



**Wamalwa & 2 others v Republic (Criminal Appeal 173 of 2018)  
[2022] KECA 487 (KLR) (25 March 2022) (Judgment)**

Neutral citation: [2022] KECA 487 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 173 OF 2018  
PO KIAGE, J MOHAMMED & M NGUGI, JJA  
MARCH 25, 2022**

**BETWEEN**

**ZADOK WAMALWA ..... 1<sup>ST</sup> APPELLANT**

**FRANCIS BARASA WAKHUNGU ..... 2<sup>ND</sup> APPELLANT**

**ERIC SIFUNA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment of the High Court of Kenya at  
Bungoma (Ali-Aroni J.) dated 8th February, 2018 in HCCC NO. 23 OF 2013)*

**JUDGMENT**

1. The appellants herein Zadock Wamalwa (Wamalwa), Francis Barasa Wakhungu (Wakhungu) and Eric Sifuna (Sifuna) were on 10<sup>th</sup> December, 2013 arraigned before the High Court at Bungoma on a charge of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information charged that on the 16<sup>th</sup> of October, 2013 at Sintayi Village, Bungoma County, the appellants and one Dismas Wanyonyi Wanjala (Wanjala) murdered David Wanyonyi Nyongesa.
2. They all pleaded not guilty and a trial ensued before Aroni, J. The prosecution called 9 witnesses and each of the appellants and Wanjala when placed on their defence, gave sworn testimony. By a judgment delivered on 21<sup>st</sup> February, 2017, the learned Judge found the charge proved and convicted all the accused persons before her. She took their mitigation and then sentenced each to serve 20 years in prison. Wanjala, having been 16 years old at the commission of the offence and 20 years old at the time of sentencing, was sentenced to community service near his home under the supervision of the Probation Officer for a period of 1 year.



3. Aggrieved by the conviction and sentence, the appellants in a joint memorandum of appeal filed on their behalf by the Firm of Sala Mudany Advocates complain that the learned Judge erred in; Convicting them on insufficient evidence Convicting them without proof beyond reasonable doubt. Imposing a sentence that was excessive, harsh, unconstitutional and unlawful.
4. In readiness for the hearing of the appeal submissions were filed for the appellants and the respondent, which were highlighted before us by the parties' respective learned counsel Mr. Olonyi and Mr. Onkoba who also asked us to consider the various authorities cited in the written submissions.
5. Mr. Olonyi, for the appellants asked us to reject the prosecution theory that the appellants killed the deceased because he had stolen Wamalwa's cow. He charged that there was no evidence tendered to that effect as PW2 and PW3 the crucial witnesses relied on by the prosecution did not witness the killing. He added that malice aforethought was not proved and invited us to hold that the appellants' conviction was founded on wrong premises. He urged that in the event that we upheld the conviction, we reconsider the sentence and impose an appropriate one.
6. In Mr. Onkoba's view, the appeal is without merit as the appellants' conviction was based on consistent and corroborative evidence. The persons who were convicted did commit the offence. They went to PW2's house and dragged the deceased out of it before beating him to death. Indeed, Wakhungu, who was a Mukasa or village elder, went on that mission while declaring that he was "going to kill a thief." The conviction was thus proper as was the 20-year sentence imposed on them. He urged us to uphold it so as to send a message that people cannot take the law into their hands.
7. We have considered these submissions in light of the record before us, mindful that as a first appellate court our duty is to subject the entire evidence to a fresh and exhaustive re-evaluation so as to draw our own independent inferences of fact and conclusions on the guilt or otherwise of the appellants. See Rule 29(1) of the *Court of Appeal Rules* and *Okeno -vs- Republic [1972] EA 32*. Having done so, we entertain no doubt whatsoever about the appellant's involvement in the killing of the deceased that earned them the conviction.
8. The evidence of PW1 Fernide Malinga Masinde was that he was at the house of his brother John Simiyu (PW2) on the morning of 16<sup>th</sup> October, 2013 when, at about 7.30 a.m., the deceased came to take some tools for his work. At that point the appellants and Wanjala came and forcefully dragged the deceased from PW2's house. As they did so, they were asking for their cows. They wanted to slash the deceased right there in the house, causing PW2's wife to scream and PW2 asked them to leave. Wakhungu and Sifuna were armed with sticks while Wanjala had a panga. They threatened PW1 as they demanded that he remove the deceased from his house and Wamalwa in fact attacked PW2. He claimed that the deceased had stolen his cow worth Kshs.40,000. They overpowered PW2 and removed the deceased from the house. They started beating him with sticks right outside the house before dragging him towards the railway line.
9. As the appellants and their co-accused demanded and eventually succeeded in taking the deceased with them, they rejected entreaties by PW2 or his wife Eunice Nasambu Musee (PW3) to let the Police come and handle the matter. PW3 followed them as they took the deceased to the river near the railway line where they beat him and wanted to lynch him. They then started to sing circumcision songs and she ran away under threat by Wamalwa. In cross-examination she maintained that the appellants and Wanjala started beating the deceased right at her door step and all the way to the place by the river where he eventually died. She denied that a crowd was involved as other people came to the scene after they had killed him.



10. The testimony of Catherine Wabomba (PW4), which was brief and unshaken, was that on the fateful morning she was sweeping her compound when she saw the appellants and Wanjala passing by in a rush. She spoke to Wamalwa enquiring why they were in such a hurry and he said he was “going to kill a thief in the area.” He was armed with a stick while Wanjala had a panga.
11. An autopsy report prepared by one Dr. Damba and produced in court by Dr. Philip Koskei (PW7), who was his colleague at Bungoma County Referral Hospital, showed that the body of the deceased had lacerations of the right cheek and head as well as a dislocated right hip joint. There was bilateral bleeding on the brain and he formed the opinion that the cause of death was severe head injury secondary to blunt force trauma.
12. When placed on their defence, all the appellants and their co-accused denied any involvement in the death. While Wamalwa explained that he indeed lost a cow, he testified that beyond reporting to Wakhungu who was the village elder, and going towards Majanja and Malakisi in a vain search for it, he took no other action and in particular did not go to PW2’s house and never participated in the killing of the deceased.
13. Wakhungu said he received a report from Wamalwa about the lost cow and that the hoof prints led to the deceased’s house. He advised the reportee to go make a report with the police. Even though he knew the deceased as a resident of his village, he did not see him on the material day nor did he go to PW2’s house. He also did not go to the scene where the body of the deceased was after hearing news of the death. He claimed that PW2 and PW4 had a grudge against him because he once arrested the couple over Chang’aa. When cross-examined about this claim, he admitted that he did not mention it to his lawyer but explained that he “forgot”.
14. Sifuna, who was Wamalwa’s herdsman, stated that on the material day he was informed by his wife that a cow was missing. He then saw Wamalwa, Wakhungu and others as they went to look for the lost cow. He remained behind to feed the rest of the cows. Even though he knew the deceased, he did not see him that day, did not go to PW2’s house, and did not participate in the killing.
15. We think that the evidence of PW2 and PW3, the couple from whose house the deceased was fetched with violence and menaces and dragged out of with beatings, is decisive with regard to the appellants’ involvement in the death of the deceased. They started beating him right at the couple’s house and ignored entreaties to report the matter of his alleged theft of Wamalwa’s cow to the police. PW3 in fact followed the appellants and Wanjala all the way to the riverside by the railway line where they intensified their beatings on the deceased. Those beatings went a notch higher when they started singing circumcision songs at which point she had to flee as they threatened her with violence but not before seeing them attempting to lynch the deceased. The direct evidence of beating with sticks seen by PW2 at the beginning and by PW3 for much longer is consistent with the autopsy findings that the deceased died as a result of injuries in the nature of blunt trauma that included injuries to the brain. The investigating officer, Corporal Vincent Owino (PW8) on getting to the scene found that the deceased’s body was partly burnt.
16. Those beatings with the sticks the appellants wielded, coupled with the places they were directed at, leading to dislocation of the right hip joint laceration of the right cheek and scalp and bleeding on the brain together with the burning, all show that they were inflicted with the intent to cause either death or grievous harm to the deceased. Those injuries, so intended, are sufficient to establish the element of malice aforethought as defined by section 206 of the Penal code;

“206. 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.”

17. Moreover, even though motive is not a requisite element for the proof of murder under our law, its presence in the present case goes to bolster the evidence that the beatings were indeed meant to cause the death of the deceased. Wakhungu told PW4 in categorical terms as he rushed to PW2’s house that he was going “to kill a thief in the area”. He and the other appellants as well as Wanjala were clearly out to eliminate the deceased on the basis of suspicion that he had stolen Wamalwa’s cow.
18. We are thus satisfied that the appellants’ conviction was sound and well-merited, their guilt having been established beyond reasonable doubt.
19. Regarding sentence, we note as did the learned Judge, that the appellants had no justification for taking another’s life no matter what crime he was suspected of. The fact that the appellants committed the offence while singing circumcision songs and threatened to beat up PW3 who all along was trying to dissuade them and thereafter set the body of the deceased on fire speak to a heinous act committed with impunity.
20. In light of all the circumstances including the mitigation offered that they were first offenders whose families depended on them as bread winners, we think that the 20-year sentence was reasonable if not lenient. We would therefore not interfere.
21. In the result, the appeal is devoid of merit and is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MARCH, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

*I hereby certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

