



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 26 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

ROBIN KIRUI LAWENDI.....1ST ACCUSED

WYCLIFF KECHA CHEMIATI.....2ND ACCUSED

STEPHEN MOYOYI CHEMENI.....3RD ACCUSED

J U D G M E N T

The Accused **Robin Kirui Lawendi** alias **Doctor** (accused 1), **Wycliff Kecha Chemiati** alias **Luke Kecha** (accused 2) and **Stephen Moyoyi Chemen** (accused 3) are charged with 4 counts for offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **Robin Kirui Lawendi** alias **Doctor**, **Wycliff Kecha Chemiati** alias **Luke Kecha** and **Stephen Moyoyi Chemen** on the 2nd of March 2008 at Embakasi village in Trans Nzoia County, jointly with others already before court, unlawfully murdered **Mary Chesang**.

COUNT II

Robin Kirui Lawendi alias **Doctor**, **Wycliff Kecha Chemiati** alias **Luke Kecha** and **Stephen Moyoyi Chemen** on the 2nd of March 2008 at Embakasi village in Trans Nzoia County, jointly with others already before court, unlawfully murdered **Sofia Cheptek**.

COUNT III

Robin Kirui Lawendi alias **Doctor**, **Wycliff Kecha Chemiati** alias **Luke Kecha** and **Stephen Moyoyi Chemen** on the 2nd of March 2008 at Embakasi village in Trans Nzoia County, jointly with others already before court, unlawfully murdered **Titus Kipyego**.

COUNT IV

Robin Kirui Lawendi alias **Doctor**, **Wycliff Kecha Chemiati** alias **Luke Kecha** and **Stephen Moyoyi Chemen** on the 2nd of March 2008 at Embakasi village in Trans Nzoia County, jointly with others already before court, unlawfully murdered **Samuel Kibet**.

COUNT V

Robin Kirui Lawendi alias **Doctor**, **Wycliff Kecha Chemiati** alias **Luke Kecha** and **Stephen Moyoyi Chemen** on the 2nd of March 2008 at Embakasi village in Trans Nzoia County, jointly with others already before court, unlawfully murdered **Moses Mbuya**.

Hon Abida Aroni took the plea and heard **PW1 Robinson Mbuya** and **PW2 Sarah Kipkemoi**. Her ladyship then went on transfer. On 1.9.2018 this court explained to the accused the provisions of Section. 200 C.P.C. The accused elected this court to proceed from where the proceedings had reached and did not wish to have any witnesses who had testified to be recalled.

PW1 Robinson Mbuya was with a police reservist at his home in Kiwasai hiding in a bush on 2.3.2008 at 2.a.m due to the 2007 – 2008 post-election clashes. He was hiding outside his house when at 2 a.m. he saw Wycliffe Situma and the other accused persons. They entered his

house and shot at his wife who screamed twice. They then set fire to his grass thatched house where his wife Mary Chesang and 3 children Sophy Mbuya, Kipyegon Mbuya and Samuel Mbuya all got burnt. They also went to the neighbours houses which they also set on fire. He stayed up to 5 a.m. when police came. When police arrived they were also shot at by attackers but reinforcement was called for.

With the assistance of police he went to his house and found his other children Joan, Emma and Esther injured but alive. They were taken for treatment. He reported the matter to police. The accused ran away from the area and only came back after 2 years when they were arrested.

On being cross-examined by Musumba for accused, he stated that he saw accused 3 Stephen who as his neighbour for 3 years. He also used to see accused 1 and 2 for about one year. He stated that he saw 6 people enter his house but does not know who shot the wife. He stated that after the incident accused escaped to Uganda and were arrested in 2013.

PW2 Sarah Chepkemoi was at their house on 3.3.2008 with her mother Mary Chesang (1st deceased) and siblings. Joan Chelagat (..) Emma Chemutai (...) Esther Chelimo (...) and Samuel Kibet, and one Moses. While there at 2.a.m people came and woke them up and asked the mother (1st deceased) to open the door. She opened. They were shooting. She escaped and went outside. She saw accused 3 Stephen shooting. Accused 1 said "tokeni Maumbwa tunataka nyinyi". They set the house on fire. The other siblings Joan, Emma and Esther ran out and went to a neighbours home. The other family members who didn't come out died. At 5 a.m. police came and visited the house where they found the deceased had been burnt beyond recognition. She knew the accused as neighbours but they escaped from the area from 2008 till 2014 when they were arrested.

On being cross-examined by Musumba for the deceased, the witness stated she knew accused 1 and accused 2 as they were staying about 2 km away. She stated that she escaped from the house and hid 20 meters away. She stated she was 12 years old then, and was able to recognize the accused from the light of the burning houses. She confirms that 1st-4th deceased were in the house.

PW3 PC Frasto Onyango Klesen then attached to DCIO Kitale was on 6.3.2008 assigned to take over the investigations of the Murder incident that had occurred on 2.3.2008 at Embakasi village in Tran nzoia, where 13 people had been shot dead, among them the 1st-4th deceased in this case. He recorded statement from Robinson Mbuya (PW1) who mentioned the suspect. He gave the name of Stephen Moyoyi who lost who lost 3 members of his family and Robinson Mbuya who lost 5 family members. The names he was given were the actual names and nicknames. He handed the names to his colleague PC Mwanande who is the one who arrested the accused.

PW4 PC David Kipchumba then attached to DCIO Kitale in company of Senior OCPD and DCIO visited a scene where 12 people had died allegedly by Land Defence Force Militia then camping at Mt. Elgon on suspicion that they were giving information to police. At the scene he took 20 photograph. He later processed them and produced them as exhibit.

Exh. 1 and 2. Among the photograph he took was the burnt house where there were 5 bodies burnt beyond recognition. The house belonged to the PW1 Mbuya.

PW5 Dr. Phaustine Shitole produced post mortem report on the deceased performed by Dr. Mogoi. His findings were that Mary Chesang (1st deceased) had 100% burns, Samuel Mbuya Kibet (4th deceased) had 100% burns, Kibet Mbuya a child was severely burnt, Salome Cherotich was shot at and cause of death was due to severe haemhroge secondary to gunshots. Abel Kiptoo also sustained two gunshot wounds and cause of death was due to sever haemhorage secondary to gun shot wounds.

PW6 Julius Mwasenye the investigating officer took over the investigations from **PC Gigenge** on 24.2.2014. He found accused had been arrested by police officers with assistance of KPR. He recorded further statements and then caused accused to be charged with present offence.

PW7 Justine Chemiso was at her house on 3.3.2008 at 2 a.m. when she heard people opening the cows den. She informed her husband. They then shot the door and her husband. She lit the lamp. 5 people entered the house wearing green uniform and others in civilian. They shot her at the abdomen. She observed the assailants and identified one of them as Kecha (accused 2) who stays near their home. Her children Dorcas was shot on the stomach, Abel was also shot, and Coided was cut and died. She was able to identify Stephen (accused 3) as among the assailants. She testified that 2 days before the incident accused 3 had bought petrol and taken it to his house.

On being cross examined by **Musumba** for the accused, she stated that Robinson Mbuya (PW1) home is not far and she knew his home was also attacked.

The accused gave sworn evidence in their defence. Accused 1 Robin Kirui Lawendi. He testified that he was elected as a Trustee during land adjudication in their village and was not involved in the murder. He testified that the witnesses did not mention him in Kitale H. Cr 8 of 2009 and that witnesses Joan Temiso who recorded a statement was not called to testify.

He confirmed in cross-examination by M/s Nyakibia that his nickname is "daktari".

DW2 accused 2 Wycliff Chemiati Kecha testified that on 2.3.2008 he was at his home which is 5 kms away from the scene of murder. In 2014 while at home police officers came and arrested him. He had heard of the murder and went to see. He testified that the name 'Kecha' is not peculiar to him as there are many others by that name as meaning twins. On cross-examination he stated that his home is about 2 hours walk distance to the scene.

DW3 Accused 3 Stephen Moyoyi Chemeni testified that there were tribal clashes in Mt. Elgon and people ran away. The brother of Robinson (PW1) was among them. Robinson (PW1) asked accused 3 to rent a house for his brother and paid rent for 2 months. In 2007 the accused 3's tenant was killed. He then saw leaflets circulating alleging that they were Land Defence Force. He handed over the leaflet to the

chief who was also killed. He received threatening leaflets. He went to Matumbai in Endebess until 2008. In July-August 2008 he went to Mt. Elgon. In 2009 he came back to Embakasi. In 2014 he was asked by clan elder to go to Kitale police station where he was arrested. He said he knew PW 1. (Sarah (PW2) knew him as she is a daughter of a neighbor but did not mention him in her first report to police.

Mr. Musumba for all the accused filed written submissions. Counsel submitted that there is no dispute of the fact of deceased demise as there is clear evidence in proof of the same. As whether they died due to the unlawful act or omission of the accused, counsel submits that the prosecution evidence is based on the purported recognition of the accused persons by PW1 Robinson who stated he was almost 1 kilometer away and who did not explain how he would identify the accused persons. Counsel submits that the offence was committed at night and that the court should find the evidence of PW2 Sarah not to be cogent as she did not mention accused 3 in other proceedings in Kitale H.C.CR 8/2009 which the defence produced as DExh.1. Counsel therefore submits that there is a high chance of mistaken identity of the accused. He referred this court to the decision in **Kiarie –V- Republic (1984) eKLR.**

The accused 1, 2,3 are all charged with 5 counts of murder contrary to Section 203 as read with Section 204 of the offence of Murder. Section 203 provides.

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

204. Any person convicted of murder shall be sentenced to death.

In a charge of murder, the prosecution must prove beyond reasonable doubt the following ingredients of the offence

1. The fact of death and cause of death.
2. The unlawful act or omission that caused the death of deceased.
3. That there existed malice aforethought.
4. That it is the accused who caused the unlawful act or omission from which the deceased died.

PW5 Dr. Phaustine Shitole produced a post-mortem report prepared by Dr. Mogoi. The post mortem was performed at Kitale hospital mortuary on 7.3.2008. He produced the post mortem for the following deceased

1. Samwel Mbuya
2. Mary Chesang (deceased in count 1)
3. Kibet Mbuya
3. Salome Cherotich
5. Abul Kiptoo

He did not in this case produce post mortem reports for

1. Sofia Cheptek (deceased in court 2)
2. Titus Kipyegon (deceased in court 3)
3. Samwel Kibet (deceased in count 4)
4. Moses Mbuya (deceased in count 5)

In respect to Mary Chesawa Chesang deceased in count 2, he found that she had 100% burns and formed opinion that the cause of death was due to severe burns. The evidence of this witness proved the fact and cause of death. His evidence also confirms that the unlawful act or omission that caused the death of the deceased was the setting on fire of the deceased who then sustained 100% burns.

The next element that the prosecution must prove beyond reasonable doubt is whether it is the accused alone or jointly with others set the deceased on fire.

PW1 Robinson Mbuya the husband of the deceased in count 2 Mary Chesang was with a police reservist. On 2.3.2008 in a bush outside his house keeping security during the 2007-2008 post-election violence in Saboti area. At about 2 a.m. he saw Robin accused 1) Wycliffe (accused 2) and one Situma with other people enter his boma. They got into his house and shot his wife deceased in Count 1 and children Samuel Mbuya, Kipyego Mbuya and Sophy Mbuya. They then burnt his grass thatched house. The people also burnt his neighbor houses. He did not respond until 5 a.m. when police came.

The accused then escaped and went out of the area for 2 years but were later arrested. He testified that accused 3 is his neighbour but he used

to see accused 1 and 2. On cross-examination he stated that he had told police he was on patrol and that he was watching and saw 6 people enter the house. He confirmed he told police that he was 1 km away but stated he was in a bush next to his house. He confirmed it was at night but stated he was able to recognize the people from the light of the fire from the torched houses.

PW2 Sarah Chepkemoi was in the house with her mother Chesang and siblings when they saw the hose on fire. The mother Chesang opened. People started shooting. She saw accused 3 Stephen Moyoyi shoot. He also said "Tokeni Maumbwa tunataka nyinyi". The 2nd accused Wycliffe Kecha said they went all to them. She then ran out. Other siblings Joan, Emma and Esther came out and they together ran away. She testified that she knew accused before as they were neighbours as accused 1 Robin and accused 2 Wycliffe stay about 2 km away. She stated that she recognized the accused and from the light and their voices.

PW7 Justine Chemiso gave evidence on how she was attacked in her house and how she recognized Kecha (accused 2) and Stephen (accused 3) as the attackers. She testified that the house of Robinson Mbuya (PW1) which is not far from her home was also attacked.

The main issue is whether the accused jointly or individually have been positively identified as the person who attacked and set fire to the house where deceased died. Positive identification of the accused as the person who committed the unlawful act or omission causing death of deceased is an important element of the offence of murder. In the Court of **Appeal in Anjononi –Vs- Republic 1980 KLR 59** stated.

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification, of the assailants recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other...”

The court must consider the evidence on identification with outmost care, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. Such evidence can be from a single witness or multiple witnesses. The court must be satisfied that the evidence of the witness is truthful and that the conditions for identification were favourable.

In **Wamunga –V-Republic 1989 KLR 424 the Court of Appeal** stated:

“It is trite law that where the only evidence against the defendant is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and true from possibility of error before it can safely make it a basis of conviction.”

In assessing the quality of identification evidence the court of appeal in **Donald Atemia Sipendi -V- Republic (2019) eKLR** stated that the court should consider

a. What were the lighting conditions.

“35. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

a. What were the lighting conditions under which the witness made his/her observation?

b. What was the distance between the witness and the perpetrator?

c. Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

PW1 Robinson Mbuya testified that he during this period was hiding in a bush not far from his house when he saw the accused 1 Robin, accused 2 Wycliff and Situma go to his house. He saw his 2 grass thatched house torched and heard his wife Chesang scream. He was in a bush a few meters away from the house. He has known accused 1 as his neighbour for 3 years and accused 2 and accused 3 for 2 years. He explained that he saw them clearly from the light of the houses which were burning.

PW2 Sarah Kepkemoi who was in the house with deceased testified that she knew accused 3 Stephen Moyoyi as the person who shooting. Accused 3 also talked saying "Tokeni Maumbwa tunataka nyinyi." She knows the accused 1, 2,3 well as they were neighbours. After running out she was able again to recognize them from the light of the burning houses. He was able to also recognize their voices.

The accused 1's defence is he did not commit the offence and was not positively identified. He confessed that he was not mentioned by the witnesses in Kitale HCCR 8/209 relating to the same offence where other people were charged. He stated he was a trustee during Land Adjudication.

Accused 2 testified that he was at his home at time of offence and only came to hear of the murder. He admits that his name is Kecha and witnesses mentioned the name of Kecha.

Accused 3 Stephen Moyoyi Chemen testified he knew Sarah (PW2) as she is a daughter of her neighbor and that she knew him well.

PW2 Sarah testified that while in the house she saw accused 3 shoot. While accused 2 and 3 stayed about 2 km away and she only used to accused 3 was an immediate neighbor known to her well. This is confirmed by accused 3. The evidence of visual identification of accused 3 is that of recognition of a close neighbour. With both the light present as the house was burning, I find that her recognition of accused 3 Stephen Moyoyi Chemen was positive and free from possibility of error.

I am not satisfied that the familiarity of the accused 1 Robin Kirui and accused 2 Wycliff Kecha who stayed 2 Kilometers away and had only seen severally before was free from error. I therefore find that the prosecution has not proved its case beyond reasonable doubt in respect of accused 1 Robin Kirui Lawendi and accused 2 Wycliff Kecha Chemiati. I find accused 1 Robin Kirui Lawendi and accused 2 Wycliff Kecha Chemiati not guilty of the offence of murder on all the 4 counts and acquit each of them under Section 215 C.P.C. Accused 1 and 2 to be set at liberty unless otherwise lawfully detained.

As for accused 3 Stephen Moyoyi Chemeni, I find that the prosecution only proved the death of deceased in count 1 Mary Chesang whose post mortem was produced. The post mortem of deceased in count 2, 3, 4, 5 were not produced by the doctor PW5 Dr. Phaustine Shitole and therefore the fact and cause of death was not proved.

I therefore find accused 3 Stephen Moyoyi Chemen guilty of the offence of murder Contrary to Section 203 as read with Section 204 of Mary Chesang in Count 1 and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY JULY, 2021

S N RIECHI

JUDGE