



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 28 OF 2015

REPUBLIC.....PROSECUTOR

-VRS-

1. SAMSON ONCHONG'A GICHANA.....1ST ACCUSED

2. RAPHAEL MOKAYA GIDEON.....2ND ACCUSED

3. GEOFFREY ONUONGA ONGERA.....3RD ACCUSED

JUDGEMENT

The accused persons are charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the 1st consolidated charge are that on 28th February 2012 at Nyagacho village in Borabu District within Nyamira County, jointly murdered Euniah Kerubo, deceased.

On count II, it is alleged that on 28th February 2012 at Nyagacho village in Borabu District within Nyamira County they jointly murdered Abinali Marwanga, deceased.

The accused persons pleaded not guilty on both counts. To prove its case, the prosecution called nine witnesses. The 1st accused was represented by Okemwa Elijah Advocate while the 2nd and 3rd accused were represented by G. M. Nyambati Advocate.

The uncontested facts of this case are that on the material day Euniah Kerubo, deceased in count I and Abinali Marwanga, deceased in count II, were both residents of Nyagacho village. On the material day Euniah Kerubo left her house at between 7am and 8am and went to assist Abinali's sister Esther Kwamboka (Pw4) in her farm where Abinali joined them briefly before leaving for Nyagacho Primary School. It was not long before Abinali was brought back by a group of people who also apprehended Euniah Kerubo. The group of people (mob) accused Euniah and Abinali of practicing witchcraft. They roughed them up and told them to produce the book where they had allegedly recorded the names of the people they were going to bewitch. The mob then frogmarched the deceased persons to Euniah's home and demanded that they produce the book. According to Pauline (Pw1), Euniah's daughter who was at home at the material time, when she heard noises on the road she shut the door and stood outside the house. She soon realized that the approaching crowd was headed to her home. The group who was with her mother Euniah and Abinali claimed they were looking for witches. They pushed her mother towards their home and ordered her to open the house so that they could get the book. It was then that she (Pw1) handed the key to one of the villagers in the group whom she identified as the 3rd accused and the house was opened. The search done therein did not however yield anything. The group did not stop there because the next thing they did was to shove the two suspected witches, now the deceased persons in this case, into the house which one of them set on fire. By the time word reached the local administration the house had been razed to the ground and the deceased persons burnt beyond recognition. The matter was subsequently reported to Keroka Police Station. A team comprising PC Korir (Pw7) and other officers was dispatched to the scene to carry out investigations. The remains of Euniah and Abinali had by then been taken to Nyansiongo Mortuary by officers who were called to the scene by the area Assistant Chief.

On 2nd March 2012 Dr. Maurice Rauta (Pw9) conducted separate post mortems on the remains of the deceased and in both cases came to the conclusion that the cause of death was cardiorespiratory arrest secondary to severe burns. It was his testimony that the bodies were completely burnt up externally and internally. He produced the post mortem reports in evidence Exhibit 3 (a) and (b).

The court heard that following the incident a total of nine suspects were rounded up and taken to Keroka Police Station. The 1st accused was among those suspects. The 2nd and 3rd accused were arrested later. On 8th March 2012 Chief Inspector Munyoki (Pw5) was detailed to conduct identification parades. The witnesses in the parade were Esther Kwamboka (Pw4), Pauline Kwamboka (Pw1) and Simon Marwanga (Pw3). It was following these parades that the accused persons were charged with these offences. The parade forms were also produced in evidence [Exhibit 2 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j)].

Joshua Momanyi Tombe (Pw2), the Assistant Chief of Mogusii Sub-location within whose jurisdiction the incident occurred produced a small exercise book (Exhibit 1) which had names of the alleged witches as well as the names of the people they had bewitched and were dead as well as those they were going to bewitch. He stated that after the book was given to him by one Jane Sulumbo he put it in his pocket and proceeded to the Chief's office. It was while he was there that information reached them that trouble had shifted to the home of Euniah. He rushed there with the Chief and two administration police officers and found Euniah's house engulfed in flames. It took them quite a while to quell the fire and to retrieve the bodies of Euniah and Abinali which they took to Nyansiongo Mortuary. Pw2 told this court that the three accused persons are from Nyagacho village also known as Kamacira.

The accused persons all made unsworn statements. The 1st accused confirmed he hailed from Nyagacho in Mogusii. He stated that on 28th February 2012 he woke up at 6.30 am and went to his father's shamba in Riamoni. He stated that he and his wife stayed there until 6pm and upon arrival back home at 7pm his wife made supper which they ate and then slept. He stated that at midnight the area Assistant Chief Joshua Momanyi Tombe knocked on his door. He opened and the Assistant Chief and the Police Officers he was with told him to dress up which he did. After that he was taken to a vehicle and without any explanation taken to Keroka Police Station where he spent the night. He stated that he was told he would answer to a murder which had occurred in the village. He stated that his reply was that he had been away at Riamoni when the killings took place.

The 2nd accused recalled that he woke up early on that day and went to plough a shamba that had been led by his father. He stated that he went there at 6am and left at 1pm and that while he was there he heard a broadcast that houses at a certain place had been torched. It started raining and at about 1pm him and his father went home. On arrival he went to graze the oxen they were using to plough the land. He stated that he now hears that on 16th February while he was working at a hotel the Chief went with Police Officers. He contended that he was taken to Keroka where the charges were read to him. He contended that he knows nothing about the charges and that he was not at the scene when the killings occurred. He claimed to have disagreed with the Chief because of money he had lent to him. He contended that the Chief had threatened to do something which he would not forget if he continued pestering him (the Chief) to repay the money. He contended that that is what led to his arrest.

The 3rd accused told this court that he is a labourer from Mogusii and that he could recall that on the material day he was at Nyamasini village where he was raised after the death of his parents. He stated that he returned home on 16th March 2016 and stayed for a month. Then the Chief arrested him and said he would be told the reason later. He was later told he had killed someone. He stated that the Chief had been threatening him because he wanted him (accused) to sell him land. The 3rd accused stated that he had suffered because he did not know the whereabouts of his children despite being on bond.

The 1st accused called his wife Zipporah Kerubo Ondieki as a witness and she testified that on 28th February 2012 she went to Riamoni with her husband and stayed there until 7.30pm. She stated that they did not get any information regarding the happenings at home while they were there. She also stated that she cooked dinner at 7pm which they ate and slept but about midnight her husband was apprehended by the Chief. On being cross examined she stated that they left for the farm on foot at 6am and got there at 8am. She contended that they arrived back home at 7pm.

The 2nd accused called his father Simeon Mokaya Nabwera who stated that on the material day the two of them went to the shamba at 6am to plant maize and beans. He stated that they did not meet anybody on the way and since they were near a river they could not have heard anything happening in the village. He further stated that they left the farm at 1pm and went home but they still did not hear anything until later in the evening when he heard some people had been burnt. He stated that the accused was later arrested. He confirmed that he was aware the accused had lent some money to the Assistant Chief and that the accused had told him that when he asked the Assistant Chief for the money his response was that Assistant Chiefs do not pay. The witness contended that his son was not at the scene of this crime.

At the close of the case for the defence Mr. Nyambati, Advocate submitted that the prosecution had not proved its case beyond reasonable doubt. He submitted that the investigation was selective and geared towards innocent people yet more than 10 people were identified at the parade. Mr. Nyambati submitted that no explanation was given as to why the 2nd and 3rd accused were not arrested until 16th March 2016 a period of four years after the occurrence yet they remained at their homes. Counsel also questioned why they were not subjected to the identification parade. He submitted that there was a protracted dispute between the accused persons and their area Assistant Chief hence the reason they were framed. He contended that nothing prevented taking photographs of the culprits at the scene and stated that the real culprits were released. He urged this court to give the benefit of doubt to the accused persons and further submitted that the prosecution did not establish the provisions of Section 203 of the Penal Code. Counsel submitted that the offence of murder was not proved as mens rea or malice aforethought was not proved. Counsel further submitted that there was nothing to show communication or a meeting between the accused persons before the commission of the offence. Counsel submitted that this court ought to consider the evidence in its entirety and acquit the accused persons.

On his part Mr. Ochieng, the Prosecution Counsel acting for the State submitted that the evidence adduced was sufficient to prove the accused persons committed this offence. He submitted that the evidence placed the accused persons at the scene and contended that they were seen committing the offence. Counsel submitted that the motive was that the deceased were practicing witchcraft and the fact that other participants of the mob justice were not arraigned in court does not absolve them accused persons of the crime. Counsel stated that criminal offences are not limited by passage of time and the fact that the 2nd and 3rd accused persons evaded justice for four years is no bar. On the accused's defence, Counsel submitted that the same was contradictory and should be treated as a sham. He contended that **Sections 303 and 304** of the Criminal Procedure Code cited by Counsel for the defence are not relevant.

In reply, Mr. Nyambati reiterated his own submissions and further added that the ingredients contemplated by Sections 203 and 204 of the Penal Code were not proved. He urged this court to acquit the accused persons.

Section 203 of the Penal Code defines the offence of murder in the following terms: -

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

guilty of murder.”

From the facts of this case it is evident that the deceased persons were killed by a group of people who suspected they were practicing witchcraft. That group comprised their fellow villagers. It was claimed that the small exercise book produced as (Exhibit 1) contained names of people who had been killed and who would be killed by the deceased persons through witchcraft. Some of the villagers who are alleged to have frogmarched the deceased from the farms where they found them to the house where they set them on fire claimed that their names were in that book. Our law forbids any form of witchcraft and holding oneself as a witchdoctor or supplying advice or article for witchcraft with intent to injure, or using witch medicine with intent to injure and even possession of charms or other articles usually used in the exercise of witchcraft are all offences under the **WITCHCRAFT ACT (Cap 67 Laws of Kenya)**. The penalties provided for those offences are quite stiff. **Section 9 (1) of the Act** also gives District Commissioners power to order persons suspected of practicing witchcraft to relocate. This is of course upon them doing due inquiry and satisfying themselves that the person(s) suspected is likely to cause fear, annoyance or injury in mind, person or property to any other person by means of pretended witchcraft. Practicing or pretending to practice witchcraft as the law defines it is therefore an offence recognized by our law and anybody who suspects another of so doing has recourse in reporting it to the authorities. The people who killed the deceased persons in this case in the guise that they were practicing witchcraft therefore had no justification for doing so as their redress lay in reporting them to the lawful authorities. They took the law into their own hands which is unlawful. The court heard that the “mob” frogmarched the duo to the house of one of them (Euniah Kerubo) purportedly in search of the book where the names of their victims were recorded and not finding it one of them shoved them into the house while another poured “oil” which I understood to mean petrol before setting the house on fire. The post mortem reports tendered in evidence confirm that the deceased’s bodies were severely burnt. There is no way that any of them would have survived the fire. This was unlawful. **Section 206 of the Penal Code** sets out the circumstances that establish malice aforethought. It is my finding that in this case malice aforethought has been established beyond reasonable doubt by more than one of those circumstances. It is clear from the conduct of those people that they had an intention to cause the death of the deceased or to do them grievous harm. I can also confidently hold that the “mob” had knowledge that locking up the deceased persons in a house and setting it on fire would probably cause their death or grievous harm. It is my finding that whoever killed the deceased did it of malice aforethought and hence committed the offence of murder. I am also satisfied that it was proved beyond reasonable doubt that those who did it had formed a common intention to commit the offence and that each of them is therefore deemed to have committed the offence.

The only issue that remains for determination is whether the accused persons herein participated in the murder of the deceased.

This offence was committed in broad daylight. All the witnesses said the time was between 7am and 8am. The perpetrators were the deceased’s fellow villagers and were well known in that area. Pauline Kwamboka (Pw1), the daughter of Euniah, the deceased in count I, was clear in her mind that she saw the 3rd accused. It was her testimony that it was to him that she gave the key to her mother’s house. She told the court that he was their neighbour, that she knew him since she was born. Pw1 also identified the 1st accused as the person who shoved Abinali and her mother into the house where they were burnt. She knew the 1st accused by name. She stated that it is the 1st and the 2nd accused who sprinkled the house with the fuel which fuelled the fire. Her testimony remained unshaken even upon rigorous cross examination by Counsel for the accused persons.

Joshua Momanyi Tombe (Pw2) the Assistant Chief of the area where this heinous crime was committed also testified that he knew the accused persons well. Indeed, he must have known them as the 3rd accused and his father claim he (Assistant Chief) framed him because he (3rd accused) had lent him money which he refused to pay. During cross examination Pw2 testified that the 2nd accused was in the group of people who handed to him the exercise book (Exhibit 1) which allegedly contained the names of the victims of witchcraft. He knew the 2nd accused well. Esther Kwamboka Marwanga (Pw4) the sister of Abinali (deceased in count II) was with Euniah (deceased in Count I) in her shamba. The deceased had gone to assist her and they were still weeding her garden when her brother Abinali was taken there by a group of people who were beating him. When she asked them why they were doing that they said it was because he was a wizard. When Euniah asked them if he could really do that one man hit her and knocked out her teeth. They then dragged her and Abinali to his house which they searched before taking them both to Euniah’s house. She identified the 1st accused as the person who was beating Abinali. It was her evidence that she knew him well as they had attended the same primary school. She was candid that she did not see the 2nd and 3rd accused persons that day saying there were so many people that she could not identify them at all. Hellen Kwamboka Sambura (Pw6) the wife of Abinali (deceased) confirmed that she had left the deceased at home on that day. She also testified that when she returned home that day the house was in disarray – the window was broken and things were strewn all over. Although she did not identify those who killed her husband her evidence corroborated that of Esther Kwamboka (Pw4) that the killers escorted her brother to his house, searched it and then frogmarched him and Euniah to the latter’s house. I am satisfied that Pw1, Pw2 and Pw4 positively identified the accused persons. As I stated it was in broad daylight and they knew the accused persons very well. They were also present at different scenes and stages at which the offence was committed. There is nothing to demonstrate that Pw1 and Pw4 had any grudge against the accused persons. The witnesses impressed me as credible and reliable witnesses. The alibis mounted by the accused persons were not convincing at all. To begin with even though it is always the duty of the prosecution to dislodge such evidence, they were not given an opportunity to do so as the alibis were raised very late in the proceedings. Putting the evidence of the defence witnesses side by side with that of the prosecution witnesses I believed that of the prosecution witnesses. This is given that the accused persons gave unsworn statements which unlike the testimonies of the prosecution witnesses could not be tested through cross examination. The defence witnesses were the wife of the 1st accused and father of the 2nd accused who understandably would do anything to save the accused persons skins. The identification parades conducted by Chief Inspector Munyoki (Pw5) and whose forms were produced as exhibits 2 (a) to (f) were in my view of no probative value as the witnesses already knew the accused persons.

As for the allegation that the Assistant Chief (Pw2) framed the 2nd accused, that is not convincing as that accused was also seen by Pw1 who he did not allege had any reason to lie against him.

I am satisfied that the charges against the accused persons were proved beyond reasonable doubt. I find them guilty on the two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

Signed, dated and delivered at Nyamira this 21st day of February 2019.

E. N. MAINA

JUDGE