



**Republic v Wabwoba (Criminal Case 21 of 2020)
[2024] KEHC 182 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 21 OF 2020**

DK KEMEL, J

JANUARY 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ALVIN WABWOBA ACCUSED

JUDGMENT

1. The accused herein Alvin Wabwoba has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The Particulars are that on the 9th May, 2020 at Moding area Mbakalo Location in Bungoma North Sub- County within Bungoma County jointly with another not before court murdered Emmanuel Nandepelwa Chepkwesi.
2. The accused pleaded not guilty to the charge. The Prosecution called nine witnesses in support of its case. PW1 was Kevin Amutali Kisaka who testified that on the material date he was riding his motor cycle and on reaching Moding road junction, he met a large crowd and saw the deceased herein lying on the ground and bleeding profusely. He stated that the deceased was a fellow motorcycle operator in the area. He added that he organized for the deceased to be rushed to hospital and that the following day he learnt that he had passed on. On cross examination, he stated that he was not at the scene and that he could not tell if any grudge existed between accused and deceased.
3. Anthony Juma (PW2) testified that he accompanied the deceased to check on his sugarcane and later on reaching Moding Junction, the accused and one Brian emerged from their gate and attacked the deceased. The accused's companion Brian cut the deceased with a panga and when the deceased fell down, the accused used a jembe (hoe) stick and hit him with it. He stated that he raised alarm attracting members of the public. He teamed up with Kevin (PW1) and assisted the deceased to hospital for treatment. On cross examination, he maintained that the accused and one Brian caused the death of the deceased. On re- examination, he stated that there were no other people when the deceased was attacked.



4. Eric Simiyu (PW3) testified that he was heading home when he heard somebody shouting for help. He rushed to the scene and found the deceased on the ground with an injury on the head. He organized for the deceased to be taken to hospital while he teamed up with the villagers in pursuit of the assailants. They managed to apprehend one Brian who had bloodstains on his hands and that irate villagers attacked him and who later passed on while undergoing treatment. He confirmed both on cross examination and re- examination that he did not witness the incident.
5. Humphrey Chesoli Chikani (PW4) stated that he was at his home due to curfew which was then in place when he heard noise. He rushed there and saw the accused herein assaulting the deceased who was then on the ground and that he was using a jembe (hoe) to hit him. He together with Anthony Juma assisted the deceased to hospital. On cross examination, he stated that he confronted the assailants as to why they were attacking the deceased and further added that he was the first person to arrive at the scene.
6. John Katee Keya (PW5) testified that he is a clinical Officer at Kimilili Sub County Hospital and that he attended to the deceased who had sustained injuries on the head. He added that at that time he was the proprietor of Kibisi Medical Services and that he had given the deceased first aid and referred him to Lugulu Mission Hospital but that he passed on before he could be taken there. He produced the treatment notes as exhibit one. He maintained that he did not know the cause of death.
7. Dr Reuben Nyongesa Kere (PW6) testified that he conducted a post mortem on the body of the deceased herein on the 15.5.2020 at Lugulu Mission Hospital. He noted cut wounds on the left side of the head and that there were three skull fractures as well as bleeding in the Brian. He formed the opinion that the cause of death was critical head injury due to physical assault arising from blunt and sharp objects. He produced the report as exhibit No. 2. On cross examination, he stated the injuries were due to assault as there were wounds on both arms confirming that the deceased was defending himself. He reiterated that the injuries could not have been sustained through a fall or accident.
8. George Mparayapili (PW7) testified that on 9.5.2020 he was on his way when he heard noise. He checked and saw the accused herein and one Brian who were in possession of a jembe and panga respectively. He also saw the deceased lying on the ground bleeding from the head and that the accused was then hitting him with a jembe. He stated that the two assailants fled on seeing him approach. He added that the deceased was assisted to hospital by Anthony Chesoli and Eric Wattimah and that he learnt that the deceased passed on while in hospital. On cross -examination, he stated that he had purchased land from an uncle to the assailants and that he was their neighbour and had no grudges with them. On re- examination, he stated that he saw the accused assaulting the deceased with a jembe.
9. Ronald Wanjala Simiyu (PW8) testified that on learning of the incident, he rushed to Kibisi Dispensary and found the deceased who was then unconscious and that they rushed him to Lugulu Mission Hospital but was pronounced dead on arrival. He witnessed the post mortem conducted on 15.5.2020 where he noticed fractures of the skull. On cross examination, he stated that he did not witness the incident.
10. No. xxxx PC Felix Oduor Ojowi (PW9) was the investigating officer. He stated that he established that the accused and one Brian had attacked the deceased while armed with a jembe and panga respectively. He later recorded statements and had the accused who was already in custody charged with the offence herein. On cross examination , he stated that he did not recover the assault weapons and that he did not see bloodstains at the scene.
11. Upon the accused being placed on his defence, he tendered a sworn testimony. He testified that the deceased was their neighbour. He stated that on 9.5.2020 he was at his grandfather's farm when certain



known person came and led him to the police station. He maintained that he was not at the scene of the crime as alleged and that the evidence of PW1 should be rejected since he was meant to dig their family farm but had failed to do so even after being paid.

On cross examination, he stated that he had not disagreed with PW1 over refund of Kshs. 1500/- for digging their farm. He also agreed that PW2 had been his friend with whom he had not differed before. He also admitted that he had not disagreed with other witnesses.

Analysis and determination

12. I have considered the evidence tendered by both prosecution and defence as well as submissions filed herein. It is trite law that the burden to prove all the ingredients of the offence herein falls on the prosecution in all cases save for a few statutory offences. The standard of proof in all criminal cases is that of beyond any reasonable doubt. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. See *Miller v Minister of Pensions* (1947) ALL ER 372. In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused.
13. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice afore thought either directly or indirectly by the accused.
14. As regards the fact of death, there is a post mortem report produced as exhibit No. 2 by Dr. Reuben Nyongesa Kere (PW6) who conducted the autopsy and formed the opinion that the cause of death was critical head injury due to physical assault arising from blunt and sharp objects. This ingredient of the offence was duly proved by the prosecution.
15. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* (2016) eKLR - that referred to the case of *Guzambizi Wesonga v Republic* (19483 15 EACA 65 where it was held:

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence or in defence of property”.
16. The deceased herein was found to have died from critical head injury due to physical assault from both blunt and sharp objects. It was upon the prosecution to prove that the accused assaulted the deceased and that he had malice aforethought and therefore not excusable. Further, the prosecution was under obligation to adduce evidence which placed the accused at the scene of crime as the assailant. The injuries as disclosed in the post mortem report and the evidence of the pathologist left no doubt that the perpetrator intended the said injuries to lead to the death of the deceased.
17. The evidence of PW2, PW4 and PW7 placed the accused at the scene of crime. PW2 who was in company of the deceased stated that the accused and one Brian assaulted the deceased with a jembe and panga respectively. He added that he was joined by PW1, PW4, and PW7 who managed to raise alarm attracting members of public who managed to apprehend the accused while they viciously attacked Brian who was accused's accomplice and who died afterwards. It transpired from the evidence that the



accused and his accomplice had been laying in wait for the deceased since no sooner had the deceased approached their gate than the assailants sprung out of their compound and attacked him viciously even in the company of PW2. The two attackers did not even speak with the deceased when they confronted him. It is thus quite clear that the assailants had malice aforethought as it appeared that they had planned to eliminate the deceased. Indeed, there was no evidence that an argument arose between the deceased and the assailants. The kind of injuries sustained by the deceased left no doubt that the assailants intended those injuries to cause the death. It is instructive that as soon as the deceased fell down after being cut with a panga by accused's accomplice, the accused herein went ahead to viciously hit the deceased who was already on the ground by use of a jembe (hoe). It is obvious that the accused's mission was to finish off the deceased. Again, both the accused and his accomplice were apprehended by members of public immediately after the incident and that the accused's accomplice was viciously attacked by the irate mob and who died afterwards while the accused was escorted to the police station. The incident took place around 7.00 pm before pitch darkness had set in and thus, the witnesses had no difficulty in identifying the assailants. PW7 stated that he is a neighbour to the accused herein as he had purchased land from an uncle of the accused and that accused was well known to him. The accused in his defence admitted on cross examination that he had not differed with PW1, PW2, as well as the rest of the witnesses. Hence, i find the defence of alibi fronted by the accused to be unworthy of belief and thus i must reject it. I am satisfied from the evidence adduced by the prosecution that the accused herein was squarely placed at the scene of crime. He was arrested within the vicinity of the crime and handed over to the police station while his accomplice was viciously attacked by the irate villagers and who died soon afterwards. I have no doubt in my mind that the accused and the one who was later killed by an irate mob are the persons who caused the death of the deceased. The two had lay in wait for the deceased to pass by their gate and then sprung up a surprise and killed him. The reason behind the murder is within the knowledge of the accused and his deceased accomplice. The prosecution has proved that the two had malice a forethought and that they actualized it when the deceased passed by their gate on the material date.

18. In the result, it is my finding that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused Alvin Wabwoba guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). He is convicted accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JANUARY 2024

D. KEMEI,

JUDGE.

In the presence of

Alvin Wabwoba Accused

Olonyi/Wakoli for Accused

Miss Kibet for Prosecution

Kizito Court Assistant

