



REPUBLIC OF KENYA



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**Republic v Wawire & another (Criminal Case 46 of 2019)
[2025] KEHC 9397 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 46 OF 2019**

S MBUNGI, J

JULY 1, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

BENSON WASIKE WAWIRE 1ST ACCUSED

BONIFACE SIFUNA WASIKE 2ND ACCUSED

JUDGMENT

1. The 1st and the 2nd accused persons were charged with the 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 3rd day of November 2018 at about 1500hrs at Kimatuni village of Sidikho sub-location, Sidikho location in Navakholo sub-county within Kakamega County jointly murdered one Lazarus Wanjala Wekesa.
3. The 1st and the 2nd accused persons pleaded not guilty to the charges.
4. The prosecution, to discharge the burden of proof under section 107 (1) of the *Evidence Act* called 9 witnesses in support of its case.

Summary Of The Evidence.

5. PW1, Joseph Juma, testified that on 3rd November 2018, he was in the market at 2.00 pm, he saw the 1st and the 2nd accused hold the deceased by force and put him on a motorcycle ridden by the 2nd accused person and they drove off with the deceased.
6. He claimed that he followed the accused persons across the river and that they stopped at a home belonging to a woman unknown to him. He testified that the accused seemed to have asked a question to the lady, who answered in the affirmative.



7. He avers that the 1st and the 2nd accused left the home of the woman and came back to the road and that the 1st accused took a knife and stabbed the deceased on the left ribs and the 2nd accused hit the deceased with a rungu .
8. He testified that when the deceased went numb, the 2nd accused collected shrubs and covered the deceased and lit the shrubs and branches from the sugarcane and lit them the deceased got burned. Members of public tried to stop them but they refused any attempt to help the deceased.
9. police officers were alerted when they arrived at the scene, they asked questions, took pictures and took the deceased's body to Kakamega mortuary.
10. On cross-examination, he testified that that he knew the accused persons but did not know their names since they frequented the market. He testified that on the day of the incident, which was a market day, the 2nd accused rode the red motorcycle while the deceased sat in the middle and the 1st accused on the rear end. He testified that he followed the accused persons on a different motorcycle across the river to a home.
11. He further said he saw stabbed with a Masai knife. He did not intervene, nor scream. Other onlookers raised an alarm.
12. On re-examination, he stated that he knew the accused persons who are in the boda boda business and that the 1st accused, Benson operated at Khamanda stage and that the 2nd accused Boniface at Dorofu stage and on the date of the incident, the accuseds rode on one motorcycle with the deceased which was driven by the 2nd accused and that the 1st accused was the one who stabbed the deceased.
13. PW2 Zachariah Wanjala Wasike testified that he knew PW1, a carpenter, and the 1st and 2nd accused persons, as boda boda riders operating along the Kakamega route. He also knew the deceased, a businessman and a cattle dealer at Dorofu.
14. He recalled that on 3rd November 2018 at about 1-2 pm, he witnessed a commotion between the deceased and the 1st and the 2nd accused persons, who forced the deceased into a motorcycle being ridden by the 2nd accused person. He testified that he followed the motorcycle being driven by the 2nd accused from a distance across river Nzoia and river Matoi until he saw them stop at a home. He saw the 1st accused person stab the deceased with a knife. The deceased fell, they continued beating him. The covered him with sugarcane waste and the 1st accused person lit a matchbox which was given to him by an unknown woman. The deceased got burned.
15. The area chief and his assistant came to the scene. The police officers removed the body.
16. On cross examination, he recalled that on 3.11.2018, he was at Dorofu Market when the motorcycle carrying the accused and the deceased left the market. He stated that he knew the 1st and the 2nd accused as boda boda rider for more than 10 years . They are from Kakamega Kharanda village while he was from Bungoma, Mwibale village.
17. He stated that he witnessed the deceased being beaten while he and PW1 stood 5 meters away.
18. He stated that he saw the 1st accused stab the deceased with a knife on the left side of his chest, and that he saw other people assault the deceased while he was on the ground using their fists.
19. The accused tried to force the deceased into the burning house but a woman refused them. He claimed that there were many people assaulting the deceased but he only identified the 2 accused person.



20. Pw3, William Simiyu Wekesa the brother to the deceased testified that on 3.11.2018, he was at home when he got a call from his cousin asking him if he knew what had happened to the deceased. He heard people talking about how his brother had been killed. He went and joined the police and took his brothers body to the mortuary and he identified the body during post mortem. The post-mortem report was produced as Exhibit PMFI No. 1.
21. On cross-examination, he testified that he did not witness the accused kill the deceased.
22. PW4, Moses Wanyony Wasike, testified that he knew the 1st and the 2nd accused persons since they were his neighbours and that the deceased was his cousin. The deceased was a hawker and a cattle driver, and a casual labourer.
23. He recalled that on 3.11.2018 at about 1-2 pm, he was at Dorofu market ,he saw the 1st accused hold the deceased's hand while the 2nd accused held his trousers. He asked the accused persons to release him and to report to the police if he had done anything wrong.
24. The 1st accused pushed him away. He backed off when he saw a knife on his waist they took the deceased away with a motorcycle being driven by the 2nd accused person, with the deceased seated in the middle of the motorcycle.
25. He was informed later that the deceased was killed and his body burnt. He called the deceased's brother and they reported the incident at Dorofu police post. He did not go to the scene . The deceased brother was the one who went to the scene.
26. On cross-examination, he stated that he recorded his statement and that he did not see the accused kill the deceased and that he was informed while at Dorofu, but he saw the accused person take the deceased away using a motorcycle. He said that he reported the incident at the police post that the deceased had been killed and that he saw the 1st accused hold the deceased while the 2nd accused drove the motorcycle. He also said that the motorcycle carrying the deceased was followed by another motorcycle, which he did not know the riders.
27. He said there was no need for an identification parade since he had known the 2 accused persons , fellow boda boda riders since 2010
28. On re-examination, he testified that at the scene, he saw the 2 accused persons and 2 others he did not recognize. He claimed that he reported the incident to the police 30 minutes after informing his deceased brother.
29. The first motorcycle carried the 2 accused persons and the deceased and the 2nd motorcycle carried 4 other persons.
30. PW5, Johnston Wele Wekesa, testified that the deceased was his brother. He recalled that on 3rd November 2018 he was herding cattle when he received a call from PW4 informing him that his brother was taken away by accused persons. He went to Dorofu police post to ask for protection for his brother. He was at the scene and that he saw the 2 accused person assault the deceased and covered his body to the sugar cane remains and lit a match stick burning the deceased body.
31. PW6, Eunice Nanjala Maliongovi, testified that on 3.11.2018, she was at home at kimatunyi area when she heard noises outside. They locked themselves in until 5.00 pm when they heard that her husband had been killed, although she was not at the scene and did not know the accused persons.
32. On cross-examination, she said she did not see the accused kill the deceased , she was married to the deceased for 6 months, and that she had left him since he had cut her on the head.



33. She also testified that one day the deceased went to their home and burnt his brother's house and cut their goats with a knife.
34. PW7, Beatrice Nafula testified that on 3.11.2018, she was at home but left at 9.00 am to go to church and came back between 5.00 pm and 6 pm and on her way from church she received a call from her son Emmanuel she rushed home only to be informed that the deceased, who was his son in law had come home he was attacked and killed. She did not know the accused persons.
35. On cross-examination, she testified that the deceased had married her daughter and that on one occasion, he burnt her house, he had taken one of their goats, she reported the incident to the police.
36. She stated that she did not witness the incident and did not see the accused person kill the deceased.
37. PW8 William Masinde testified that on 3.11.2018, he was at home at 2.00 pm when he heard screams from the neighbours he went to the scene, he found a body at the scene other people were also there. He called the chief who came with the assistant chief. He did not see the person who lit the body on fire, he did not see the accused persons.
38. On cross-examination, he testified that he did not see the accused kill the deceased , Beatrice was his neighbour from a different ridge.
39. PW9 Aggrey Wanjala, a retired chief, testified that on 3.11.2018, he was at home with the assistant chief when at 3.00 pm he received a call from PW8 of the nyumba kumi informing him that a resident of Bungoma south had been found at the home of Maliongoni Mayusi dead and the body burnt.
40. They went to the scene and found the AP officers had already arrived there, the police officers informed them that the deceased had been burnt. The Police took pictures and took the body to Kakamega General Hospital Mortuary. The accused persons, who were known to him, were arrested. He did not see them commit the crime.
41. The deceased had been linked to an incident of burning a home and killing a goat, claiming that that might have been the reason why he was burned.
42. PW10, the pathologist Dr. Dixon Mchana testified that on 7/11/2018, he examined the body of the deceased. He testified that the body was identified by William Simiyu and Johnston Wekesa. He filed the post-mortem report of the remains of the deceased, a 40-year-old male, approximately 5'9 feet, the body was burnt beyond recognition. He saw lacerations on the forehead, which were defensive injuries. There was no medical intervention before the death.
43. He noted the deceased had bruising on the chest and injuries on his 7th and 8th left ribs, the lungs ballooned, and had soot in the airways.
44. He found that the cause of death was multiple organ failure secondary to extensive burns at 90%, there was evidence of blunt trauma on the body. He produced the post-mortem report as P EXH 1.3.
45. On cross-examination, he confirmed the cause of death was multiple organ failure.
46. PW11, the investigating officer, recalled that on 3/11/2018 at about 1545 hours, he was at the station when he was informed, he went with some officers to the crime scene and found a big crowd a body was burning . They took photographs and retrieved the body, and took it to the mortuary.
47. They later began their investigation, recorded statements and visited the crime scene, and did a sketch plan after the accused persons had been arrested. He produced the 1st and the 2nd photographs of the body of the deceased as exhibits 1 and 2, and the accompanying certificate as exhibit 4. He claimed that



the two accused persons were identified as the ones who took the deceased from the market and took him to the crime scene, which was 50 meters away from his in-laws' house. He produced the sketch plan as Exhibit 5.

48. On cross-examination, he confirmed that there was a mob justice incident. That he did not see the accused kill the deceased, and that it was the chief who had made a report about the incident.
49. On re-examination, he stated that there had been a case against the deceased who had caused some fracas against his in-laws .
50. The accused persons when they were placed on their defence they denied having committed the offence saying they were not at the scene.

Issues For Determination

- a. Whether the 1st and the 2nd accused persons caused the death of the deceased.
 - b. Whether the act that resulted in the deceased's death was committed with malice aforethought.
51. The offence of murder is defined in section 203 of the penal code, which states that "any person who, of malice aforethought, causes death of another person by an unlawful act or omission is guilty of murder."
 52. For the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond a reasonable doubt.
 53. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows: -
 - (a) The death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
 54. The first element that the prosecution had to prove was the death of the deceased.

The death of the deceased

55. The post-mortem form PEXH.3 filled by Dr. Dixon Mchana reveals that the deceased suffered a widespread dry heat burns with varies degree at 90%, lacerations on the forehead which measured 4x2 cm and 5x1 cm, contusion of the anterior chest on the 7th and 8th ribs, hyperflated lungs with soot in the bronchial tree. The doctor formed the opinion that he died of multiple organ failure and extensive dry heat burns.
56. The body of the deceased was positively identified by the deceased brothers, PW3 and PW5.
57. There is therefore sufficient evidence adduced to prove death as a threshold issue under Section 203 of the *Penal Code*
58. The prosecution was able to establish the first element of the death of the deceased.

Proof that the accused persons committed the unlawful act which caused the death of the deceased

59. It was the evidence of PW1 that he witnessed the 1st and the 2nd accused forced the deceased into the motorcycle after a heated altercation at the market, he saw them drive off. He followed them together with PW2 who was the rider.



60. It was his testimony that he trailed the two accused at a distance until they crossed the river Matoi and stopped at a home of an unknown woman. They then took the deceased to the road, he saw the 1st accused stab deceased with a knife. The 2nd accused beat him with a rungu repeatedly and later took sugarcane remains and set the deceased a blaze.
61. PW1's evidence was further supported by PW2, the boda boda rider, who organised the accused persons for they were in the same transport business.
62. He followed them together with PW1 and narrated how the 1st accused person stabbed the deceased and how they took sugarcane remains and set the deceased on fire.
63. The testimony of the 1st and the 2nd prosecution witness was supported by the post-mortem report produced by the pathologist doctor marked P, exhibit 3, which established the death of the deceased was as a result of multiple organ failure, lacerations, contusions on the anterior chest, as well as extensive dry heat burns at 90%.
64. It is my view that the identity of the 1st and the 2nd accused persons as the people who stabbed and burnt the deceased was established beyond a reasonable doubt through recognition by PW1 and PW2.
65. All these witnesses not only recognized the accused persons but were eyewitnesses to the quarrel and struggle between the deceased and the accused persons; they also witnessed the stabbing of the deceased by the accused persons.

Malice aforethought

66. The offence of murder is complete when “malice aforethought” is established. Section 206 of the [Penal Code](#). The Section defines malice aforethought as the intentional killing of the deceased or doing grievous harm to any person, whether that person is the person killed or not, or knowledge that the act or omission will result in the death of a human being.
67. Malice aforethought describes the mens rea or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If ‘malice aforethought’ is lacking the unlawful homicide will be manslaughter.
68. Section 206 of the [Penal Code](#) gives the instances when malice aforethought is established. It states that: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



69. In *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, Eastern Court of Appeal observed:
- “In determining the existence or nonexistence of malice, one has to look at the facts proving the weapon used, how it is used, and the part of the body injured.”
70. In the case of *Hyam v DPP* {1974} A.C., the Court held inter alia that:
- “Malice aforethought in the crime of murder is established by proof beyond a reasonable doubt when, during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious bodily harm.”
76. In the case of *Daniel Muthee v Republic Criminal Appeal No. 218 of 2005 (UR) Bosire, O’kubasu and Onyango Otieno JJA.*, while considering what constitutes malice aforethought, observed as follows:
- “When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan similarly, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”
- a. In the case of *Nzuki v Republic* [1993] KLR 171, the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.
 - a. Intention to cause death
 - b. Intention to cause grievous bodily harm
 - c. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without a lawful excuse.
76. It is clear from the above definition of malice that there are three broad elements of ‘malice aforethought’. They are express, implied, and constructive malice.
77. Express malice is proved when it is shown that an accused person intended to kill, while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.
78. In the case of *Cunliffe v Goodman* 1950 1 ALL ER 724 Asquith L.J in regard to the definition of intention in homicide offences: “An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition”
76. This is the right approach when it comes to manifestation of malice aforethought as defined under section 206 (a) and (b) of the penal code.
76. Where the circumstances of the case demonstrate that in carrying out the unlawful act, the accused acted with full knowledge that the act was highly capable of causing death or grievous harm, malice aforethought should be inferred.



77. In this particular case, the 1st and 2nd accused were positively identified by PW1 and PW2 when they saw the 1st Accused stab the Deceased with a Masai Knife and 2nd Accused hit him with a rungu and both placed sugarcane remains on the body of the deceased and 1st Accused lit a match stick from a matchbox which was handed to them by the unknown woman, setting the deceased on fire. This showed express malice on the part of accused persons and intention to cause the death of the deceased since they knew that by stabbing the deceased and setting him on fire, he would die, and it can be inferred that their intention was to kill the deceased. For they knew their act would cause death or grievous harm to the deceased.
78. In the circumstances, I am persuaded beyond a reasonable doubt that the prosecution also proved this limb of the presence of malice aforethought on the part of the accused persons beyond a reasonable doubt.
79. All in all, the prosecution proved its case beyond a reasonable doubt against the accused persons. I therefore find them guilty as charged, and accordingly convicted them for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 Laws of Kenya.
80. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF JULY, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Agong’a

Ms Shaka holding brief for Mukavale J for Accused present online.

Ms Osoro for the DPP present online.

Accused present online.

