



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NO.23 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ZADDOCK WAMALWA MUTEKHELE.....1<sup>ST</sup> ACCUSED**

**FRANCIS BARASA WAKHUNGU.....2<sup>ND</sup> ACCUSED**

**D W W.....3<sup>RD</sup> ACCUSED**

**ERICK SIFUNA.....4<sup>TH</sup> ACCUSED**

**JUDGEMENT**

1. The four accused persons Zadock Wamalwa Mutekhele, Francis Barasa Wakhungu, D W W and Erick Sifuna are faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on the 16<sup>th</sup> of October, 2013 the 4 named persons murdered David Wanyonyi Nyongesa.

2. The Prosecution's Case in brief is that the 1<sup>st</sup> accused lost a cow and the four suspected the deceased and pursued him to PW2's house where they forcefully evicted him fatally injuring him and as a result succumbed to death in the process of beating the deceased they also burnt him.

3. PW1, PW2 and PW3 testified and stated that they were present at about 7 a.m. on the 16/10/2013 when the deceased went to get his working tools from PW2, when the 4<sup>th</sup> accused went and called the deceased who declined to join him, shortly the 4<sup>th</sup> accused was joined by the other accused persons. The second accused who was the village elder ordered the deceased be removed from PW2's house saying they would take him to the police. All the 3 witnesses further testified that the four who were armed with sticks and a panga forcefully removed the deceased from PW2's house, and beat him up. That the 3<sup>rd</sup> accused had a panga and 2<sup>nd</sup> a stick whereas the other 2 were not armed.

4. PW3 on his part said that she followed the deceased and saw him being taken to the railway line where she found the accused persons beating the deceased more and on asking she was threatened. That as they beat the deceased they sang circumcision songs as they alleged that the deceased had stolen the 1<sup>st</sup> accused cow. The accused wanted to burn the deceased and as she was threatened, she ran back home.

5. PW4 came across the Mukasa that morning rushing she enquired why he was in a rush and he told her he was going to kill a thief in the area.

6. PW7 Dr. Philip Koskei produced the postmortem on the deceased which revealed the following:

- Laceration on the right cheek approximately 100cm long.
- Laceration on the head 70cm long.
- Dislocation of right hip joint
- Bilateral bleeding on the brain.

Cause of death was given as severe brain injury secondary to blunt force trauma.

7. **PW8** was **the investigating Officer** whose evidence complements PW1-PW3. He confirmed that the deceased was suspected to have stolen a cow and was beaten and burnt as he was a suspect. He visited the scene of crime.
8. Upon being placed on their defence the accused persons all denied having been with the deceased on the material day or being involved in the killing.
9. **DW1 – 1<sup>st</sup>** accused admitted having lost a cow but he denied having been involved in killing the deceased. He stated that he reported the incident to the village elder and the police. He denied having told the police that he had been to PW1 although he signed the said statement with the information.
10. **DW2 - 2<sup>nd</sup> Accused.** He admitted going to DW1's house and getting information. Although he denied seeing the deceased on the material day or going to the house of PW1. On being shown his statement to the police he admitted having written the statement and having gone up to PW1's house, saw the deceased but denied that he went near those who killed the deceased. He said that PW1 and PW3 had a grudge with him.
11. **DW3- 3<sup>rd</sup> Accused** said he was 17 years at the time and in form I. He denied being involved in the killing though he confirmed he was aware that DW1 lost a cow.
12. **DW4 – 4<sup>th</sup> Accused** equally denied participating in the killing. He was an employee of DW1 and on reporting to work he learnt of the lost cow but left his boss to follow up.
13. This is a charge of murder and three ingredients of the offence must be proved. Firstly ***the death of the deceased must be established***, secondly ***it must be established that an act or omission leading to the death to the deceased is linked to the accused*** and thirdly ***malice aforethought must be proved***.
14. The first ingredient is not in dispute. Indeed PW7 in the postmortem report where it was ascertained that the deceased received several injuries and died due to a head injury.
15. **PW1 – PW3** were categorical that 5 people assisted in removing the deceased from PW1's house, one of the 5 is not in Court. PW3 went first and thereafter the other 4. Accused number 2 who was the village elder directed his removal and thereafter they all beat up the deceased, took him to the railway line as witness by PW2 and beat him to death. Accused 2 on being pressed admitted that he witnessed the deceased being removed from PW1's house and being beaten, though he denied being in the group. He did not give details of the assailants. In my view there is overwhelming evidence from eye witnesses against all the accused persons which evidence was not dislodged by the accused persons in their defence.
16. The 2<sup>nd</sup> accused got the deceased from PW1's house together with his co accused saying they would take him to the police. PW4 heard the 2<sup>nd</sup> accused say he is going to kill. They beat the deceased senselessly and their action was no doubt laced with ill motive.
17. In the circumstances therefore based on the evidence on record I hereby convict all the 4 accused persons of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

**DATED and DELIVERED at BUNGOMA this 21<sup>st</sup> day of December, 2017**

**ALI-ARONI**

**JUDGE**