



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 2 OF 2014**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**NAFTALI GITONGA MUGO.....1ST ACCUSED**

**EUNICE KARIMI MUGO.....2ND ACCUSED**

**RULING**

1. The accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal to which offence they pleaded not guilty.
2. At the close of the prosecution's case fifteen (15) witnesses had testified in this case.
3. The summary of the evidence is that on 29/04/2009 the deceased was in her house around 8.00 p.m. when she was attacked by a group of people including the two accused persons. Allegations were made that the deceased had removed soil from the grave of someone's child and used it to bewitch the child of the 2<sup>nd</sup> accused leading to the death of the said child.
4. Further evidence was that the mob which was made up of several relatives and neighbours of the deceased later lynched the victim who died while undergoing treatment at Embu Level 5 hospital the same night.
5. The accused persons were represented by Mr. Siagi who filed submissions arguing that the prosecution had not made up a *prima facie* case and that the accused persons ought to be acquitted at this stage.
6. Mr. Siagi highlighted a few contradictions in the evidence of PW1 and PW2 on how they explained the beginning and the progress of the whole saga. PW1 said that the 1<sup>st</sup> accused who was his nephew and close neighbour borrowed a mattock from him on the material day to go and do some work with it the following morning. He was given the tool and left PW1's home.
7. PW2 the daughter of PW1 said she was in the kitchen and overheard the conversation between the 1<sup>st</sup> accused and PW2 her father. She then heard the 1<sup>st</sup> accused call one Murimi as he walked away. PW2 said she became suspicious and followed the 1<sup>st</sup> accused to the house of the deceased where she found him ordering the deceased to open the door for him or else he would force it open. At this juncture, PW2 decided to go inform her father that the 1<sup>st</sup> accused had borrowed the mattock to go kill the deceased with it. PW2 went to the scene but the 1<sup>st</sup> accused became hostile to him and also to PW2 forcing them to leave.
8. The defence said PW2 did not explain why she followed the 1<sup>st</sup> accused to the house of the deceased which renders her evidence a creation of her own. She said there was no lighting at the scene which fact was admitted by PW2 thus rendering the identification of the accused persons negative. The defence further argued that the distances given by both PW1 and PW2 concerning distances between homesteads compared to those covered by the witnesses at the material time were contradictory and did not make sense in view of their testimonies. The defence dismissed the evidence of PW1 and PW2 as untrue.
9. It was also argued that the fresh investigations were poorly conducted by PW14 the investigating officer. The recovery of the mattock does not come out clearly as to who had it at the time of recovery or where it was found.
10. PW14 said the sledge harmer was recovered through OCS Manyatta and was lying at the station when she took over the investigations.
11. PW11 was mentioned by PW5 as having taken part in lynching the deceased. The defence dismissed the evidence as unreliable.
12. Analysis of the evidence of PW1, PW2 and PW3 places the two accused persons at the house of the deceased on the material evening

which was followed by other developments.

13. The scenario started as a scuffle between the two accused persons and the deceased. The 2<sup>nd</sup> accused person, accused the deceased of bewitching her child while the 1<sup>st</sup> accused who was her brother led the onslaught on the deceased demanding that she opens the door for them. At some point, the two accused seem to have chased PW1 and PW2 from the scene. PW3 left the scene on her own volition.

14. PW5 who came to the scene much later (after PW1, PW2 and PW3 had left) said that he found a mob at the home of the deceased and that she saw PW11 pouring paraffin on the deceased and lighting her up using a match box. This witness did not mention in his evidence that he played any role. It is important to note that PW11 was not charged with the offence of murder of the deceased. PW14 the investigating officer explained that these witnesses were minors and were used by the two accused persons to lynch the deceased. From the statement of PW11, he said he was aged 19 years when he recorded the statement thus contradicting PW14 assertion that he was a minor.

15. The law exempts children under the age of twelve years from criminal responsibility with conditions. PW11 was an adult at the time he recorded his statement. The decision not to charge PW11 with the offence shows that it was either a misdirection on the part of PW14 or it was shoddy investigations done by her.

16. Before PW14 took over the case for investigations, a *nolle prosequi* had been entered. The two accused persons were later charged afresh.

17. The postmortem report produced by PW9 stated that the cause of death was cardio-respiratory arrest due to severe burns and dehydration.

18. There was evidence that the deceased was lynched by a group of people. However, the prosecution did not advance any evidence to show the part played by the 1<sup>st</sup> and 2<sup>nd</sup> accused in the lynching of the deceased or that they used PW1 to do it on their behalf as alleged by PW14. The prosecution have a duty to adduce sufficient evidence to support the charge in relation to the role of the accused persons.

19. Despite PW1, PW2 and PW3 placing the accused persons at the scene, there is no evidence that they played any part in the lynching or that they acted in execution of a common purpose with others not before the court.

20. The recovery of the exhibits was in two stages of investigations. PW14 was not able to explain how the sledge hammer and the mattock were recovered. She did not call witnesses who recovered them to testify.

21. I agree with the defence that the investigations carried out in this case were shoddy and leaves a lot to be desired.

22. From the analysis, I am of the considered opinion that calling upon the accused persons to give their defence would be futile. It would amount to them filling up gaps left by the prosecution in their evidence.

23. It is my finding that the prosecution have failed to make up a *prima facie* case for the accused persons to be called upon to make their defence.

24. Consequently, I find that the accused persons have no case to answer and are hereby acquitted under Section 306 of the Criminal Procedure Code.

25. The accused persons are hereby set at liberty unless otherwise lawfully held.

26. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 18TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Mwanza for State**

**Both Accused persons present**