



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 8 OF 2009

REPUBLICPROSECUTOR

VERSUS

PATRICK CHEMININGWA CHEPTALAM.....1ST ACCUSED

ANDREW MASAI MALI ALIAS HOUSE.....2ND ACCUSED

J U D G M E N T

1. The accused were jointly charged with 5 counts of murder as hereunder.

On the first count, they were charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District within Rift Valley province, jointly with others not before court murdered Mary Chesang Mbuya.**

2. They were equally charged with the second count of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District within Rift Valley province, jointly with others not before court murdered Samuel Mbuya.**

3. They were charged with the third count of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District within Rift Valley province, jointly with others before court murdered Sofy Mbuya.**

4. They were also charged with the fourth count of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District within Rift Valley province, jointly with others not before court murdered Moses Mbuya.**

5. On the fifth count the Accuseds were charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District within Rift Valley province, jointly with others not before court murdered Kibet Mbuya.**

6. They both denied the charges. The prosecution called several witnesses whose evidence can be summarised as hereunder.

7. **PW1 Robinison Mbuya** testified that on 2nd March 2008 at around 7.00 pm he returned home from the local trading centre. Since the security on the ground was volatile he decided to stay outside that night. At 2.00 am he heard her wife screaming and his house was set on fire. The house had been surrounded by about 10 people who were armed with firearms and teargas. He then heard gunshots. His wife and his three children were shot and died. Moses Mbuya who was his worker was in another house. Others managed to escape.

8. He said that among the people who attacked them were the accused whom he managed to recognise courtesy of the moonlight. He knew them before the incident. The police visited the scene at 5.00 am. He was taken to the hospital together with the injured children.

9. On cross-examination he said that he was on a patrol that day and by 2.00 am he had dozed off and that he was awoken by gunshot. He however saw the accused persons that night.

10. **PW2 Stephen Nyoka** testified that he was awakened by some noise outside the house that night and he heard a bang at the door. The house was then set ablaze. The intruders gained access and he was shot. They shot his wife and children. He however did not identify the two accused persons. The relatives of the accused are the ones that attacked them.

11. **PW3 Jostin Chemusto** is the wife to PW2. She was also awakened that night by the gunshot. The house was set on fire. She was shot on the leg and arm. She identified the attackers who included the 1st accused who was equally known to him as well as a relative. Her children were shot dead. She did not however identify the 2nd accused.
12. **PW4 Sarah Chepkemoi Mbuya** was equally at home that fateful night when they were attacked by a group of people who included the accused persons. He identified them from the light emanating from the burning houses.
13. On cross-examination she said that she attended an identification parade at the police station but she identified other persons and not the accused herein. She knew the second accused by the nickname "House".
14. **PW5 Joan Temko** was also at Embakasi village when they were attacked at 3.00 am. She was ordered by her late mother Mary Chesang to open the door. She was killed together with her brother and sister. She hid under the bed. She identified the 1st accused who was her neighbour. She did not however see the 2nd accused.
15. **PW6 Doctor Moses Okumu** testified on behalf of Dr. Mogoi who carried out postmortem exercise on the 5 bodies. Essentially the causes of death for all of them was severe burns.
16. **PW7 P.C. David Kipchumba Bett** from the scene of crime did produce the sets of photographs taken at the scene.
17. **PW8 Doctor Donald Makoi** produced the Photocopy of the postmortem on the said bodies. The original postmortem forms were misplaced or were lost.
18. When put on their defence, the 1st accused gave unsworn evidence denying the charges. He said that on 18th February 2009 he was at home at 5.00 am when police officers came to his house. He was taken in to assist in investigations. He was taken to Lodwar Kakuma where he was charged with the offence but later brought to Kitale. He denied knowing anything concerning the case.
19. The 2nd accused equally gave unsworn evidence. He said that on 22nd September 2008 he was in his farm and he had a quarrel with his neighbour whom he accused of trespassing onto his land.
20. On 23rd September his neighbour came with police officers and ordered that they go and settle the land issue. He was held up at the police cells till the following day when he was taken to the police station where he stayed till 18th October when he was charged . He denied the charges.

Analysis and Determination

21. Its appropriate to note that the three ingredients for the offence of murder are;
 - i) proof of the fact and cause of death of the deceased.
 - ii) Proof that the deceased met his/her death due to an unlawful act or omission on the part of the accused.
 - iii) Proof that the said unlawful act or omission was committed with malice aforethought.
22. The cause of death of the deceased persons was fatal burns as a result of arson. The postmortem reports, though photocopies, which explanation was given by the prosecution, clearly showed that they were burned almost beyond recognition.
23. The graphic gruesome photographs produced by the prosecution showed the extent of the sufferings they went through.
24. The entire prosecution evidence against the accused persons centered on the fact that they were seen at the scene of the incident. Nearly all the key witnesses explained that by the time they were woken up, the houses had been set ablaze and it was almost a miracle to get out. Those who survived sustained gun shots or some fire burns.
25. They explained that they were able to recognise the accused persons courtesy of the light from the fire from the grass thatched houses.
26. PW1 stated that he saw them when he woke up after dozing. PW3 saw the 1st accused who was her neighbour and a relative.
27. PW4 stated that;

“ ----- the attackers had already set on fire other houses in our compound. I saw the first accused when he entered our house and fired a bullet shot at my mother and siblings. They were all killed in the process. I saw the second accused whom we know by the name “house” when he told the first accused that my mother had not died. This prompted the first accused to shoot my mother again -----”.
28. PW5 identified the first accused as she hid under the bed. He was equally a neighbour.

29. A portion of the case *Anjononi Vs Republic (1980) KLR 59 at page 60* is worth reproducing here as it relates to the same set of circumstances. It states;

“ 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 ----”.

30. There was no evidence to suggest that the accused persons were not neighbours with the key primary witnesses. Their defence as well as cross-examination did not challenge this. It even appears that they were related in one way or the other.

31. In my view therefore the accused persons were clearly placed at the scene. The lights from the burning houses was sufficient enough to have enabled the witnesses identifying the attackers. They took time, almost 30 minutes which essentially, despite the commotion that existed, for them to be identified.

32. I have relooked at their unsworn evidence and the same has no probative value. Apart from being untested by way of cross-examination, they did not explain themselves where they were that fateful night.

33. There was in my view a common intention to kill the deceased persons as well as destroy their properties. Although there was no direct evidence to suggest that the two accused persons light the fire, they were among the attackers that night. The attack was well planned and executed by many people including the accused persons. They knew that shooting and burning people would result in death, which it did.

34. The provisions of Section 20(1) of the Penal Code applies squarely in this aspect. The same states;

“ 20(1) “ when an offence is committed, each of the following person is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -

a) Every person who actually does the act or makes the omission which constitutes the offence

b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.

c) Every person who aids or abets another person in committing the offence

d) any person who causes or procures any other person to commit the offence”.

35. In light of the above provision I am persuaded that the two accused persons aided or abetted in the offence. There was malice aforethought.

36. In the premises, the two accused persons each is found guilty of causing the death of the 5 deceased persons, pursuant to the provision of Section 203 of the Penal Code.

Delivered, signed and dated at Kitale this 18th day of December, 2018.

H.K. CHEMITEI

JUDGE

18/12/18

In the presence of:

Mr Kakoi for State

Wanyama for Accused

Accused 1 & 2 present

Court Assistant – Kirong

Judgment read in open court.