



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. 49 OF 2015**

**REPUBLIC .....**

**PROSECUTOR VERSUS**

**THOMAS WANYONYI WANYAMA ..... 1<sup>ST</sup>**  
**ACCUSED**  
**KUNDU WANYAMA NAVACHENJE ..... 2<sup>ND</sup>**  
**ACCUSED**  
**JOTHAM MASENGERE NABACHENJE ..... 3<sup>RD</sup>**  
**ACCUSED**  
**OSCAR WANJALA BARASA ..... 4<sup>TH</sup>**  
**ACCUSED**  
**BENARD WERE CHEBAKOO ..... 5<sup>TH</sup>**  
**ACCUSED**

**RULING**

1. The five Accused persons have been convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code. The maximum penalty for murder is death. However, the death penalty is reserved for most aggravated cases.

2. The Accused persons committed a monstrous act of injustice often referred to as mob justice. In doing so, they took the law into their hands and meted out a cruel fatal punishment on their victim whom they suspected of stealing a cow.
3. The Judiciary Sentencing Guidelines has laid down the principles of sentencing with the ultimate objectives being retribution; deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration.
4. In determining the appropriate sentence, the same Guidelines require the court to consider the aggravating and mitigating factors while bearing in mind the following factors:-
  - i. Age of the offender.*
  - ii. Being a first offender.*
  - iii. Whether the offender pleaded guilty.*
  - iv. Character and record of the offender.*
  - v. Commission of the offence in response to gender-based violence.*
  - vi. Remorsefulness of the offender.*

*vii. The possibility of reform and social re-adaptation of the offender.*

*viii. Any other factor that the court considers relevant.*

*ix. Time already spent in prison by the convict.*

*x. Duress, provocation, less participation in the offence (including progressive provocation).*

*xi. Any attempt to make reparation for the offence.*

5. The court called for pre-sentence reports which are largely in favour of the Accused persons. The 1<sup>st</sup> Accused is an elderly man aged 82 years who expressed deep remorse and said that it was not his intention to have the deceased killed when he raised an alarm over his missing cow. He is sickly with diarrhea and during his 15 days in custody after his bond was cancelled upon conviction, he fell critically ill and the court had to reinstate his bond. A non-custodial sentence is recommended.
6. The 2<sup>nd</sup> Accused is equally elderly at 71 years. He denied direct involvement in the killing but expressed regret over the offence and extreme sympathy for the victim's family. He is said to be living positively with HIV. A lenient custodial or non-custodial sentence was recommended.

7. The 3<sup>rd</sup> Accused is 63 years old. The Probation Officer noted that he was sincere in his remorse and willingness to take responsibility for his actions. A lenient sentence was recommended on account of his law-abiding conduct over the period he was on bond. The court has also perused the record and established that on 16<sup>th</sup> July 2019, the Accused who had been referred for mental assessment was examined at the Kakamega County General Hospital and a report made that he was mentally unstable and in need of close psychiatric follow up.
8. The 4<sup>th</sup> Accused is the youngest among the Accused persons at 51 years of age. He is said to be remorseful albeit maintaining his innocence and saying that he was merely escorting the deceased to the police station.
9. The 5<sup>th</sup> Accused is 54 years old and a member of *Nyumba Kumi*. He is said have expressed regret and acknowledged that the incident was unlawful but avoidable. He pleaded for leniency. The Probation Officer recommended leniency in light of his remorse, low risk of reoffending and strong community support.

10. The pre-sentence reports have a general finding that all the Accused persons have a low risk of reoffending, have strong community support, and pro-social conduct.
11. The Prosecution did not submit that any of the Accused persons are repeat offenders so I deem them to be first offenders.
12. On my interviewing the victim's father Justus Nyongesa, he expressed deep pain over the loss of his son. He indicated that he now has a challenge raising the victim's orphaned child. He also said that his wife died after the incident. This reinforces the findings in the pre-sentence report where it is stated that the victim's father said that the victim's death robbed him of his primary source of financial support. He pleads for a sentence that will render justice to the deceased and offer closure to his family which has suffered immense grief, sorrow and anguish at the loss of their son's life in the hands of their relatives.
13. From the record, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Accused persons spent the least time in custody before they were released on bond. The 3<sup>rd</sup> Accused was in custody from 3/8/2015 until 26/5/2020 when he was released on bond. The 4<sup>th</sup> Accused

was in custody from 3/8/2015 until his release on bond on 24/5/2020. Upon conviction, all the Accused persons were committed to remand custody pending sentencing save for the 1<sup>st</sup> Accused who fell ill and had to be released. In total, the 3<sup>rd</sup> and 4<sup>th</sup> Accused persons have been in custody for approximately five (5) years. Additionally, the ten (10) years during which the accused persons have attended the trial must have given them time to reflect on the gravity of their unlawful action. In my view, the objectives of punishment have been partially achieved.

14. The court has to balance the rights of the accused against the rights of the victim's family as it metes out punishment.
15. Section 4 (5-8) of the Probation of Offenders Act provides that:-

**“(5) Before making a probation order under subsection (1) or (2), the court may consider the view of the victim as contained in the pre-sentence report prepared pursuant to subsection (6).**

**(6) Where a subordinate court or a superior court considers making a probation order, it shall, before making such order, direct a probation officer to**

**conduct a social inquiry into the circumstances of the case and the accused and make a presentence report of the findings to the court.**

**(7) A probation officer shall, while acting on the authority of the court, have the right to access records and any other necessary information from any person or authority having such records or information for the purpose of preparing a social inquiry report.**

**(8) A pre-sentence report shall include a recommendation as to the suitable period of supervision, rehabilitation programmes and any measures necessary to reduce the risk of re-offending.”**

16. I have considered the pre-sentence report and in view of the disparity in the age and circumstances of the Accused persons, I have also considered the victim's father's sentiments and the objects and purposes of sentencing. I now make the following orders:-

(i) The 1<sup>st</sup> Accused is sentenced to serve probation for one (1) year.

- (ii) The 2<sup>nd</sup> Accused is sentenced to serve probation for one (1) year.
- (iii) The 3<sup>rd</sup> Accused is sentenced to three (3) years' probation. Additionally, he shall pay to the victim's father a sum of Kenya Shillings One Hundred and Twenty Thousand (Ksh. 120,000/=) payable in three instalments of Ksh. 40,000/= per annum.
- (iv) The 4<sup>th</sup> Accused is sentenced to three (3) years' probation. Additionally, he shall pay to the victim's father a sum of Kenya Shillings One Hundred and Twenty Thousand (Ksh. 120,000/=) payable in three instalments of Ksh. 40,000/= per annum.
- (v) The 5<sup>th</sup> Accused is sentenced to three (3) years' probation. Additionally, he shall pay to the victim's father a sum of Kenya Shillings One Hundred and Eighty Thousand (Ksh. 180,000/=) payable in three instalments of Ksh. 60,000/= per annum.

Dated, signed, and delivered at Kakamega, this 27<sup>th</sup> day of January 2026.

**A. C. BETT**

## **JUDGE**

### **In the presence of:**

Ms. Chala for the Prosecution/State

Ms. Eroba holding brief for Mr. Momanyi for the Accused  
persons

Court Assistant: Polycap

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