



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL CASE NO 29 OF 2010**

REPUBLIC..... PROSECUTOR

VERSUS

1. BONFACE JUMA MASIKA

2. JENTRIX WAMUKOTA .....ACCUSED PERSONS

**JUDGMENT**

1. The two accused persons namely **BONFACE JUMA MASIKA** and **JENTRIX WAMUKOTA** are faced with two counts of murder contrary to Section 203 as read with 204 of the Penal Code.

2. The particulars of the offence on the 1<sup>st</sup> count are on diverse dated between 8<sup>th</sup> and 9<sup>th</sup> July, 2010 at Mukweya village Nalondo location in Bungoma central District within Western province they jointly murdered **DANIEL WEKESA WAMALWA**.

The particulars of the 2nd count are that on diverse dates between 8<sup>th</sup> and 9<sup>th</sup> July, 2010, Mukweya village Nalondo location in Bungoma central District within Western province they jointly murdered **SELINA NASIPONDI**.

3. The accused person pleaded not guilty and the matter went to full trial with the prosecution calling a total of 9 witnesses. At the close of the prosecution case the court put the accused person on their defence. They both gave sworn evidence but did not call witnesses.

4. In brief the prosecution case is that the deceased children's father Wycliffe Wamalwa had two wives the deceased mother Consolata and a second wife Lydia. Wycliffe had a disagreement with Lydia and he took Lydia's child Charity to his sister, **PW4** on the 7<sup>th</sup> of July, 2010, and his action angered Lydia's mother the 2<sup>nd</sup> accused who threatened that something terrible would happen unless her grandchild was returned. On the 8<sup>th</sup> the two dead children disappeared prompting Wycliffe to return Charity on 9<sup>th</sup> by which time the two children had been murdered.

Further that the 1<sup>st</sup> accused was seen with the children of the first wife before their disappearance on the 8<sup>th</sup>.

5. The salient features of the prosecution evidence is as follows;

6. **PW1 Consolata Wamalwa** - mother of the two deceased children. Recalled that on the 8<sup>th</sup> of July, 2010 her two children Daniel and Selina Wamalwa were down with malaria. She gave them food at 3.00 p.m. Daniel was 4 and Selina 3. She left them home as she went to Boyula. On returning at 6.00

p.m she did not find them. She only found her other children who had arrived from school. She searched for them until 7 p.m after which she alerted the police. She asked neighbors including the 2<sup>nd</sup> accused who appeared hostile and did not say anything and warned that no one should trouble her. The bodies of her dead children were found near their homestead near a bush in a neighbors farm. The following morning it was her testimony that accused 2 killed the children as she had made threats.

7. **PW2 Roselyne Majuma Kimingichi** –recalled that on 8<sup>th</sup> July 2010 at 5 p.m as she came from the posho mill she decided to use a short cut to her home. She found the 1<sup>st</sup> accused with 5 children, in an open field including the two dead children. When **PW1** inquired whether she had seen children she told her that she had seen the children with accused 2. The next day she learnt that the children had been found dead. Wycliffe and Lydia were married and they had a child who Wycliffe took to his sister and they really fought over the issue. At 9.00 p.m Bonface was confronted and he admitted having ben with the children earlier although the 1<sup>st</sup> accused denied knowledge of the children’s whereabouts.

8. **PW3 Selina Nasipondi** –recalled that on the 8<sup>th</sup> of June, 2010 at 6.00 a.m. she saw the two accused persons in her compound. She welcomed them and the first accused said she will not go near her as she wanted the witness’s son to return her child. The witness referred them to her son and accused 1 told her that if her child was dead many more would die. The following day she received news of her grandchildren’s death.

9. **PW4 Jane Nekesa Ndiema** - a sister to Wycliffe Wamalwa. She recalled her brother taking his child with his 2nd wife to her home on the 7<sup>th</sup> of July, 2010 and informing her that the child’s mother had disappeared and he would come for the child once the mother returned.

On 9<sup>th</sup> at 7.00 a.m her brother returned and informed her that his 1st wife’s 2 children had disappeared the night before and he wanted to return Charity hoping that the others will resurface. He left with the child. 20 minutes later she received a call from her sister Stella from Nakuru who informed her that the two children had been found in bush strangled. She left for Mukweya immediately but found the bodies had been removed.

10. **PW5 Isaac Wamalwa** - a brother to the deceased children reiterated that on 9.7.2010 his father woke him up so that he could take him to Misese which he did. The father was going to his aunt **PW4** to get his sister Charity.

He then returned home and at about 8 a.m he learnt from one Linnet that the children were found in a bush dead. The children had disappeared the previous day.

11. **PW6 Mary Okubo Asiba** – recalled that on 9.7.10 she heard people talking in the morning at 6.00 a.m and a Mr. Mukhwana a neighbor told her that 2 children had been killed. She went to the scene and saw the children. They were Wycliffe and Scholastica’s children.

She then called Senior Sgt. of Mukweya A.P camp. Bungoma police were called and they arrived and took the bodies. She received the bodies. The girl had a bruise on the neck so did the boy.

12. **PW7 Anthony Khisa Chenani** on 8.7.2016 she received information that PW1 wanted him to call her son in Nakuru to informed him that two of her children had disappeared. The following day at about 8 a.m. he heard people talking. He realized it was at **PW1’s** home. He ran there and found **PW1** had gone to chief. He found two of her children lying on the ground.

13. **PW8 I.P Aron Kipsang** – on 9.7.2-010 around 8.00 a.m he received a call from senior sergeant Nandi. About 2 children who were found dead by the road and 5 of them went to the scene. On reaching they found two bodies which were identified as being Daniel Wekesa and Selina Nasipondi. Scene of crime officer took pictures. The bodies were then taken to Bungoma district hospital mortuary. Witnesses were directed to Bungoma police station to write statements. Names of suspects were given as Bonface Juma and Jentrix. After statements were taken it was clear that the parents of the deceased had a

dispute with the suspect over a child Charity who had been taken away. The 2<sup>nd</sup> accused had threatened the father of the deceased children with dire consequences.

Further they learnt that the Accused 1 was seen with the children at a field by one of the witnesses while they were alive. The dead bodies had marks indicating they had been strangled. It seemed like they were strangled elsewhere and brought to where they were found. The 2<sup>nd</sup> accused did not want the father of the dead children to mistreat her daughter. The daughter had then returned home. In his investigations he connected the murder to the dispute involving charity.

14. **PW9 Dr. Isaac Obere Omeri** of Bungoma County Referral hospital produced the post mortem reports on behalf of Dr. Arunga who was on transfer.

The post mortem report of Daniel Wekesa same age as 5 years. Had a mark consistent with a rope. The body had multiple bruises. The trachea was compressed. On the spinal cord the column neck was freely mobile with a fracture. The doctor formed the opinion that the cause of death was cardio pulmonary arrest as a result of strangulation.

The report on Selina Nasipondi; age gave 3 years. She had multiple bruises, the neck was freely mobile. The trachea was compressed. The spinal cord was mobile. Cause of death was given as cardiopulmonary arrest due to strangulation.

Having been put on their defence both accused persons gave sworn statements as follows;

**DW1 –Bonface Juma Wasike**, a farmer. The 2<sup>nd</sup> accused is his mother. He had been in the area for a week and he knew the deceased children. They were children of his brother in law Wycliffe Wamalwa. He also knew their mother as his sister was married to Wycliffe. He did not meet with **PW3** on the material day. They bought land from Wycliffe in 1991, built in 2002 and have issues since. That in 2006 the 2<sup>nd</sup> accused's house was burnt down. He built a fresh house for her and for himself in 2010 where he moved in hardly a week before the alleged incident.

15. On the 7<sup>th</sup> July, 2010 at about 8 p.m. he heard PW1 and one Sikuku at his mother's house asking for the 2 children. He joined them at which point the two quarreled his mother. Wycliffe appeared and wanted to fight his mother and threatened them with dire consequences if the 2 kids are found dead as their land will be taken from them. Wycliffe had a mental problem.

16. The next day at about 8.00 a.m. as he was home he heard screams he moved to the scene. Wycliffe was arrested. On the said day as the police arrived and took the bodies to the mortuary.

17. On 13.7.2010 he was picked at 7.00 a.m. by A.P. police as he had been named by Wycliffe as a suspect. On 14.7.2010 he was asked to surrender one acre of their two acres to secure his release. All this time Wycliffe was still in custody. On 23<sup>rd</sup> of July while being taken to hospital for mental assessment he realized that his mother had also been arrested and was also being taken for mental assessment.

18. He asserted that he was not there when charity was taken or the other kids disappeared. In cross examination he denied having been with the 2 deceased children the day he confirmed that around the time his sister Lydia was not at home.

19. **DW2** on the her part stated that on 5.7.2010 she left her house at 2 p.m for Church where she stayed until 5 p.m. She was a neighbor to Wycliffe who had also married her daughter Lydia. On the same day at 11.00 a.m. she met Selina – Wycliffe's mother by the road side and asked about her grandchild Charity. She had wanted Selina help locate her whereabouts and Selina **PW4** said she could not intervene. She did not threaten as alleged. She went to the scene upon hearing screams the day the children were found. Wycliffe was there holding Charity. Wycliffe and herself were taken to the centre. Other people a well followed. She was arrested on 14th July. 1<sup>st</sup> accused was arrested first. She was asked for 1 acre. She refused and was put in. Wycliffe was released on 23.7.2016. She does not know

how the children died. They disappeared.

20. They bought land in 1991 but did not move in until 2001. They built and the house was burnt. Her husband build 1<sup>st</sup> and 2<sup>nd</sup> house but did not finish building but she moved in all the same. Wycliffe became mentally sick in June 2010. He still has mental problem in July. Lydia and Wycliffe stayed together but charity lived with her. In cross examination she clarified that the day she went to church was 7.7.2010 between 2 p.m & 6 p.m. She also stated that she had no issues with Selina as they lived as a family.

21. Upon closure of the defence case Counsel for the defence put in written submissions. The State relied on evidence on record.

22. In summary the defence submitted that in this case there were no eye witnesses, the evidence relied upon by the prosecution was circumstantial, however the ingredients of circumstantial evidence were not proved namely;

i. Whether the circumstances were such that an inference of guilt is established.

ii. Whether the circumstances have a definite tendency unerringly pointing towards the guilt of the accused.

iii. Whether the circumstances if taken cumulatively form a chain so complete that there is no escape from the conclusion that within human probability the crime was committed by the accused.

23. It was further submitted that it is settled law that mere suspicion cannot form a basis of inferring guilt and therefore the accused persons must be given the benefit of doubt.

24. The duty to prove the prosecution case beyond reasonable doubt squarely lies upon the prosecution see **Woolmington Vs. DPP [1935] AC at 462.**

25. None of the prosecution witness testified to have witnessed the killing of the children. In linking the murder of the children to the accused circumstantial evidence was adduced by **PW2** and **PW3**.

26. There is no doubt that the two children were found in the bush strangled. All prosecution witnesses confirmed this so did the 2 accused persons.

27. **PW2** in her evidence stated that on the day the two children disappeared she had seen the 1<sup>st</sup> accused with 5 small children and the two were amongst them. A fact denied by the 1<sup>st</sup> accused. None of the other 3 children were called to corroborate or dispute this fact. It is the evidence of **PW2** against that of the 1<sup>st</sup> accused.

**PW3** on her part stated that the 2<sup>nd</sup> accused had threatened that if her grandchild died two others would die. The 2<sup>nd</sup> accused has denied this saying that she had asked **PW3** to help bring her child back. This evidence of **PW3** was not corroborated either.

28. In **Abanga alias Onyango Vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the court of Appeal gave the test to be applied in order to test circumstantial evidence as follows;

***“It is settled law that when a ... case rests entirely on circumstantial evidence, such evidence must satisfy three tests.***

***(i). the circumstances from which the inference of guilt is sought to be drawn, must be cogent and firmly established. (ii). Those circumstances should be of a definite tendency increasingly pointing towards guilt of the accused; (iii). The circumstances taken accumulatively should***

***form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

29. The question is whether the evidence before this court fits the test. It is notable that crucial witnesses were not brought forth either as witnesses or accomplices i.e Wycliffe Wamalwa and Lydia the mother of Charity. It is very strange that Wycliffe who was at the centre of the saga leading to the children's death and who immediately after the murder was arrested and later discharged did not give evidence. The defence who for all it is worth could have kept mum indicated that he was a mental case at the time. This scenario has cast doubt in the mind of the court as to whether the accused persons herein were the actual killers.

Secondly the evidence of **PW2** and **3** fail to meet the test of circumstantial evidence as stated above. Mere suspicion is not enough to arrive at a conviction.

30. For the reasons above the court is of the view that no proper investigations were done in this matter and the evidence adduced is short of the required standard of evidence in criminal case and the accused herein must rip the benefit of the doubt. They are accordingly acquitted.

**Dated at Bungoma this 18<sup>th</sup> day of August 2016.**

**ALI-ARONI**

**JUDGE.**