



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

versus

1. PHILIP LULE MUSA

2. CHARLES NYAMBUGE NDUTI

3. MUSA JUMA KIRIDO..... ACCUSED

JUDGMENT

1. The villagers of Kithii Sub-Location in West Muhuru Location in Nyatike Sub-County within Migori County who mainly depend on fishing in Lake Victoria for economic sustainability had suffered for a long period from dangerous fishing methods involving fish poisoning. The local administration in liaison with the Fisheries Department had variously engaged the fishermen in public *barazas* and even had some suspected fishermen arrested and prosecuted over the vice, but still the practice was not about to come to an end.

2. In the morning of 06/10/2016 the villagers woke up to a boat which was at the lake shore and which had evidence of engaging in poisonous fishing. That boat was owned by **Philip Lule Musa**, the first accused person herein, who had hired it to some fishermen including Biwott Sobu, Gilbert Sobu, Ouma Karumanga, Kenneth Marende Nyachuma, Roger and Mzee Oyula. Enraged with the revelation, the villagers descended onto the home of Sobu where two houses were razed down and a life lost. One **James Idi Nason**, (hereinafter referred to as '**the deceased**') was burnt to death whereas others sustained serious burns.

3. Upon completion of police investigations, the three accused persons herein were arrested and jointly charged with others not before Court with the murder of the deceased. They denied the information and a trial was held. A total of nine prosecution witnesses testified in support of the information. **PW1** was **Penina Odira Sobu** whom the deceased was her nephew being a son to her brother. **PW2** was a son to **PW1**. He was one **Gilbert Mwikoma Sobu** one of those who had hired the first accused person's boat. A brother to **PW2** and a son to **PW1** testified as **PW3**. He was **David Moi Sobu**. An uncle to the deceased one **Lawrence Songai Nyangori** testified as **PW4**. The Assistant Chief of Kithii Sub-Location one **Dickson M. Angweso** testified as **PW5** whereas the Chief of West Muhuru Location one John Madara Makamba testified as **PW6**. A Government Analyst based at the Government Chemist Laboratory in Kisumu City testified as **PW7**. **Dr. Awinda Victor Omollo** who conducted the post mortem examination on the body of the deceased testified as **PW9** whereas the investigating officer one **No. 49997 Corp. Joseph Kitaka** who was attached at the Nyatike DCI Office testified as **PW8**. I will refer to the witnesses in the sequence in which they testified before Court.

4. It is the prosecution's case that in the morning of 06/10/2016 at around 08:00am the accused persons herein killed the deceased while in the company of others and in public view. Leading the evidence on how the killing was executed was **PW1**, **PW2** and **PW3**. **PW1** testified that at the aforesaid time while at her house she saw a group of around 15 men armed and heading to the house of **PW2**. It was her testimony that she knew and recognized the accused persons as those among the group and who were likewise armed. That, the first accused person **Philip Lule Musa** (hereinafter referred to as '**Lule**') carried a stone and a jerrican containing some liquid, the second accused person **Charles Nyambuge Nduti** (hereinafter referred to as '**Charles**') carried as spear and the third accused person **Musa Juma Kirido** (hereinafter referred to as '**Juma**') had an arrow.

5. **PW1** followed the group of people and on reaching **PW2**'s house she saw them breaking the windows to **PW2**'s house. She sought for any explanation from the group as to what was happening in vain and she raised alarm. Undeterred and in turns, the three accused persons led by **Lule** poured the liquid which was in the jerrican inside the house through the broken window before **Lule** removed a match box from one of his trouser pockets and struck it leading to a huge fire explosion.

6. **PW1** was aware that **PW2** and his two children together with the deceased were inside the house. Those inside the house also wailed as they called for help. **PW1** was helpless and kept on wailing all the more. She then saw the two **PW2**'s young children thrown out of the house through the window before **PW2** jumped out of the burning house through the window and fell outside. The armed people then descended on **PW2** and assaulted him. **PW1** then threw herself on top of **PW2** so as to deter the beating but that did not work. **PW1** was

likewise beaten as PW2. The villagers gathered and managed to put the fire out, but by then the deceased had been trapped inside the house and burnt to death. PW2 and his children were rushed to hospital as the police later collected the body of the deceased.

7. PW2 was the owner of and one of those who were inside the house which was torched. He was with his two young children aged 8 years old and 2 years respectively and the deceased. Hearing some commotion outside his house PW2 looked outside and saw a group of around 15 men variously armed heading to his house. They surrounded his house and shattered the glass windows with stones. PW2 saw and recognized several members of the group who were people he knew quite well. They included the three accused persons, Otieno Mtanzania, Jack Mseti, Madeba Masimba, Ombogo Ochune, Ojuka Ong'ora, Ali Nyangweso, Jacob Ludi, Nyakongo Magaga among others.

8. The accused persons led the group. PW2 saw Lule carrying a jerrican containing some liquid standing outside one of the shattered windows as he was at the sitting room. Lule then poured the liquid inside the house through the window and some poured on PW2. Charles and Juma as well took over the jerrican from Lule, and in turns, poured the liquid inside the house through the three shattered windows. PW2 then saw Lule striking a match box and fire erupted. He struggled to get out of the house and realized that the main door was locked from outside. While on fire himself, PW2 managed to through his two young children outside the house through one of the windows at the sitting room and struggled out of the house through the same window. By the time PW2 managed to get out of the house the fire had taken a high toll on him and he collapsed. As he regained consciousness, he found himself in Tagacha Health Clinic at around midday with serious burns. He was treated and referred to Migori County Referral Hospital where he was admitted for one month.

9. PW3 also recounted what he witnessed. That, on 06/10/2016 at around 08:00am as he walked towards the lake and on reaching near PW1's homestead he saw a group of around 15 armed men whom he knew quite well throwing stones. He asked Charles who was one of them if there was any problem but Charles did not respond instead Charles threw stones at him and he fled. The group then went towards PW2's house and determined to know what the matter was, PW3 followed them and stood a short distance from PW2's house intently watching what was about to unfold. Reaching PW2's house Lule locked the main door from outside and the group pelted stones on the glass windows. Then Lule poured some liquid which was in a jerrican inside the house through one of the windows and was assisted by Charles and then struck a match and the house was on fire.

10. PW3 was also aware that PW2 and his two young children together with the deceased were inside the house. Shortly after the fire erupted PW3 saw one of PW2's children thrown out of the house through the window. He then saw PW2 struggle out of the house through the window, jump outside and fell. Immediately PW2 fell, Charles led the others in pouncing on him using a club. PW1 went and fell on top of PW2 to shield the group from assaulting PW2 but PW1 was also assaulted. The group then just milled around as PW3 rushed the badly-burnt PW2 to a nearby hospital. PW2 was referred for further treatment and PW3 took him to Migori County Referral Hospital. When PW3 latter returned home he learnt that the deceased had been burnt to death inside the house.

11. PW5 and PW6 were the local administrators as the Assistant Chief and the Chief respectively. In the morning of 06/10/2016 PW5 heard screams and commotion at the lake shore from his house and alerted PW6. He promised to update PW6 as he went to the shore. He found many people who were protesting against the use of poison as a mode of fishing. He saw a boat with fishing nets and fish and a small tin which had a very foul smell and the people informed him that the tin contained the poison used in fishing and that the boat belonged to Lule.

12. While still at the shore PW5 heard screams from a nearby homestead and many of the people at the shore rushed there. Shortly PW5 saw bellows of smoke and informed PW6. PW5 then proceeded to the homestead. He found PW2's house on fire and someone he did not know completely burnt to death. PW5 remained at the scene until when PW6 arrived in the company of the police. PW5 confirmed seeing the accused persons at the lake shore.

13. PW5 and PW6 testified on the long standing fish poisoning problem in the lake and the enormous efforts they had taken to eradicate it in vain. They had, in liaison with the Fisheries Department and the Police, held several public engagements and even arrested and charged several fishermen, but the problem was nowhere to disappear.

14. When PW5 informed PW6 of the looming danger PW6 also passed the information to the police. On learning of the death of a person in the fire the DCI Nyatike directed PW8 to investigate the matter which had initially been reported at Muhuru Bay Police Post as an arson case. Accompanied by two other officers, PW8 proceeded to the scene where he found many people gathered in small groups within PW2's homestead. Some officers from the Muhuru Bay Police Post were also at the scene. The police interrogated the members of public thereat including PW3. The fire which was still burning was then put off and PW8 inspected the scene.

15. PW8 found a body of person that was completely burnt and PW3 confirmed that it was the body of the deceased. The scene was photographed and the body removed. PW8 also collected samples of the ash for analysis to ascertain whether any petroleum products were used in the fire. The police removed the body and took it to Migori County Referral Hospital Mortuary for preservation and further police action.

16. PW8 organized for and a post mortem examination on the body of the deceased was conducted by PW9 on 09/10/2016 after the body of the deceased was identified by PW4 and one **Samuel Nyambone** (not a witness). PW9 opined that the cause of death was 100% burns. PW9 filled and signed a Post Mortem Report which he produced in Court as an exhibit. PW8 also forwarded the ash to the Government laboratory in Kisumu for analysis where PW7 examined the ash and confirmed the presence of diesel which is a petroleum product. PW7 prepared a Report which he produced as an exhibit in Court.

17. On completion of investigations PW8 found that the suspects had all fled to Tanzania. Sometimes in March 2017 some of the suspects returned home and PW2 led PW8 together with other officers to Kithii Sub-Location where they arrested the three accused persons herein. PW8 escorted the accused persons to Macalder Sub-County Hospital on 05/03/2017 where they were mentally examined and all were certified fit to stand trial. The accused persons were arraigned before Court on 06/03/2017. PW8 later produced the photographs and the Certificate thereto, the ash samples, the Exhibit Memo Form and the Mental Assessment Reports as exhibits.

18. It is the forgone chronology of events that led this Court to find that each of the accused persons had a case to answer at the closure of the

prosecution's case. Placed on their defences, the accused persons elected to and gave sworn evidence and called a joint witness one **Tobias Orade Olwande (DW1)**. All the accused persons raised *alibi* defences. Lule stated that he was at his farm with DW1 and his two wives whereas Charles stated that he was ailing at his home and could not walk for such a long period while Juma stated that he was asleep in his house and only learnt of the incident much later in the day.

19. At the close of the defence case, Learned Counsels left the matter for judgment. It is on the basis of the foregone evidence that this Court is now called upon to render itself on whether the accused persons and/or any of them are guilty as charged.

20. As the accused person are charged with an information of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

21. There is no doubt that the deceased died. All the witnesses save PW7 confirmed as such. As to the cause of death, PW9 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was 100% burns. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

22. On the second ingredient as to whether the accused persons unlawfully caused the death of the deceased, PW1, PW2 and PW3 were eye-witnesses. They all testified on how the accused persons while armed and leading a group of around 15 armed men descended on the house of PW2, torched it using petrol, attacked PW2 as he attempted to escape and had the deceased burnt to death. The attack took place during the morning hours where no witness talked of adverse conditions which could have impeded visibility.

23. The accused persons however presented *alibi* defences. However, PW5 and PW6 who were independent witnesses placed all the accused persons at the scene of crime. The two were local administrators who had dealt with the menace of fish poisoning and to them there was no likelihood of bringing that practise to an end. They had no grudges with any of the accused persons and contended that the death must have been accidental. I therefore find and hold that PW5 and PW6 could not therefore have lied about the presence of the accused persons at the scene. The evidence of Lule and DW1 materially differed. Whereas on one hand Lule testified that on the material day he worked at his farm with his two wives and DW1, on the other hand DW1 testified and insisted that he was only with Lule at the farm. DW1 was also categorical that he was truthful. I do not find it possible that Lule and DW1 could have such different versions of the same thing which they allege were both present. The only reasonable inference thereto can be that the two were not together and they were not keen enough to seal the loopholes of their manufactured versions.

24. This Court had an opportunity and watched the witnesses testify. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. This Court formed the opinion that the witnesses were truthful and credible and their evidence reliable. That was however not the case with DW1. A witness who deliberately causes a Court to see him/her as otherwise not a straight-forward person runs the risk of his/her evidence regarded of no probative value or such little value, if any.

25. By placing the prosecution's evidence and the *alibi* defences side by side I am inclined to find, which I hereby do, that the *alibi* defences are perfectly dislodged by the overwhelming prosecution evidence. There is hence no doubt that the accused persons were at the scene as alleged and proved by the prosecution. There is cogent and well corroborated evidence to that effect and, as said, the defences of *alibi* fail. I find and hold that the accused persons were part of the group that torched PW2's house and caused the death of the deceased.

26. As to whether the actions of the accused persons are justified in law, I must appreciate the fact that using poison in fishing is one of the very archaic modes of fishing in this modern world. Science has invented so many good ways of modern fishing and fish poisoning must be condemned in the strongest terms possible. Having said so, I must also say that this country is constitutionally governed by the Rule of Law under **Article 10(2)(a)** of the **Constitution**. The country has never been short of laws capable of containing fish poisoning. Even if it was true that the family of PW2 engaged in fish poisoning that was not a justification for a group of people to take the law unto their hands and terminate the life of a person. **Articles 26, 27 and 28** of the **Constitution** variously protect the sanctity of life.

27. The accused persons acted together to further a common intention and as such the doctrine of common intention under **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya comes to play. The Court of Appeal in **Njoroge v. Republic (1983) KLR 197** explained the doctrine as follows:

...If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavor to effect the common object of the assembly...

28. In the case of **R v. Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault. In this case all the accused persons were part of the orgy of violence that gripped PW2's home that morning. Each one played an active role in causing the death of the deceased. I am therefore satisfied that the second ingredient is also answered in the affirmative.

29. As to whether there was malice aforethought in the accused persons causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. *Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*

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(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 fight or escape from custody of any person who has committed or attempted to commit a felony.*

30. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

(i) *The intention to cause death;*

(ii) *The intention to cause grievous bodily harm;*

(iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55.

31. Further, it matters not whether the deceased was the one who had been targeted to be killed in light of the *doctrine of transferred malice*.

32. In this case there is evidence that the villagers were fed up with the menace of fish poisoning and several interventions had been put in place to end the vice in vain. On the material day it was Lule's boat which was found with the fish poison and Lule risked the wrath of the furious fishermen and villagers. To save his life Lule had to take action and that is why he descended on the family of PW2 which he had hired his boat to. At a closer look at the way the events turned out I am not convinced that the accused persons acted with malice aforethought in killing the deceased. I find that their actions were spontaneously prompted by the revelation at the lake shore and the possibility of danger upon Lule. However, Lule and the group over reacted and caused the death of the deceased. The much Lule and the group would have done was to at least arrest the suspects and lead them to the police for appropriate legal action. The third ingredient is therefore not proved.

33. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused persons are hence found not guilty of the murder of the deceased and each of them is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused persons, but of course without any malice aforethought.

34. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds each of the accused persons guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

35. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of August, 2019.

A.C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mudeyi, Counsel for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

