



**Republic v Nyongesa & 2 others (Criminal Case E026 of 2021)  
[2024] KEHC 5311 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5311 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E026 OF 2021**

**DK KEMEL, J**

**MAY 17, 2024**

**BETWEEN**

**REPLIC ..... PROSECUTOR**

**AND**

**ISAAC WEKESA NYONGESA ALIAS NDOMBI ..... 1<sup>ST</sup> ACCUSED**

**EDWARD SAWA WANJALA ..... 2<sup>ND</sup> ACCUSED**

**ISAAC NYONGESA ANTHONY ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein Isaac Wekesa Nyongesa alias Ndombi, Edward Sawa Wanjala and Isaac Nyongesa Anthony were jointly charged with two counts of murder contrary to section 203 as read with section and 204 of the *Penal Code*. The particulars of the first count are that on the 30<sup>th</sup> day of March, 2021 at Mangoli Village, Makuselwa Sub-Location, Namarambi Location in Bungoma East Sub-County within Bungoma County jointly murdered Wilfred Walukhu Wekesa alias Zakayo Chelovani.
2. The particulars of the second count are that on the 30<sup>th</sup> day of March, 2021 at Mangoli Village, Makuselwa Sub-Location, Namarambi Location in Bungoma East Sub-County within Bungoma County jointly murdered James Wekesa Barasa.
3. The Prosecution called eight (8) witnesses in support of its case. PW1 was Dr. Edward Bilengwa who testified in respect of an autopsy that was carried out on the body of the first victim Wilfred Walukhu Wekesa, which revealed that the deceased had cut wounds on the legs and hands. He noted that the head had deformation of some sort and that the injuries on the hands appeared to have been sustained while acting in self defence. He added that the body was dissected and which revealed that his ribs (5<sup>th</sup> rib) had been fractured while the head had a depressed skull fracture, linear skull fracture and a left sided subdural hematoma. He formed the opinion that the cause of death was severe head injury due



to subdural hematoma caused by a blunt object force trauma and that the injuries were caused by an external force. He tendered the post mortem report as exhibit 1

He testified also in respect of an autopsy that was carried out on the second victim James Wekesa Barasa, which revealed deep cut wounds on the right buttock, bruises on the left hand, neck, face and legs. He also added that the lower jaw and chest bones were fractured. He also stated that the neck bone had been broken as well as the back of his skull. He also pointed out that the deceased had internal bleeding and that the left psychometric bone was depressed. He formed the opinion that the cause of death was severe external and internal hemorrhage due to cut wounds on the gluteal as well as skull fracture. The post mortem report was tendered as exhibit 2.

On cross examination, he testified that it was not true that the deceased persons were lynched and burnt by a mob.

4. Caroline Naliaka Barasa (PW2), the mother to the second victim James Wekesa Barasa, testified that on 30<sup>th</sup> March, 2021 at around 3.00 pm, she heard screams and later saw a large crowd advancing towards the house of her son and who broke down his door and on failing to find him they left. She testified that her son suddenly arrived home but before setting foot on the compound, one by the name Anthony Wekesa, (3<sup>rd</sup> accused herein), got hold of him and dragged him away as the large crowd kept on making noise. On rushing towards the crowd, she found her son on the ground having been viciously slashed. The crowd walked away with their pangas as the deceased cried up to her for help. She stated that the 1<sup>st</sup> accused herein had a panga together with others and whose clothes were bloodstained. She stated that the deceased had a cut on his neck. That she saw the 1<sup>st</sup> accused slashing her son on the buttocks. She told the court that she was present when the post mortem was being conducted on the deceased's body. She testified that the 2<sup>nd</sup> accused stood next to the 1<sup>st</sup> accused at the scene of crime while the 3<sup>rd</sup> accused is the one who seized her son and dragged him to the scene.

On cross examination, she stated that she knows the accused persons herein very well and denied claims that they were members of the nyumba kumi vigilante groups and were trying to prevent the irate crowd from harming the deceased. She also confirmed that the first victim had already been killed before they came for her son. She denied that the crowd other than the accused persons were responsible for her son's death. She denied that the accused persons are being blamed for nothing.

On re-examination, she stated that she did not know that the accused persons were members of Nyumba Kumi. She also stated that she had known all the accused persons before and denied that they had gone to assist the deceased.

5. Ferdinard Mulama Barasa (PW3), testified that the second victim James Wekesa Barasa had been his brother. He told the court that the accused persons were well known to him. He recalled on 30<sup>th</sup> March, 2021 at around 3.00 pm while heading home from school he heard people singing traditional songs and on approaching the crowd he noticed that they were heading towards his home. He stated that they informed his mother (PW2) that the deceased would no longer enjoy the fruits of theft. He stated that he saw the 1<sup>st</sup> accused and one Evans Karewi sharpening their pangas and that they broke down the deceased's door. He saw another crowd nearby had assaulted one Zakayo and that the 1<sup>st</sup> accused herein cut the said Zakayo with a panga but he managed to escape into a sugar cane plantation nearby. They pursued him while threatening to burn down the plantation and that Zakayo came out of it only for the crowd to stone him viciously despite his pleas for mercy. He later saw his deceased brother being led by hand toward the crowd by the 3<sup>rd</sup> accused herein and that one Evans Karewi pointed him out as one of those being sought. He stated that the crowd indicated that his deceased brother was not a thief only for the 1<sup>st</sup> accused person to dispute it and joined one Evans Karewi and Bernard Wanyama who hit his deceased brother with a stick on the neck causing him to fall down and that the 1<sup>st</sup> accused cut



him on the buttocks with a panga. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons hit him with stones as they claimed that they wanted to finish him. He added that his deceased brother managed to regain consciousness only for the 1<sup>st</sup> accused to hit him with the blunt side of a panga while the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons hit him once with a stick killing him.

On cross-examination, he stated that he did not know whether the accused persons were members of Nyumba Kumi community policing in the area and that he denied a suggestion that the three accused persons were trying to save the victims.

6. Elizabeth Asai Odera (PW4), testified that on 30<sup>th</sup> March, 2021 at around 1.00 pm a large group of people came to her compound demanding the whereabouts of her husband Zakayo, the first victim herein. They included Wekesa Ndombi, Wanjala, Anthony Nyongesa and one John Mabuko. It was the 2<sup>nd</sup> accused who was making enquires of the whereabouts of her husband. She stated that she informed them that her husband had stepped out shortly having suspected they bore no good intentions. She added that the crowd was armed with pangas and clubs and that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were armed with clubs while the 1<sup>st</sup> accused had a panga. They spotted her husband and ordered him to accompany them in search of a stolen goat. She stated that they were assaulting her husband as they walked away. She stated that she saw the 2<sup>nd</sup> accused hitting him and who approached her and demanding for her husband's phone to which she gave him and further demanded for his M-pesa pin to which she declined. She added that her husband was explaining to them that he had not stolen any goat but the crowd kept ordering him to move. The 1<sup>st</sup> accused herein cut the deceased on the head with a panga and the 2<sup>nd</sup> accused was holding the deceased and preventing him from escaping. The 3<sup>rd</sup> accused was hitting the deceased on all parts of his body. She stated that all the accused persons are well known to her.

On cross-examination, she stated that she did not know that the accused persons are clan elders in the area. She also denied that the accused persons were trying to protect her husband from the irate mob. She maintained that it was not the irate mob that killed her husband but the three accused persons herein.

On re-examination, she stated that the villagers were claiming that her husband had escaped and that the said irate mob first stormed her compound before pursuing her husband.

7. Daniel James Sasaka Wanda (PW5), testified that on 30<sup>th</sup> March, 2021 at around 1.15 pm while visiting a neighbour, he heard screams and rushed towards the noise. On arriving at the home of one Mutonyi Mauyo where the deceased Zakayo had taken refuge he saw a large crowd with weapons. He saw the 1<sup>st</sup> accused herein armed with a panga while the 2<sup>nd</sup> had a club and the 3<sup>rd</sup> accused had a club and metal rod. There was one John Mangoli who is not before the court. He learned that the deceased was alleged to have stolen a goat. He confronted the 2<sup>nd</sup> and 3<sup>rd</sup> accused person on whether the alleged stolen goat had been recovered only for the 2<sup>nd</sup> accused to push him away and who jumped on the roof of the house and managed to get the deceased whom he cut on the head. The three accused persons herein together with one John Mangoli removed the deceased from the house he had been hiding in and took him away. He told the court that he saw 1<sup>st</sup> accused herein chopping off the legs of the deceased. There was also another suspect by the name Javan whose buttocks had been cut. He told the court that the three accused persons herein and one John Mangoli viciously attacked the deceased persons herein. He stated that both deceased persons and the accused persons herein were well known to him.

On cross-examination, he stated that Mutonyi Mauyo witnessed the incident and further confirmed that the first victim had was his cousin. He also confirmed that his witness statement indicates that he reached the scene when the victims had been killed and that he agreed with the defence counsel that the statement does not indicate that he saw the accused persons assaulting the alleged suspects.



On re-examination, he confirmed seeing the accused persons injuring the victims herein.

8. Wilberforce Malukhu Chesula (PW6), testified that on 30th March, 2021 at 2.00 pm he received a call notifying him that his brother Wilfred Zakayo had been chased by a mob and had taken refuge at a certain house but had been flushed out and taken towards Mukuselwa area. He rushed there and found a large crowd who included the 1st accused herein standing with a panga and a club. He also saw the 2<sup>nd</sup> accused and one John Mangoli armed with clubs. The 3<sup>rd</sup> accused had a metal rod. He saw his brother, Wilfred Wekesa Walukhu Zakayo lying on the ground with both wrists, knees and head cut and one John Mangoli claiming that they had resolved the issue of goat theft in the area. He knew all the accused persons herein before.

On cross-examination, he confirmed that he did not witness the incident but that Paul Kakai did so and who alerted him about it. He stated that the irate mob numbered about one hundred and that he did not know the positions the accused persons hold in the village.

9. Namusasi Ingwe Sindani (PW7), testified that on 30<sup>th</sup> March, 2021 he heard noise coming from the house of Mauyo and on rushing there he found a large crowd of people armed with pangas and metal bars. He was able to identify eight of them. The crowd claimed that somebody who had stolen a goat was hiding in one of the houses of Mauyo. The 1<sup>st</sup> accused was on top of the roof busy cutting the iron sheet in a bid to flush out the alleged thief. The 3<sup>rd</sup> accused was waiting near the door. He pleaded with the crowd not to kill the man. The crowd managed to flush out the man who had a cut wound on the head which had been inflicted by the 1<sup>st</sup> accused person. The man emerged and the three accused persons herein and the crowd attacked him. Later they went in search of another alleged suspect called Javan and who emerged from some bushes and was attacked as well. The 1<sup>st</sup> accused person attacked him and proceeded to the house of Javan in search of the stolen goat. The 1<sup>st</sup> accused used a panga to cut the deceased persons viciously while the 3<sup>rd</sup> accused used his metal bar but the 2<sup>nd</sup> accused feared the deceased relatives.

On cross-examination, he stated that the other suspects namely John Mapuku, Luka Munialo and Wanyama were all in the village despite having been arrested. He also stated that the crowd numbered about two hundred. He also denied the defence suggestion that the accused persons were trying to prevent the irate mob from attacking the victims.

10. No. 236144 IP Patrick Wafula (PW8), testified that on 30<sup>th</sup> March, 2021 he visited the scene of crime where he found the body of one Wilfred Juma Walukhu and that of another victim James Barasa who was still alive then but who passed on while undergoing treatment. After investigations and gathering evidence the three accused persons herein were arrested and charged.

On cross-examination, he stated that he did not know if the accused persons are members of Nyumba Kumi. He also confirmed that the accused persons recorded statements in which they denied being involved in the crimes. He also stated that villagers from Wakhonyi village were pursuing stolen goats. He also admitted that the police did not trace the lady whose goats had allegedly been stolen. He also stated that he opened an inquiry file but the DPP directed that the police charge the three suspects who had all been in their homes during investigations.

On re-examination, he stated that the police had opened an inquiry file over the matter but the DPP directed that they prefer charges against the three accused persons. He also indicated that the police had not yet managed to trace the names of the stolen goat's owner. He finally state that the accused persons are not members of Nyumba Kumi.



11. The Court upon analyzing the evidence, established that the Prosecution had established a prima facie case against the accused persons who were thus placed on their defence. The accused persons opted to tender sworn evidence.
12. Isaac Wekesa Nyongesa (DW1), the 1<sup>st</sup> accused herein, testified that he is a member of the community policing committee in his area and also a farmer. *Vide* DEXH1 he produced in Court a letter dated 22<sup>nd</sup> August 2022 from the assistant chief regarding his duties as a member of the community policing committee. According to him, the allegations against him are false as he recalls on 30<sup>th</sup> March 2021 he went to purchase items from the market and while there he received a call from a fellow policing member, John Mabuko, who informed him that a stolen goat had been recovered somewhere. He informed him that he was away and that he should reach out to the other members but he would join them later on. He proceeded to the home of one mzee Wamutete where he found a large crowd almost 1000 in number. He testified that he did not see the two deceased persons walking about but he saw their bodies being placed into a vehicle. He testified that the 1<sup>st</sup> victim was already dead while the 2<sup>nd</sup> was covered with clothes. He told the Court that he did not witness the crowd assaulting the deceased persons and that they tried to prevent villagers from killing the persons but that the tables turned on them. He told the Court that PW5 and the mother of the 2<sup>nd</sup> victim promised to fix them for failing to protect the deceased persons.
13. On cross-examination, he told the Court that he was appointed a member of the community policing in the year 2020 and that his duty was to resolve disputed within the village and then hand over to the Mukasa to take over. He affirmed that he was with the Mukasa, Robert Ekesa, in the morning prior to heading to Misikhu Market and that he was present when the bodies of the deceased persons were loaded onto the police vehicle. He testified that the witnesses who testified to seeing him at the scene were correct and that he also so the 3<sup>rd</sup> accused person but he did not see one Chikarau and mother to the 1<sup>st</sup> victim. He testified that he knows PPW6 well as he is a village mate and he did not threaten to fix him in this particular case. He affirmed that he knows PW7 as that they have no grudges. He testified that the Mukasa only directed them to investigate the theft of the goat.
14. On re-examination, he told the Court that they took the law onto their own hands and that PW6 and PW7 had issued threats to fix him in this case.
15. DW2 was Edward Sawa Wanjala who testified that he is the 2<sup>nd</sup> accused herein and a peasant farmer. He told the Court that he is the former chairman of the community policing committee and proceeded to produce a letter in Court dated 4<sup>th</sup> March 2022 as DEXH2. According to him, he became a chairman of the community policing committee in January 2021 and that the charges herein against him are false. He recalled on 30<sup>th</sup> March 2021 at 11.00 am he received a call from a village elder, Robert Ekesa, who told him to join him as there were people looking for a stolen goat. He proceeded to his place and on the way he met the Mukasa with a crowd of 100 villagers. The said Robert Ekesa, informed him that it had been claimed that the stolen goat was at the home of the 1<sup>st</sup> victim herein. That they found the wife of the 1<sup>st</sup> victim and informed her of the reason of their visit. She allowed them into her house in search of her husband. Robert Ekesa entered the house while he stood outside but they could not trace the 1<sup>st</sup> victim. They were not able to trace the 1<sup>st</sup> victim. Later in the day, a woman raised an alarm indicating that there was someone who was hiding inside a sugar plantation. The crowd rushed there and that the 1<sup>st</sup> victim was flushed out but he managed to seek refuge inside a home of one John Mutonyi. A large crowd accompanying the lady pelted the house with stones and that the 1<sup>st</sup> victim called out to him pleading with the villagers to spare his life as he was ready to lead them to where he had hidden the stolen goat. He relayed the message to Robert Ekesa that the stolen goat was at the home of one Barasa. He testified that the villagers accused him of sheltering thieves as he tried to prevent them from



harming the 1<sup>st</sup> victim. The villagers broke down the door with the intention of flushing out the 1<sup>st</sup> victim leading them into the house of James Barasa where the stolen goat was kept. He testified that he was overpowered as they headed to the home of the 2<sup>nd</sup> victim making him to call the assistant chief requesting his help. The 1<sup>st</sup> victim managed to slip away by entering a sugar plantation and on following the villagers, he found the 1<sup>st</sup> victim had been killed while at the farm of John Mutete. The chief and the police arrived and placed the body of the deceased onto the police vehicle and that the villagers came claiming that the 2<sup>nd</sup> victim had also been killed. He testified that his intention was to save the victims.

On cross-examination, he told the Court they recovered the goat and could have handed it over to the Mukasa. He told the Court that they were about 10 members of the community policing committee but only three were arrested. He testified that the family members of the victims blamed them for the incident and that all the witnesses for the prosecution are relatives of the deceased herein. He testified that the incident occurred during the day and that the villagers knew the 1<sup>st</sup> victim as a habitual thief but never availed any evidence. He testified that the village elders led the villagers to homes of the victims in search of the stolen goat and insisted that their goal was to safeguard the property of the villagers and not a source of their problems.

On cross-examination by the Court, he told the Court that the goat was never recovered.

On re-examination, he told the Court that he had ten members in his team and that he did not see them at the scene. He reiterated that he never led the villagers to the homes of the victims.

16. DW3 was Isaac Nyongesa Anthony, who told the Court that he is the 3<sup>rd</sup> accused herein and that he served as a member of the community policing committee. He produced in Court a letter dated 4<sup>th</sup> March 2022 by the assistant chief as DEXH3. He testified that the charges he is facing in this Court are false. He recalled that on 3<sup>rd</sup> March 2021 at around 2.00 pm while at home he received a call from the chairman of the community policing committee, John Mabuko, who alerted him to rush to the scene where some people had attacked thieves. He rushed there and found the police had arrived as well as the area assistant chief with about 100 villagers. The first victim had already been placed in the police vehicle. He counted two victims that were fatally wounded and that the villagers knew him as a member of the community policing committee. He testified that his chairman was already at the scene and that he briefed him on what had occurred. He testified that he did not see the alleged stolen goat and that the evidence by the prosecution witnesses herein is false.

On cross-examination, he told the Court that John Mabuko was at the scene and that he arrived at the scene after the incident had occurred. He testified that he did not know the 1<sup>st</sup> victim or members of his family. He later testified that he knew the 1<sup>st</sup> victim who hailed from his village and that it was the witnesses who blamed him.

On re-examination, he told the Court that he knew the 2<sup>nd</sup> victim as a neighbour and that the witnesses are from the family of the 2<sup>nd</sup> victim who threatened to fix him.

17. DW4 was Wanjala Simiyu, who testified that he knows all the accused persons herein. He recalled on 30<sup>th</sup> March 2021 at 10.00-1.00 am he was at the home of the 2<sup>nd</sup> accused person when a village elder by the name of Robert rang him on the phone requesting him to proceed to a certain village where a goat had been stolen. The 2<sup>nd</sup> accused person requested him to accompany him and on their way they spotted a huge crowd of more than 100 people heading in the same direction of the deceased's home. On arriving there, they found the deceased's wife and the deceased had escaped into the sugarcane plantation behind their house and the crowd was in pursuit of him. The deceased emerged from their only to seek refuge inside the home of one John Mutonyi. He proceeded there with the 2<sup>nd</sup> accused person as the whole village thronged the scene. The deceased pleaded with the 2<sup>nd</sup> accused person to



assist in dissuading the irate mob from killing him as the stolen a goat was still available. The deceased trusted in the 2<sup>nd</sup> accused person as he was a clan elder but the irate mob gained access to the house he was hiding and flushed him out while attacking him. The 1<sup>st</sup> and 3<sup>rd</sup> accused persons were not at the scene. The 1<sup>st</sup> deceased person promised to lead them to the home of the 2<sup>nd</sup> deceased person, James Barasa, where he had kept the stolen goat. Th 2<sup>nd</sup> accused person tried to protect the 1<sup>st</sup> deceased person but was overpowered by the mob as he was stoned at. They proceeded to the home of the 2<sup>nd</sup> deceased person but did not find him. At that moment the 1<sup>st</sup> deceased person managed to slip away taking off but was pursued by the mob. They followed them afterwards only to find the body of the 1<sup>st</sup> deceased person lying on the ground. He saw the body of the 2<sup>nd</sup> deceased person when the Police came to pick it up. The 2<sup>nd</sup> accused person helped the chief and the police to load the bodies onto the police vehicle. At that time the crowd had swelled to about a thousand in number and that it was false that the 2<sup>nd</sup> accused person participated in the assault of the deceased persons. He testified that he only saw the 1<sup>st</sup> and 3<sup>rd</sup> accused persons after the police had collected the bodies.

On cross-examination, he told the Court that he accompanied the 2<sup>nd</sup> accused person to meet up with his fellow clan elder, Robert Ekesa. He told the Court that the 2<sup>nd</sup> accused person had blood stains on his clothes due to his attempt to shield and protect the 1<sup>st</sup> deceased from the attack meted out on him by the mob and that the 1<sup>st</sup> deceased person shouted loudly requesting the 2<sup>nd</sup> accused person to plead with the irate mob. He testified that the door of John Mutonyi's house was broken down by the irate mob and that the 2<sup>nd</sup> accused person is the chairman of the clan elders. He insisted that he only saw the 1<sup>st</sup> and 3<sup>rd</sup> accused persons after the incident, and that he could not tell if the 1<sup>st</sup> and 3<sup>rd</sup> accused persons were present at the scene. He told the Court that he was with the 2<sup>nd</sup> accused person throughout the incident and if he left it was only briefly. He insisted that he was not defending his step-brother and that the irate mob was from the other village. He told the Court that he was only focused on the 2<sup>nd</sup> accused person and the 1<sup>st</sup> deceased and that there was a large crowd of villagers.

On re-examination, he told the Court that he heard the 1<sup>st</sup> deceased person calling onto the 2<sup>nd</sup> accused person and that the clan elder, Robert Ekesa, was present at the home of John Mutonyi.

18. At the close of the defence case, the court directed that submissions be filed and exchanged by the parties.
19. Mr. Robert Wamalwa, counsel for the accused vide submissions dated 4<sup>th</sup> April, 2024, submitted that the prosecution has failed to prove its case against the accused person beyond reasonable doubt as per the required standard. It was also submitted that there is no other material evidence to corroborate the evidence adduced before the court by the prosecution witnesses and hence the accused persons cannot be held liable on unreliable evidence that has no basis and failure to involve the evidence of an expert to prove the offence and which failed to meet the dictates under section 48 and 50 of the *Evidence Act*. It was the contention of counsel that the contradictions in the evidence of the Prosecution witnesses cannot be cured by section 382 of the *Criminal Procedure Code*. Counsel further submitted that the prosecution witnesses stated that there were very many eye witnesses amounting to 1000 people but chose to only rely on the evidence of witnesses who happened to be relatives of the deceased persons without calling for independent witnesses. He further submitted that the 1<sup>st</sup> accused person raised an alibi that behooved the prosecution to rebut the evidence but no such rebuttal was fronted. He urged this Court to acquit the accused persons as no such evidence was availed by the prosecution. Counsel relied on the following case laws:

- i. *Republic versus Patrick Sila Kyule* (2020) eKLR.
- ii. *JOO versus Republic* (2015) eKLR.



- iii. [\*Ndugu Kimanji versus Republic\*](#) (1969) eKLR 282.
  - iv. [\*Richard Munene versus Republic\*](#) (2018) eKLR.
20. Counsel for the prosecution relied on the evidence on record.
21. Having considered the evidence on record and the submissions of the accused persons, the issue for determination is whether the prosecution proved its case to the required standard of proof. It is trite that the burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all instances save for a few statutory offences. 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 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 person.
22. If there is a strong doubt as to the guilt of the accused, it should be resolved in his favour. Hence, an accused must not be convicted because he has put up a weak defence but rather that the prosecution's case strongly incriminates him and that there is no other hypothesis than the fact that the accused person committed the alleged crime. See *Woolmington V DPP* (1935) AC 462.
23. The offence of murder is defined by section 203 of the [\*Penal Code\*](#) as:
- “Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
- Section 206 of the Penal Code provides as follows:
- “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 actually 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.”
24. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 206 of the [\*Penal Code\*](#) are as follows:
- i. That the deceased is dead;
  - ii. That the death was caused unlawfully;
  - iii. That there was malice aforethought; and



- iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

The post mortem report on the examination of the body of the deceased was duly produced as no objection was raised by the defence. Dr. Edward Bilengwa (PW1) who conducted the post mortem of the 1<sup>st</sup> victim Wilfred Walukhu Wekesa confirmed the presence of cut wounds on the legs and hands. He noted that the head had deformation of some sort and the injuries on the hands appeared to have been sustained while acting in self defence. He added that the body was dissected and which revealed that his ribs (5<sup>th</sup> rib) had been fractured while the head had a depressed skull fracture, linear skull fracture and a left sided subdural hematoma. He formed the opinion that the cause of death was severe head injury due to subdural hematoma caused by a blunt object force trauma and that the injuries were caused by an external force. He tendered the post mortem report as exhibit 1. Also, he conducted the post mortem of the 2<sup>nd</sup> victim James Wekesa Barasa and confirmed the presence of deep cut wounds on the right buttock, bruises on the left hand, neck, face and legs. He also added that the lower jaw and chest bones were fractured. He also stated that the neck bone had been broken as well as the back of his skull. He also pointed out that the deceased had internal bleeding and that the left psychometric bone was depressed. He formed the opinion that the cause of death was severe external and internal hemorrhage due to cut wounds on the gluteal as well as skull fracture. The post mortem report was tendered as exhibit 2. To that extent, the first ingredient of the offence has been proved.

25. 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* (1948) 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-defense or in defence of property.”

26. The 1<sup>st</sup> deceased herein was found to have died from severe head injury due to subdural hematoma caused by a blunt object force trauma and that the injuries were caused by an external force while the 2<sup>nd</sup> deceased person was found to have died from severe external and internal hemorrhage due to cut wounds on the gluteal as well as skull fracture. There is therefore certainty as to the cause of death. Given the nature of injuries suffered by the deceased persons that resulted in their death as indicated in the respective post-mortem reports, it can safely be concluded that death was the desired outcome of whoever the assailants was.
27. The evidence of PW2 was that she heard screams and later saw a large crowd advancing towards the house of her son and who broke down his door and on failing to find him they left. She testified that her son suddenly arrived home but before setting foot on the compound, the 3<sup>rd</sup> accused herein got hold of him and dragged him away as the large crowd kept on making noise. On rushing towards the crowd, she found her son on the ground having been viciously slashed. The crowd walked away with their pangas as the deceased cried up to her for help. According to her, the 1<sup>st</sup> accused herein had a panga together with others and whose clothes were bloodstained. She stated that the deceased had a cut on his neck. She saw the 1<sup>st</sup> accused slashing her son on the buttocks while the 2<sup>nd</sup> accused stood next to the 1<sup>st</sup> accused at the scene of crime. Also, the 3<sup>rd</sup> accused is the one who seized her son and dragged him to the scene. PW3 on the other hand testified that he recalled on 30<sup>th</sup> March, 2021 at around 3.00 pm while heading home from school he heard people singing traditional songs and on approaching the crowd he noticed that they were heading towards his home. He stated that they informed his mother (PW2)



that the deceased would no longer enjoy the fruits of theft. He stated that he saw the 1<sup>st</sup> accused and one Evans Karewi sharpening their pangas and that they broke down the deceased's door. He saw the 1<sup>st</sup> accused herein cut the 1<sup>st</sup> victim with a panga but he managed to escape into a sugar cane plantation nearby. They pursued him while threatening to burn down the plantation and that the 1<sup>st</sup> victim came out of it only for the crowd to stone him viciously despite his pleas for mercy. He testified that he later saw his deceased brother being led by hand toward the crowd by the 3<sup>rd</sup> accused herein and one Evans Karewi pointed him out as one of those being sought, and that the 1<sup>st</sup> accused cut the 2<sup>nd</sup> victim on the buttocks with a panga. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons hit him with stones as they claimed that they wanted to finish him. He added that the 2<sup>nd</sup> victim managed to regain consciousness only for the 1<sup>st</sup> accused to hit him with the blunt side of a panga while the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons hit him once with a stick killing him. On the other hand, it was the evidence of PW4 that on 30<sup>th</sup> March, 2021 at around 1.00 pm a large group of people came to her compound demanding the whereabouts of her husband, the first victim herein. They included Wekesa Ndombi, Wanjala, Anthony Nyongesa and one John Mabuko. It was the 2<sup>nd</sup> accused who was making enquires of the whereabouts of her husband. She added that the crowd was armed with pangas and clubs and that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were armed with clubs while the 1<sup>st</sup> accused had a panga. They spotted the 1<sup>st</sup> victim and ordered him to accompany them in search of a stolen goat. She stated that they were assaulting him as they walked away. She stated that she saw the 2<sup>nd</sup> accused hitting him. The 1<sup>st</sup> accused herein cut the deceased on the head with a panga and that the 2<sup>nd</sup> accused was holding the deceased and preventing him from escaping. The 3<sup>rd</sup> accused was hitting the deceased on all parts of his body. She stated that all the accused persons are well known to her. PW5 testified that, he saw the 1<sup>st</sup> accused herein armed with a panga while the 2<sup>nd</sup> had a club and the 3<sup>rd</sup> accused had a club and metal rod. He testified that when he confronted the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons on whether the alleged stolen goat had been recovered, the 2<sup>nd</sup> accused pushed him away and jumped on the roof of the house and managed to get the deceased whom he cut on the head. PW6 testified that, on rushing to the scene found a large crowd who included the 1<sup>st</sup> accused herein standing with a panga and a club. He also saw the 2<sup>nd</sup> accused and one John Mangoli armed with clubs. The 3<sup>rd</sup> accused had a metal rod. Lastly, PW7 testified that on 30<sup>th</sup> March, 2021 he heard noise coming from the house of Mauyo and on rushing there he found a large crowd of people armed with pangas and metal bars. He saw the 1<sup>st</sup> accused was on top of the roof busy cutting the iron sheet in a bid to flush out the alleged thief. The 3<sup>rd</sup> accused was waiting near the door. He pleaded with the crowd not to kill the man. The crowd managed to flush out the man who had a cut wound on the head which had been inflicted by the 1<sup>st</sup> accused herein. The man emerged and the three accused persons herein and the crowd attacked him. The 1<sup>st</sup> accused used a panga to cut the deceased persons viciously while the 3<sup>rd</sup> accused used his metal rod but that the 2<sup>nd</sup> accused feared the deceased's relatives.

28. From the evidence of PW2 to PW7, it is clear that the accused persons were placed at the scene of crime. Indeed, the accused persons themselves confirmed in their evidence that they were at the scene but they alleged that they only arrived after the victims had been killed while the 2<sup>nd</sup> accused person insisted that he was only after protecting the 1<sup>st</sup> victim from the irate mob and that he raised an alibi vide his witness (DW4).
29. This is so because PW2 to PW7 clearly placed the accused persons at the scene of the incident assaulting the deceased persons. From the evidence of PW2 to PW7, it is proved that the accused persons assaulted the deceased. The next issue for determination is whether the said assault was with malice aforethought. The evidence of PW2 and PW4 is that they confronted the accused persons wanting to know why he was assaulting the deceased whereupon the accused persons made it clear that the deceased persons would no longer enjoy the fruits of theft. I find this was the factor giving rise to the malice aforethought. Suffice to add here that PW2, PW3, PW4, PW5 and PW7's evidence on how they attacked the



deceased persons and their resilience to sniff them out of their hideouts provided the requisite malice aforethought in this offence. Hence, the accused's claim that they found the deceased already dead only after they arrived later at the scene was not convincing. The evidence as availed by DW4 was not in any way capable of casting any doubt on the evidence as availed by the prosecution. It is clear that the accused persons were at the scene of the crime and that he participate in that same crime. The issue of motive was dealt with by the Court of Appeal in the case of *Libambula v Republic* [2003] KLR 683, when it held as follows:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of person. See section 8 of the *Evidence Act* Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime”.

30. Learned counsel for the defence has submitted that the prosecution did not establish the element of actus reus and mens rea on the part of the accused persons to warrant a conviction and that all those who witnessed the incident were coincidentally relatives of the deceased persons herein as none of them was an independent witness. However, the fact that the accused persons were seen assaulting the deceased persons left no doubt that they were involved in the death of the deceased. The evidence of PW2, PW3, PW4, PW5, PW6 and PW7 perfectly established the motive (malice aforethought) for the assault.

31. Even if there is no other material evidence to corroborate the evidence adduced before this court as suggested by defence counsel, there are no co-existing circumstances which could weaken or destroy the inference of the guilt of the accused as the assailant as there is no escape from a conclusion that the crime was committed by the accused and nobody else. In the case of *R v Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held as follows:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of is guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

32. A reading of the accused persons advocate's submissions alludes to the case of the Prosecution being grounded on evidence that was contradictory. This line argument was not elaborated to demonstrate the alleged inconsistencies nor was it suggested that the evidence contradicted other witnesses' evidence. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that this court ought to have rejected the evidence. As was held in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. It subtly stated: -

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

33. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. (See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251). It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the issue at hand that the accused person is entitled to benefit therefrom. (See *Theophilus vs State* {1996} 1 NWLR (Pt.423) 139.)
34. Applying the above tests to this case, I find no contradictions in the prosecution's evidence and even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt.
35. The defence counsel submitted that despite all the numbers of people who witnessed the incident, the prosecution chose to rely on the evidence of only witnesses that happened to be relatives of the deceased persons and that no independent witnesses were called. This argument is attractive. However, it brings into view section 143 of the *Evidence Act* Cap 80, Laws of Kenya which provides: - “No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.” The Court of Appeal in *Julius Kalewa Mutunga v Republic* Criminal Appeal No. 31 of 2005 stated:

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
36. The Court in the case of *Bukenya & Others v Uganda* {1972} E.A.549 was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a much better version of the evidence.
37. Upon evaluating the evidence, I find that this is not a proper case for the court to make an adverse inference on account of the failure to call the alleged independent witnesses. The witnesses called were quite sufficient in my view as they gave their versions of what transpired on the material date. It is instructive that the incident took place in broad day light and thus the witnesses did not have any difficulty seeing the assailants. The witnesses came out as truthful and were not shaken on cross-examination.
38. The evidence of the pathologist (PW1) is that he noted in respect of an autopsy that was carried out on the body of the first victim Wilfred Walukhu Wekesa, which revealed that the deceased had cut wounds on the legs and hands. He noted that the head had deformation of some sort and the injuries on the hands appeared to have been sustained while acting in self defence. He added that the body was dissected and which revealed that his ribs (5<sup>th</sup> rib) had been fractured while the head had a depressed



skull fracture, linear skull fracture and a left sided subdural hematoma. He formed the opinion that the cause of death was severe head injury due to subdural hematoma caused by a blunt object force trauma and that the injuries were caused by an external force. Further, he testified also in respect of an autopsy that was carried out on the second victim James Wekesa Barasa, which revealed deep cut wounds on the right buttock, bruises on the left hand, neck, face and legs. He also added that the lower jaw and chest bones were fractured. He also stated that the neck bone had been broken as well as the back of his skull. He also pointed out that the deceased had internal bleeding and that the left psychometric bone was depressed. He formed the opinion that the cause of death was severe external and internal hemorrhage due to cut wounds on the gluteal as well as skull fracture. The act of approaching the victims households/compounds armed with weapons, pangas, sticks/clubs and stones, and the aggressiveness in sniffing them out of their hideouts made it clear that the accused persons intended to cause the death of the deceased persons. Such kind of conduct leaves no doubt that he had the requisite malice aforethought

39. From the above authorities, the evidence of the key prosecution witnesses (PW2 to PW7) left no doubt that there are no co-existing circumstances which could weaken or destroy the inference of guilt of the accused persons since they were placed at the scene of crime. The accused persons claim that they found the deceased persons already dead is not plausible as they were seen assaulting the deceased persons by PW2 to PW7. The said witnesses were not shaken even on cross-examination and therefore the element of a frame up does not arise at all and hence the testimonies of the accused persons that they were only at the scene of the crime to protect the victims and recover the stolen goat, which up to their defence hearing, was never recovered, must be rejected outrightly as they was placed at the scene of crime and that there is no frame up of any kind.
40. I find the accused persons had the requisite malice aforethought since from the injuries inflicted, it can be discerned that the assailants intended to achieve desired result namely death of the deceased persons. They were duly placed at the scene of crime and must therefore be held responsible for the crime. The actions of the accused persons in assaulting the deceased persons were not warranted since the alleged theft could have been reported by the accused persons to the relevant authorities for action. The killing of the deceased persons was therefore not justified in the circumstances. The claim by the accused persons that they were village vigilantes then trying to protect the deceased from harm by the irate mob is not believable since they are the ones who were on the forefront in the killing. Suffice to add that no stolen goat was recovered from any of the deceased persons so as to justify any claim that they were thieves. The accused persons literally took the law into their hands yet there were lawful channels for taking them through. The defence evidence has not shaken that of the prosecution which is quite overwhelming against the three accused persons herein.
41. In the result, it is my finding that the prosecution has proved the charge of murder against the accused persons herein: Isaac Wekesa Nyongesa alias Ndombi, Edward Sawa Wanjala and Isaac Nyongesa Anthony beyond reasonable doubt. I find each of the accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and are accordingly convicted therefor.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:



Isaac Wekesa 1<sup>st</sup> Accused

Edward Sawa 2<sup>nd</sup> Accused

Isaac Nyongesa 3<sup>rd</sup> Accused

Wamalwa R for all Accused

Miss Kibet for Prosecution

Kizito Court Assistant

