



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCR NO. 23 OF 2018

REPUBLIC.....PROSECUTOR

VERSEUS

WILBERFORCE FUCHAKA SIMIYU.....1<sup>ST</sup> ACCUSED

DOUGLAS SIMIYU KINALI.....2<sup>ND</sup> ACCUSED

JOHN BARASA MANYONGE.....3<sup>RD</sup> ACCUSED

DAVID WAFULA WAKHUNGU.....4<sup>TH</sup> ACCUSED

TOM WATAKA MUINDI.....5<sup>TH</sup> ACCUSED

JAMES BARASA WAFULA.....6<sup>TH</sup> ACCUSED

J U D G M E N T

The accused **WILBERFORCE FUCHAKA SIMIYU** (accused 1), **DAUGLAS SIMIYU KINALI** (accused 2), **JOHN BARASA MANYONGE** (accused 3), **DAVID WAFULA WAKHUNGU** (accused 4), **TOM WATAKA MUINDI** (accused 5) and **JAMES BARASA WAFULA** (accused 6) are charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **WILBERFORCE FUCHAKA SIMIYU** (accused 1), **DAUGLAS SIMIYU KINALI** (accused 2), **JOHN BARASA MANYONGE** (accused 3), **DAVID WAFULA WAKHUNGU** (accused 4), **TOM WATAKA MUINDI** (accused 5) and **JAMES BARASA WAFULA** (accused 6) on the 3<sup>rd</sup> day of July, 2018 at Binyenya village, Kakamwe Sub-location Bungoma North Sub-county within Bungoma County, murdered **PAUL KERICH**.

The case for the prosecution is that the deceased Paul Kerich was a police officer of the rank of Senior Sergeant then attached to Kapchoru police station. On 3.7.2018, **PW1 Stephen Simiyu Abesi** the chairman of Ambogi Bodaboda Self-Help Group which has 45 members was on duty at the stage on 3.7.2018 at 10 a.m. when he received information that some boda boda riders had dug a trench along Ambogi-Ndalu road. He informed the Assistant-Chief whom he carried on his motor cycle to the scene. At the scene he found the trench had been dug. He informed the boda boda riders at the scene that the assistant chief to address them and went to look for MCA. He did not find him and went to the scene and left with assistant Chief. Later at 5 p.m. he was informed that a person had been shot. He decided to go there but on the way he met Robert Nakitare who had also been shot.

**PW2 Jane Naliaka Mwanja** the assistant Chief Kakembi sub-location was informed that boda boda riders were demonstrating. She went with PW1 Stephen to the scene. At the scene the riders told her they wanted the MCA. She called the MCA who promised to send a representative. She then went to other duties. Later she received information that George had been shot and deceased killed. She testified she did not witness any of them being killed.

**PW12 John Wamalwa Simiyu** was at his home when he saw young boys demonstrating about the poor state of the road between Ndalu and Amisi. They had dug trenches on the road. He was about 20 meters away. From where he was he saw George Simiyu and another person who wore a khaki attire struggling over ignition key of a motor cycle. He then saw the person in khaki whom he came to know was deceased, remove a pistol. There was a quarrel between George and the deceased police officer. He then saw many people come from Ndalu Brigadier and Tongaren to the scene. He then saw the police officer shoot at George and the son of Nakitare. The police officer then started running away and heard more gun shots. He did not identify the people who were chasing him. Later he learnt the police officer had been killed.

**PW9 Antony Nakitare** testified that on 3.7.2018 at 4.30 p.m. he was at Amish. He went to the stage where he met George a boda boda rider and they rode on the motor cycle towards the bridge. At the bridge they decided to push the motor cycle. He then saw George argue with a person telling him unaninyanyaza. He then heard gunshot and he was shot on the shoulder. He became unconscious.

**PW10 Frank Matere Aboss** was carrying sisal on a bodaboda when he reached the bridge and found a trench had been dug across the road. He borrowed a jembe to fill it and pass. He then saw many boda boda riders come. They beat him up. He identified the attacker as Kevin and Edwin who also took away Kshs 2000 from him. On cross-examination he testified that he was not there when George and the police officer were killed.

**PW6 Chief Inspector Julius Omboto**, then OCS Kiminini police station testified that on 3.7.2018 he went to the sub-county headquarters and left deceased at the station to be in-charge. While at the sub county headquarters he received a telephone call from the deceased who informed him that some youths had dug a trench at Mukuyuni road and that he had gone to the scene. He instructed inspector Maritim to go to the scene. Later inspector Maritim called him and informed him deceased had been killed.

**PW7 Inspector Philip Kipeyegon Maritim** was called by PW6 who informed him of the digging of the trench along the road. Shortly after he received a call from the deceased who informed him people were stoning him. He went to the police station to get reinforcement. They went to the scene and on the way they received information that deceased had been killed. He went to the scene and found body of deceased which was removed to the mortuary. He saw a crowd there but it was far and could not identify them.

**PW8 APC Patrick Okwako** was in company of PW7 IP Philip Maritim when they proceeded to the scene. At the scene they found the body of the boda boda rider who had been shot. They were shown where the body of the deceased was. They found deceased body lying on the ground and a pistol next to him. He took the pistol. Later together with other officers arrested about 18 people. Later accused 6 James Barasa Wafula was arrested at Ndalu market with a mobile phone. On being cross examined by Wamalwa he confirmed accused 6 working at a cyber cafe and they arrested him in his house. At the scene he said there were over 1000 people and would not have recognized accused 6 at the scene.

**PW4 Joyce Kavou Mwonga** the wife of the deceased was at the police lines at Kapchorwa police station when deceased left for duty in the afternoon. Later she received information that he had been killed. At 5-6 p.m the body was brought and taken to the mortuary. On 13.7.2018 she was asked for the IMEI number of deceased mobile phone. She checked in a box he had bought the mobile phone with and found it to be IMEI NO. 359927/07/097873/0. She also forwarded the receipt he was issued on 6.7.2016 when he bought the phone. She was shown a mobile phone which she identified as belonging to the deceased.

**PW13 Peter Simiyu Wanamboko** works at a cyber café in July 2018 Jimmy (accused 6) who also works in another cyber café took a Samsung phone and requested him to flush it. It had been done factory reset and required one to input an IMEI NO. He managed to flush it by bypassing the IMEI no. Input. Accused 6 paid him 200. Later police came and arrested him and he confirmed he was the one who had flushed it.

**PW14 Emmanuel Simiyu Lumbasi** was at his butchery on 25.7.2018 when James (accused 6) went to him and told him he had a mobile phone he wanted to sell at Kshs 3000. He agreed to buy at Kshs 2500. The witness gave accused 6 his KCB card and pin No. and accused 6 withdrew the money. Accused 6 gave him the phone. After he was arrested with the phone and informed police he had bought it from accused 6.

**PW15 PC Fredrick Omondi** the investigating officer was assigned to investigate the murder of the deceased and had been issued with a pistol and 15 rounds of ammunition. There was an incident of unrest at Ambish and he went there alone. He established that while at the scene one young man attempted to stab deceased with a knife and deceased shot him. The boda boda riders chased him and he used 10 rounds of ammunition. They then stoned him. He established that the deceased had a phone while at the scene. They obtained the IMEI no. of the deceased phone. IMEI no. 3599270978730. Using the IMEI No. they traced the phone to Emmanuel Simiyu (PW14). Emmanuel upon interrogation said he bought it from accused 6 James Barasa Wafula. Accused 6 was arrested and on interrogation said he was given the phone by accused 3 John Barasa Manyonge. They searched accused 6 possession they recovered the sim-card and ID No. used to register the new Sim card.

The accused upon being placed on defence gave sworn evidence. **Accused 1 Wilberforce Fuchaka Simiyu** testified that he knew George and had guaranteed a motor cycle to Premium Finance.

He received information that George had been shot dead. He saw one Cale riding the motor cycle he had guaranteed George. He told him to park the motor cycle. He went and kept it. He was later arrested by police on allegation of being in possession of illegal brew. He was taken to Mukuyuni where he found other 28 people also arrested. He was later charged with present offence. On being cross examined by M/s Nyakibia for state he stated he was not present at the scene.

**Accused 2 Douglas Simiyu Kinali** testified that on 3.7.2018 he was at his home when he took his child to hospital then took her home. At 7 p.m. he was informed that George had been shot and a police officer killed. He denied being present at the scene. On being cross examined he denied that on that day at 4 p.m. he was at Georges mother's house drinking alcohol.

**Accused 3 John Barasa Manyonge** testified that on 3.7.2018 he was at his home up to 6 p.m. when he received information that a boda boda rider George had been shot at and a police officer killed. On 4.8.2018 people came beat him and took him to Wabahongi police post together with 20 other people. He was later charged with present offence. He denied knowing Anthony Mulongo but confirmed that the trench was dug outside the George's mothers house.

**Accused 4 David Wafula Wakhungu** testified that on 3.7.2018 he went to his place of work where he operates a video and Barber shop at Webuye. He later went to check on a sick cow. He then heard news of the person who had been killed. On 3.8.2018 he went to visit the father at Tongaren when his step mother started screaming at him. He left. At 10 p.m. police officers came with the step mother and he was arrested and later charged with the present offence.

**Accused 5 Tom Wataga Muhindi** testified on 3.7.2018 he was at his wife's stall at Kanduyi where he stayed from morning to evening. At around 9 – 10 a.m. he heard Stephen Ambasi (PW1) call the assistant chief (PW2) and they went to the scene. He did not accompany them.

At 4 p.m. he received information George had been shot and a police officer killed. On 3.8.2018 he was arrested and later charged with the present offence.

**Accused 6 James Barasa Wafula** testified that he works at a cyber cafe testified that on 3.7.2018 he as at his place of work from morning till evening. On 17.7.2018 a customer brought a phone for him to remove a password. He left the phone Samsung by make. He took it to Peter (PW13) who flushed it for him. He took it the next day. He called the owner to come for it but he did not come. Later, the owner told him to sell and send him money. He sold the same to Emmanuel Lumbasi (PW14) at Kshs 2500. He took his commission of Kshs 500 and sent the money to the number the customer had given him which shows the recipient as Rosemary Nakuminja. After one week police came and inquired about the phone and took them to Emmanuel (PW14). Upon cross examination by M/s Nyakibia accused 6 confirmed that he was the one in possession of the Samsung phone J1 (Exh. 5) and that he sold it to Emmanuel. He also confirmed he had taken the phone to Peter Simiyu (PW13) to flush for him.

Mr. Wamalwa Simiyu for accused filed written submission. He submitted that the accused are under Article. 50 (2) presumed to be innocent until proved guilty, and that the burden of proving their guilt is on the prosecution. He submitted that for an offence of murder the prosecution must prove the death and cause of death, that it is accused who committed the unlawful act that caused the death and that accused had malice aforethought.

Counsel submitted that the fact and cause of death was confirmed by PW3 and the pathologist who produced the post mortem form Exh. 2. Counsel submitted that the death was occasioned by an unlawful act by persons who pelted him with stones whereof he became overwhelmed and fell down and died.

On whether the prosecution has proved that it is accused who committed the unlawful act, counsel submitted that none of the prosecution witnesses saw any of the accused assaulting the deceased. He submitted that the prosecution had to identify the accused persons and bring them to the scene of crime as well show their participation in the killing. The evidence of the prosecution was majorly direct evidence with his witnesses being those who were at the scene when the deceased was being killed. However, no one of them directly pointed out to any of the accused persons as being involved in the killing of the deceased.

Consequently, counsel urged this court to find accused not guilty of the offence.

The accused were charged with the offence of murder contrary to Section 203 of the Penal Code.

**203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a) The death of the deceased and the cause of that death.**
- b) That the accused committed the unlawful act which caused the death of the deceased.**
- c) The accused had the malice aforethought.**

The deceased died of the injuries sustained at the scene on 3.7.2018 is not in contention. Indeed, the doctor (PW confirmed both the fact and cause of death. As to whether it is the accused who committed the unlawful act of pelting stones to the deceased from which he sustained injuries and died, the prosecution called 15 witnesses. **PW1 Stephen Simiyu Abesi** testified that he did not see the deceased being killed. **PW12 Jane Nalianya Mwanja** the assistant chief testified that she left the scene in the morning and confirmed that she did not witness the deceased being killed.

**PW3 Martin Shikuku Nandoha** was 200 meters away from where the boda boda riders had dug the trench. At 5 p.m. he heard gunshots and went to the scene where he found many people. He saw George had been shot and people started throwing stones at deceased. He ran away and ran to a plot where he succumbed to the injuries. This witness testified that though he was at the scene, he did not see who killed the deceased. PW4, Joyce the wife of deceased and **PW5 Wilson Kibet Koech** were not at the scene. **PW6 Chief Inspector Julius Omboto** and **PW7 Inspector Philip Maritim** only went to the scene after receiving information that deceased had been killed, same with **PW8 APC Patrick Okwako**.

**PW9 Antony Nakitare** who was with George the boda boda rider testified on the quarrel between the deceased and George before the deceased shot at the witness on the shoulder who became unconscious. He testified that he only saw George and the deceased and did not see accused persons.

**PW10 Francis Matere Abas** who tried to pass by the dug trenches by filling in was attacked by the boda boda riders who also stole from him Kshs 2000. He only identified Kevin and Edwin who are not in court. **PW11 George Omenya Chesimba** the chairman of boda boda only visited the scene after the event where he saw both George and deceased bodies lying at the scene. **PW12 John Wamalwa** testified that he did not know the people who were chasing the deceased.

From the evidence of these witnesses none of them pointed out as having seen any of the accused 1,2,3,4,5,6 chase and inflict injuries on the deceased.

As for accused 6 the prosecution evidence connecting him to the crime is that he was found in possession of the mobile phone of the deceased which the deceased had at the time he was killed. **PW4 Joyce Kavou Mwangi** the wife of the deceased testified that the deceased

had mobile phone make Galaxy J with IMEI No. 359927/07/097873/0 which she handed over to the investigating officer who used it to trace the mobile phone. Later she was shown the phone and identified it as that which the deceased had on the at day. PW7 Inspector Philip Kerich testified that the deceased called him 3 times that day from the scene using his telephone No. 0728735040 to the witnesses NO. 023215613. The prosecution therefore established that the deceased had the mobile phone with him at the place where he was killed.

Accused 6 was found to have sold the phone to Emmanuel (PW14) on 25.7.2018. PW13 Peter had confirmed that accused 6 had taken the phone to him to flush and by pass the input of a password. The accused 6 in explaining how he came by the mobile phone stated.

*“ On 17.7.2018 while at my place of work I was brought a Samsung phone to flash to remove password. It was brought by another customer. There was no electricity. He left the phone to me and gave me his phone number. I took it to Peter (PW13) who flashed it for me. Peter is PW13. The next day I went and took it. I called the owner but said he will come. He lar told me to sell the phone and send him the money. I only had his mobile phone. I sold it to Emmanuel Lumbasi who bought it at Kshs 2500. The owner told me to sell. I took my 500. I took the 2000 and I sent it to his number which gave the name of Rosemary Nakuminja. After one week police came and asked for a phone. It old them and gave the number of the Mary and Mpesa Message. I took them to Emmanuel who gave them the phone.”*

The prosecution in respect to accused 6 James Barasa Wafula relies on the doctrine of recent possession of an article possessed by deceased at time of the killing and found in possession of accused.

The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of a recently stolen property in circumstances he has not explained.

### **Kevin Nyongesa & 2 Others –vs- Republic 2017 eKLR.**

The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR, where the court stated as follows:

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof,

first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property

was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and

pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.

The court restated the legal position in **Joseph Wafula Mukenya v Republic, Nairobi Criminal Appeal No. 96 of 2005 (UR):**

***“Be in possession of” have in possession” includes not only having in own personal possession, but also knowledge having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any other person if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each of them.....”*** on the definition of possession under Section 4 of the Penal Code.

From the evidence the exhibit mobile phone was recovered from Emmanuel (PW13). Emmanuel testified that he had bought it from accused 6. The evidence therefore is that accused 6 was the person who first had possession of it, and therefore the primary possessor. In order to dispose of it, had the mobile phone flashed by PW so that it evades the need for password to open and then having done so sold it to Emmanuel.

Possession can therefore be direct, physical or even constructive. In this case there was evidence that a few days after the murder the appellat took the phone for flashing and then sold the same to Emmanuel. This evidence is even admitted by accused 6.

Where the prosecution has established the facts that denote recent possession of a property or article in possession of or belong to the deceased at the time he was murdered, the person in possession assumes the evidential burden to show that he lawfully obtained the same.

Where the prosecution proves that an article which is proved to be connected directly with crime after commission of the crime may in

certain circumstances lead to the irresistible inference that the possessor of the article participated in the crime. *(See Andrea Obonyo & Others –vs Republic 1962 EA. 542.*

Accused 6 in this case readily admits that he was in privy possession of the mobile phone on 17.7.2018. His explanation is that he was given the same by a person he did not know first to flush and later to sell. The explanation by the possessor must be to such standard as to satisfy the court that the same was lawfully possessed. In this case the accused 6 neither stated the name of the person who allegedly gave him the phone, the alleged phone number he left nor the message he allegedly received. This shows the court that his blame of a 3<sup>rd</sup> person is not truthful. The court then under the doctrine of recent possession drives the inference that the accused obtained the same from the deceased that time of the murder. That being so I find that the prosecution sufficiently established that the accused 6 James Barasa Wafula participated in the murder of the deceased.

In the result, I find the prosecution has not proved a charge of murder contrary to Section 203 of the Penal Code against WILBERFORCE FUCHAKA SIMIYU (accused 1), DAUGLAS SIMIYU KINALI (accused 2), JOHN BARASA MANYONGE (accused 3), DAVID WAFULA WAKHUNGU (accused 4), TOM WATAKA MUINDI (accused 5) beyond reasonable doubt.

I therefore find WILBERFORCE FUCHAKA SIMIYU (accused 1), DAUGLAS SIMIYU KINALI (accused 2), JOHN BARASA MANYONGE (accused 3), DAVID WAFULA WAKHUNGU (accused 4), TOM WATAKA MUINDI (accused 5) not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit each one of them under section 215 C.P.C

As for accused 6 James Barasa Wafula, I am satisfied that the prosecution has proved a charge of murder against him beyond reasonable doubt. I therefore find JAMES BARASA WAFULA guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**S.N RIECHI**

**JUDGE**