused the unlawful act or omission that caused the death of deceased.

PW10 Dr. Soita Francis who produced the post mortem report prepared by Dr. Geoffrey Obala testified that the deceased suffered 100% burns which were spread on the whole body and injuries on the head leading to skull fracture. He formed opinion that cause of death was due to the 100% burns on the body. This witness therefore established the fact and cause of death. He further established that the unlawful act that caused the death was the burning of the deceased.

The next issue the prosecution must prove is that it is the accused who either alone or with others inflicted the burns on the deceased.

PW1 Gladys Nakuminja Wanjala the assistant chief testified that when she arrived at the scene, she found about 20 people. She saw accused 2 hitting the deceased with kicks and fists. She testified that when deceased tried to run away, the mob gave chase and when he fell down, he was hit with stones. She then saw fire and deceased burning.

PW2 Mark Simiyu Masika who also ran to the scene found the deceased tied with a rope on his hands and sitting down. He saw accused 2 beating him with fists and kicks. When deceased ran away and fell, the mob threw stones at him and set the body on fire. The crowd then disbursed when police came.

Accused 1 and 2 defence is that they arrived at the scene when the deceased had already been burnt by the mob. That being connected with the death is because accused 1 is the chairman of the bodaboda and accused 2 was the owner of the stolen motor cycle which the deceased was found with.

It is common grounds that the deceased had been connected to the theft of a motor cycle which had been recovered. There is also evidence from the prosecution witness that his arrest and recovery of the motor cycle attracted a crowd of bodaboda riders. He was then tied on his hands and made to sit down. He then made the unfortunate decision to run away and the mob ran after him. When he fell down, they then hit him with stones and set his body on fire. None of the witnesses said they saw any of the accused hitting deceased with stones or indeed even setting fire on him. What the prosecution witnesses have emphasized on is the presence of the accused at the scene, and that accused 2 hit him with fists and kicks. The cause of death was the 100% burns and none of the accused had been shown to have done it.

After considering all the evidence, I find that the prosecution had not established its case against the accused 1 and 2 beyond reasonable doubt. I find accused 1 Edwin Wasike Barasa and accused 2 Geoffrey Okiru Odionye not guilty of the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code and acquit them under Section 215 C.P.C. The accused 1 Edwin Wasike Barasa and Accused 2 Geoffrey Okiru Odionye to be set at liberty unless lawfully detained.

DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF JUNE, 2021

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S.N RIECHI

JUDGE