



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

HIGH COURT CRIMINAL CASE NO. 29 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

PATRICK WAULA NABUTOLA.....1ST ACCUSED

KEVIN KHISA WANYONYI.....2ND ACCUSED

TIMOTHY BARASA MASINDE.....3RD ACCUSED

J U D G M E N T

The accused **PATRICK WAFULA NABUTOLA** (accused 1) **KEVIN KHISA WANYONYI** (accused 2) **TIMOTHY BARASA MASINDE alias Baro** (accused 3) are charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the 5th day of November, 2017 at Chwele Township in Bungoma Central Sub-County within Bungoma County jointly with others not before court murdered **AMOS WEKESA WAFULA**.

The prosecution case is that on 5.11.2017 **PW3 George Wanyonyi Wekesa** who operates a butchery at Chwele market closed his shop at 8.00 p.m and started driving home. On reaching at the Lwakhakha- Kimilili T Junction he saw many motor bikes with headlamps on. He parked at the edge of the road to give them space to pass. After they had passed he followed them and saw that one motor cycle Reg. No. KMEA 647U was dragging a person tied to the motor cycle on the road. He saw 'Baro' (accused 3) sitting on as a pillion passenger on that motor cycle. He spoke to accused 2 Kevin Khisa Wanyonyi who told him that he (Khisa) had carried the person being dragged but he found he was armed with a knife. He took him to the police station but the police did not assist and the bodaboda riders took him. The witness called the OCPD and he said he will inform his officers. Upon cross-examination by Anwar for accused 2 he stated that he knew accused 2 well and they spoke at the scene. He however stated that he did not see accused 2 beat the deceased but tried to save him. On cross examination by M/s Lunani for accused 3 he stated he saw accused 3 riding on the motor cycle and that he did not see accused 3 beat the deceased who was suspected to be a thief.

PW4 Hannington Lombosha Nasira a Matatu driver was in his house when he heard noise from the road. He went there and saw people on motor cycle shouting mwizi mwizi (thief thief). He went there and saw accused 3. He saw accused 3 come with a rope and after a short time he saw motor cycles passing dragging a person towards the police. He stated he saw accused 3 well with a rope when the deceased was being interrogated.

PW6 Abdi Nour Ismael was going home from prayers when he saw a young man being beaten by a boda boda riders. He saw accused 3 was beating him. He asked accused 3 what the problem was. Accused 3 told him that the young man had maize in a sack and a sword. He advised accused 3 to take the young man to police. They put the young man on a motor cycle and went towards the police station about 100 meters away. After a short time accused 3 came back with the young man together with other riders. He then saw accused 3 who had a rope then tied the young man who is now the deceased on the neck and started dragging him on the road for about 100 meters. On cross examination he stated he knew accused 3 well and spoke to him on 2 occasions that night.

PW7 Ramadhan Toili was at his shop where he heard boda boda riders hooting. He went to check and saw a motor cycle dragging a person on the road who had been tied to the motor cycle. He went closer and saw the rider of the motor cycle was Baro (accused 3). He knew accused 3 well and was riding motor cycle Reg. No. KMEA 667 V.

PW9 No. 230606 Chief Inspector Timothy Ndiwa the investigating officer on 5.11.2016 received information that boda boda riders had killed a person and dumped the body on the Chwele Kimilili road. He went there and found deceased's body with a rope tied on the neck.

He observed and saw deceased had a fracture on the head. He took photographs of the scene and removed the body to mortuary.

On 6.11.2016 he visited the scene again and drew the sketch plan. He removed the rope and recovered a knife allegedly owned by the deceased. Upon investigations he impounded motor cycle Reg. No. KMDT 941X which was being used by accused 2 and Motor cycle reg. No. KMCA 674u used by accused 3. He arrested accused 1 and 2 within Chwele and accused 3 was arrested at Ndenderu in Nairobi on 5.5.2017. He recorded statement of witnesses and accused were later charged with present offence.

PW11 Abraham Welimo Wamalwa testified that on material day he was with Abdi (PW6) walking when on reaching the Chwele stage they found people beating a person. They were boda boda riders and could recognize them from the moonlight and security lights at the stage. He saw they tied the person on the neck with a rope and tied it to a motor cycle. They started dragging him on the road. He was able to identify Baro (accused 3) as among the people who assaulted the deceased.

PW12 Wycliffe Sichangi the owner of motor cycle Reg. No. KMEA 647U testified that he had employed accused 3 Baro as a rider of the motor cycle and which was driving boda boda business. On 10.11.2017 he was informed that it had been used in a murder incident and had been impounded by police. Later the rider accused 3 was arrested.

The accused on being put on their defence gave affirmed evidence in defence. **Accused 1 Patrick Wafula Nabutola** testified that on 5.11.2017 at 8 p.m. was at his home attending a funeral of his father and did not go to Chwele where he as a watchman at the shop of Aggrey Sifuna. He stayed at his home for 3 days. When he reported on duty he was informed a person had been killed at the market. He was then arrested.

Accused 2 Kevin Khisa Wanyonyi testified that on 5.11.2017 at 8 p.m. he was at his home and did not go to Chwele market on that day. On 14.11.2017 he heard that a person had been killed. He stated he is the owner of motor cycle KMTT 941Y and had employed a rider. He received information that the motor cycle had been involved in an accident at Chepkaka. He went there to check and was told it was at the police station. It was involved in murder. He told them the rider was James Juma and he does not know where he is.

Accused 3 Timothy Barasa Masinde testified that on 5.11.2017 he was in Nairobi as he had left Kabuchai on 3.11.2017 for Nairobi. He produced a bus ticked DEXh. 1. On 5.5.2018 he was arrested at Ndendere market and taken to the police station. He was later brought to court. He denied that he as ever employed by Wycliffe (PW12) as a rider in his motor cycle Reg No. KMEA 647 U. He said he does not even know him.

Ms Natwati for accused 1 and 2 filed written submission. Counsel submitted:

“The 1st and 2nd accused person raised the defence of ALIBI stating that at the occurrence of the alleged offence they were not present at the scene.

The 1st accused person stated that though he was a watchman he was at home on 5.11.2017 at 8 p.m. since they had just lost his father and that prior to the occurrence of the offence he had been granted leave by his employer to go and bury his father and after returning back to work he worked for about 3 days before he was arrested.

On cross examination he stated that he was not at work on 5.11.2017 he further stated that its true he knows PW4 but in his evidence PW4 stated he did not see the 1st accused at the scene of crime.

The 2nd accused person stated that on 5.11.2017 at about 8 p.m. he was at his home in Mukuyuni and on 14/11/2017 they called over his motor cycle Registration No. KMDT 941Y which he had employed someone to operate it for him and he was informed that his motor cycle had caused an accident, that he went to Chwele police station on arrival he was arrested and put in custody.

The defence of ALIBI was celebrated in the case of Republic –vs- Omar Ali Chidagaya whereby it was stated that ALIBI postulates physical impossibility of the accused at the scene of offence, and its trite law that if the accused person raises a defence of ALIBI, the burden always lies on the prosecution to prove that the accused was at the scene of crime and if the prosecution failed to discharge this burden the case ought to be resolved in favour of the accused person.

And in this case before this honourable court, the prosecution failed to put the 1st and 2nd accused person at the scene of crime.”

Counsel submitted that since there was no direct evidence placing accused 1 and 2 at scene, the prosecution would only rely on circumstantial evidence. However, the circumstances proved did not meet the threshold required for inference of guilt of accused. Counsel referred this court to the decision in *Musilo Tuno –vs- R (2014) ECR and R-vs- George Simiyu Kundu Bungoma HCCR 32/2014*.

M/s Lunani for accused 3 submitted that the incident happened at night and there being a large crowd of people there is a possibility of the prosecution witnesses not making a proper recognition/identification of the 3rd accused.

The motor cycle KMEA 647 U used to drag the deceased did not belong to the 3rd accused neither did the prosecution establish if he was employed by the owner of the motorcycle or if the 3rd accused was riding it on the material night.

In this defence, the 3rd accused stated that he was in Kiambu on 5.11.2017 and only learnt of the murder upon his arrest. He further testified that he did not know the deceased therefore had no motive of murdering the deceased, the element of malice aforethought was not proved.

The accused are charged with murder, a criminal offence. It is generally agreed that the essential ingredients of a crime are:

1. The voluntary act or omission or actus reus accompanied by
2. A certain state of mind or mens rea.

These essential ingredients of criminal responsibility is captured in the definition of murder in our Penal code. Section 203 of the Penal Code defines murder as:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder”

The critical element of the offence of murder from the definition in Section 203 of the Penal Code are:

- a. The fact and cause of death of the deceased.**
- b. The unlawful act or omission causing the death or actus reus.**
- c. Positive identification of the accused as the one who caused the unlawful act or omission that caused the death of deceased.**
- d. That the accused acted with malice aforethought or mens rea.**

The prosecution in a charge of murder is under obligation to prove not 1, 2 or 3 of the elements but all the elements of the offence beyond reasonable doubt. The burden of proof in criminal cases therefore lies at all times on the prosecution and the standard of proof is beyond reasonable doubt. Lord Derring MR in *Miller –vs- Director of Pensions 1947 ALLER 372* defines the degree of beyond reasonable doubt thus:

“ That degree is well settled. It needs not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible but not in the least probable the case is proved beyond reasonable doubt but nothing sort of that will suffice.

In the United States case of United States –vs- Smith 267 F.3D 1154 (D.C Clocker 2001) the court defines the standard of proof of beyond reasonable doubt as follows:

The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant guilt but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from evidence or lack of evidence.

Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt after you weighted and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the hand there are very few things in this world that we know with absolute certainty.

The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter or highest importance. If you find that there is a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.

Upon consideration of these authorities a reasonable doubt exist when a court can say with certainty that a particular fact exists.

Reasonable doubt is doubt that would cause a reasonable person to hesitate acting in the manner sought. Any doubt in the prosecution case, either due to prosecution evidence or contradiction or gaps in the prosecution case must be given in favour of the accused. (See *Pius Arap Maina –vs- R 2013 eKLR*)

In this case the court’s duty is to analyse the evidence and determine whether the prosecution has proved all the 4 ingredients of murder to the standard of beyond reasonable doubt stated above. These are:

- a. The fact and cause of death of the deceased.**
- b. The unlawful act or omission causing the death or actus reus.**
- c. Positive identification of the accused as the one who caused the unlawful act or omission that caused the death of deceased.**
- d. That the accused acted with malice aforethought or mens rea.**

PW5 Dr. Haron Ombongi performed a post mortem on body of deceased on 11.11.2017. He found that the body had friction burns on the back, bruises on the face and fracture of staturum bone. Upon opening the body, he found that 3 ribs on right side fractured leading to lung collapse, and swelling of the brain. He formed opinion that the cause of death was due to cardio pulmonary arrest due to severe head injury. The unlawful act causing the death was therefore inflicting injury to the head of the deceased.

On whether it is accused who inflicted the injury on the deceased, **PW3 George Wanyonyi Wekesa** testified that while going home, he saw many motor cycles with riders. He noticed that one motor cycle Reg. No. KMEA 647 U was dragging a person who was tied to it on the road. He saw alias Baro accused 3 on that motor cycle where he was a pillion passenger. On inquiring accused 2 Kevin Khisa informed the witness that he (accused 2) had carried the deceased and noticed that he had a knife and therefore suspected him to be a thief. He informed him that they had taken him to the police station but police had not assisted. He had known accused 3 before and was able to identify him.

PW4 Hannigton Lumbosa Nasira responded to shouts of Mwizi Mwizi (thief thief) and on going there he saw accused 3 Timothy Barasa alias Baro. He then saw accused 3 come with a rope. He then saw a motor cycle KMEA 647 U dragging the deceased.

PW6 Abdi Nour Ismail was going home from the mosque when he met people beating a young man. He saw accused 3 present. He spoke to accused 3 as he wanted to help the young man. Accused 3 told him that they suspected the young man to be a thief. They put him on a motor cycle and took him to direction of police. Shortly later they came back. He saw accused 3 with a rope. The accused 3 then tiled the deceased on the neck and started dragging him on the road. They dragged him for about 100 meters.

PW7 Ramadhan Toil heard bodaboda riders hooting. He went and saw a person tied on a rope and being dragged on the round. He saw accused 3 riding the motor cycle dragging the deceased on the road. He did not see accused 1.

PW11 Abraham Welimo Wamalwa was with Abdi (PW6) when he saw accused 3 hit the deceased and tied a rope on neck of deceased and tied it to a motor cycle. He did not take down the Reg. No. of the motor cycle.

He stated he was able to see accused 3 clearly as there was both moonlight and security lights on the road. On being cross examined by Natwati for accused 1 he stated that he knew accused 3 well as they had gone to school together.

PW9 Chief Inspector Timothy Ndiwa the investigating officer was at Chwele police station where he received information of the incident. He went there and took the body of the deceased. He recovered a rope and later arrested accused 1 who was a watchman near the scene and to whom he had information took part in the killing. He also found out that accused 3 was riding motor cycle Reg. No. KMEA 647 U was used by accused 3 as KMDT 441T was being used by accused 2.

The evidence of these witnesses other than PW9 is that accused 3 was seen at the scene. They confirm that accused 3 had a rope which he used to tie the deceased on the neck and tied it to the motor cycle, KMEA 647 U which he was riding and dragged him on the road. It is the injuries sustained during this being dragged that led to the death of the deceased.

Accused 3 in his defence put forward an alibi defence, stating that on 5.11.2017 the date of the incident he was actually in Nairobi. He testified that he left Kabuchai on 3.11.2017 and went to Nairobi where he stayed up to 5.5.2018 when he was arrested. He produced a bus ticket Dexh1 to show that he travelled on 3.5.2017 to Nairobi.

When an accused puts forward an alibi defence, he does not assume any legal or evidentiary or burden of proving his alibi. The burden at all times remains with the prosecution to adduce evidence to displace the alibi. The accused's assertion is that he left for Nairobi on 3.11.2017. The incident complained of in the information did not occur on 3.11.2017 when he said he was traveling. The murder incident occurred on 5.11.2017 and not 3.11.2017.

The issue of alibi defence has been a point for consideration in courts both in Kenya and other jurisdictions. The Court of Appeal in *Eric Otieno Meda –vs- R (2019) EKLR*. Makhandia, Kiage and Otieno JJA explored both the concept and application of alibi defence stating:

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the **defence** dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of **Kiarie – v- Republic [1984] KLR**, this Court stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....”

In the recent case of **Victor Mwendwa Mulinge –v- R, [2014] eKLR** this Court rendered itself thus on the issue of alibi:

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....”

Comparatively, in the South African case of **S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e** the court set out five principles with respect to the assessment of alibi evidence:

(a) There is no burden of proof on the accused to prove his alibi.

(b) If there is a reasonable possibility that the accused alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

(c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."

(d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").

(e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

In another persuasive South African case of **R - v - Biya 1952 (4) SA 514 (A)** at 521C - D Greenberg JA said:

‘If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.’”

In **S -v- Sithole 1999 (1) SACR 585 (W) at 590g - i** it was correctly stated:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”

The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See **Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)**)

The present legal position is therefore it is upon the prosecution to displace the defence of alibi and show that the accused was present at the place and the time and the offence was committed by the accused.

In respect to accused 1 Patrick Wafula Nabutola, PW3 George Wanyonyi Wekesa testified on cross –examination by M/s Lunani for accused 1 that he did not see accused 1. PW4 Hannington Nasira stated in cross examination that he did not see accused 1. PW6 Abdi Nour Ismail also stated that he did not see accused 1. This is similar evidence given by PW7 Ramadhan Toil PW9 C.I Timothy Ndiwa testified that he arrested accused 1 as he was a watchman near the scene of the murder and he took part. None of the prosecution witnesses testified to having seen accused 1 at the scene or stated what role he played in the death of the deceased. Consequently, I do not find that there is sufficient evidence to connect accused 1 Patrick Wafula Nabutola with the murder of the deceased.

In regard to accused 2 Kevin Khisa Wanyonyi PW3 George testified that he saw and spoke to accused 2 who told him he had carried deceased but found he was armed with a knife and decided to take him to police. He informed him that the police chased them away and the other boda boda rider started beating him. He did not see accused 2 beat the deceased. PW4 Hannington did not see accused 2 PW6 Abdi stated he did not see accused 2. PW7 Ramadhan Toili did not mention accused 2 and PW9 C.I Timothy Ndiwa connected accused 2 to this case as he was using motor cycle KMDT 941Y. PW11 Abraham Welimo did not in his evidence mention that he saw accused 2 or what role he played. Accused 2 in his evidence while admitting the motor cycle KMDT 941Y was his, he stated he had given it to a rider James Juma to be riding and give him proceeds. He was informed the PW9 C.I Ndiwa that it was involved in accident. He went to the police station where he was arrested. From the evidence none of the witnesses stated what role accused 2 played in the death of accused. There is no evidence of him beating or participating in the beating of deceased. I therefore do not find that there is sufficient evidence to connect him with the offence.

In regard to accused 3 Timothy Barasa Masinde PW3 George Wanyonyi Wekesa in his evidence testified that he saw the deceased being dragged on the ground while tied to Motor cycle KMEA 647 U. Exh. 1. He then saw accused 3 who was a pillion passenger in the motor

cycle. He spoke to accused 2 who informed him that the deceased as a thief.

PW4 Hannigton Nasira testified that he saw accused 3 with a rope when he was interrogating the deceased. PW6 Abdi Nour Ismail testified that he saw accused 3 beating the deceased and later dragging the deceased on the road. He even spoke to accused 3 on that night. PW7 Ramadhan Toili testified he saw accused 3 riding the motor cycle that was dragging deceased.

PW9 CI Timothy Ndiwa the investigating officer established that accused 3 was the one who was in possession of the motor cycle KMEA 647 U which the deceased was tied and dragged along the road.

The accused 3's defence is that he was nowhere near where the offence was committed. The evidence of these witnesses who knew accused 3 well places him at the scene of the offence. The accused alibi defence has therefore been displaced by the evidence of PW3 George, PW4, Hannigton, PW6 Abdi and PW7 Ramadhan Toil who placed him at the scene of the murder and stated his role in the killing of the deceased.

PW11 Abraham William Wamalwa testified that he saw accused 3 beating the deceased and was able to see him from the street lights and moonlight. All these witnesses testified that they had known accused 3 as a boda boda rider and were able to clearly identify him that night.

I have considered the whole evidence; I am satisfied that there was streetlight and moonlight sufficient for the witnesses to have positively identified that accused 3 was present at scene and beat the deceased, tied him to a motor cycle and dragged him along the road where he sustained injuries from which he died.

In the result I find that prosecution has not proved the charge of murder contrary to section 203 against accused 1 Patrick Wafula Nabutola, accused 2 Kevin Khisa Wanyonyi. I find accused 1 Patrick Wafula Nabutola and accused 2 Kevin Khisa Wanyonyi not guilty of the offence of murder contrary 203 of the Penal Code and acquit the murder Sec 215 C.P.C. Accused 1 Patrick Wafula Nabutola and accused 2 Kevin Khisa Wanyonyi be set at liberty unless otherwise lawfully detained.

As for accused 3 Timothy Barasa Masinde alias Baro, I find the prosecution has proved the charge of murder against him beyond reasonable doubt. I therefore find accused 3 Timothy Barasa Masinde alias Baro guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 5TH DAY OF NOVEMBER,2021

S.N RIECHI

JUDGE