



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 47 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KATHEKE KASONOKYA.....1<sup>ST</sup> ACCUSED**

**ERICK MUTINDA KASONOKYA.....2<sup>ND</sup> ACCUSED**

**KIEVA KASONOKYA.....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

1. **Katheke Kasonokya** (1<sup>st</sup> Accused), **Erick Mutinda Kasonokya** (2<sup>nd</sup> Accused) and **Kieva Kasonokya** (3<sup>rd</sup> Accused) are charged with five (5) counts of **Murder**. The information as framed reads as follows:

**Count 1 – Katheke Kasonokya, Erick Mutinda Kasonokya and Kieva Kasonokya: On the 6<sup>th</sup> day of March, 2014 at Ngesa Village, Mutha Division in Mutomo District within Kitui County murdered Kavingi Mwangi.**

**Count 2 – Katheke Kasonokya, Erick Mutinda Kasonokya and Kieva Kasonokya: On the 6<sup>th</sup> day of March, 2014 at Ngesa Village, Mutha Division in Mutomo District within Kitui County murdered Sammy Mbuvi.**

**Count 1 – Katheke Kasonokya, Erick Mutinda Kasonokya and Kieva Kasonokya: On the 6<sup>th</sup> day of March, 2014 at Ngesa Village, Mutha Division in Mutomo District within Kitui County murdered Katuku Mbuvi.**

**Count 1 – Katheke Kasonokya, Erick Mutinda Kasonokya and Kieva Kasonokya: On the 6<sup>th</sup> day of March, 2014 at Ngesa Village, Mutha Division in Mutomo District within Kitui County murdered Kadogo Peter.**

**Count 1 – Katheke Kasonokya, Erick Mutinda Kasonokya and Kieva Kasonokya: On the 6<sup>th</sup> day of March, 2014 at Ngesa Village, Mutha Division in Mutomo District within Kitui County murdered Mukene Mbuvi.**

2. All the Accused pleaded not guilty to all counts. It was the Prosecution's case that the Deceased persons herein, were asleep inside the house that was set ablaze at night. They burnt beyond recognition. Their mortal remains were collected and taken to the mortuary where a postmortem was conducted in an endeavour to establish the cause of death.

3. To prove the case to the required standard of proof beyond any reasonable doubt the Prosecution called eleven (11) witnesses. Evidence adduced was that the Accused persons are close relatives of the Deceased persons. During that duration the 1<sup>st</sup> Accused was bereaved. He had just buried a child. On the fateful evening PW1 **John Mulinge Mwangi**, son of the Deceased in Count 1, **Kavingi Mwangi** got information that they were being called by the 1<sup>st</sup> Accused. In company of PW5 **Mutisia Mwangi** and **Mutuku** his brothers he went to the home of the 1<sup>st</sup> Accused. It was his testimony that they ate and drunk alcohol. The 2<sup>nd</sup> Accused was the first to retire followed by the 3<sup>rd</sup> Accused. They went to sleep within the homestead. There were other people at the 1<sup>st</sup> Accused's home. The 1<sup>st</sup> Accused notified them of his intention to go to sleep. The three had to leave for their home that was approximately **200 meters** away. He reached his house. Prior to sleeping, **35 minutes** later he heard a sound. Going outside he found his mother's house on fire. His brother PW5 **Mutisia** woke up and they raised an alarm by screaming. Amongst people who answered their call of distress were the Accused and their mothers. They struggled to put out fire. The local Chief and police were notified. The bodies of the Deceased were taken away. Some two (2) plastic bottles were recovered from the scene. Subsequently the Accused were arrested. On cross examination he stated that following the invitation they ate and drank from **8.00 p.m. to 9.30 p.m.** The 3<sup>rd</sup> Accused who lives far away from the 1<sup>st</sup> Accused was the first to leave. They did not quarrel. When he raised an alarm, he ran for **20 minutes** towards the home of the 1<sup>st</sup> Accused and encountered them running towards him where the 1<sup>st</sup> and 2<sup>nd</sup> Accused assisted him to put out the fire. The 3<sup>rd</sup> Accused went with him in search of the motorcycle in order to go and

report the matter to the police. After the police arrived the 1<sup>st</sup> and 3<sup>rd</sup> Accused left after **30 minutes**.

4. PW2 **Lydia Mbuve Katheke**, the wife of the 1<sup>st</sup> Accused stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused left their home only to return the following day, the **6<sup>th</sup> day of March, 2014 at 11.00 a.m.** The 2<sup>nd</sup> Accused returned with two bottles of fuel and said that they were to use it in a motorcycle to be borrowed. Since she was allergic to the smell of fuel, the 1<sup>st</sup> Accused kept it at a place not within her reach. The 1<sup>st</sup> Accused left going to **Ilanga** and returned after she had gone to sleep. She was woken up at **4.00 a.m.** by screams. Thereafter the 1<sup>st</sup> Accused went home and told her that five (5) people had burnt inside the house. On the **7<sup>th</sup> March, 2014** the 1<sup>st</sup> Accused rang notifying her that he was in **Mombasa**. She identified the two (2) plastic bottles recovered as the one she saw containing fuel. On cross examination she stated that she saw two bottles which had labels but she did not read the mark on the bottles. She admitted that such bottles are common and are used for different purposes. She admitted that one of the bottles in court did not have any label.

5. PW3 **Faith Mbeza** the daughter of PW1 and PW2 provided cups that were being used for consumption of alcohol. She was later woken up by screams at about **2.00 a.m.** She opened for the 1<sup>st</sup> Accused the door. He took clothes. She heard him tell PW2 that they were taking bodies to Kitui.

6. PW4 **Mutisya Mwangi** corroborated evidence adduced by PW1 in every material fact. Further he stated that he witnessed when the police picked plastic bottles, and a matchbox. He saw footprints that led to the home of the 1<sup>st</sup> Accused and believed they were for the Accused. He witnessed as the Accused assisted in putting out the fire.

7. PW6, **Koli Kamota**, the mother-in-law of the 1<sup>st</sup> Accused stated that she encountered the 2<sup>nd</sup> Accused carrying two (2) bottles containing fuel, on the **6<sup>th</sup> March, 2014**. He allegedly told her that **Mukene** whose house was burnt down had killed the 1<sup>st</sup> Accused's child. She went to **Mutha** and purchased various items, one litre of petrol that she returned with to the 1<sup>st</sup> Accused's home. She went to sleep with the 1<sup>st</sup> Accused's mother leaving the Accused and their cousins partaking alcohol. She was woken up by screams. She identified the voice to have been of PW1. She heard the 1<sup>st</sup> Accused calling out the 3<sup>rd</sup> Accused to go and assist. She went to the home of PW1 with **Kavene** to find a house on fire. The Accused had run past them. Many people gathered. The police and Chief arrived. She witnessed two (2) empty bottles and a matchbox being picked by the Assistant Chief who handed them over to the police. On cross examination she stated that it was not unusual for people to purchase fuel to fuel motorcycles they are to use because it is cheaper.

8. PW7 **Titus Mbithuka**, the Assistant Chief, **Kalia Katune Sub-location** got information about the house that was on fire and he reported to the **OCS, Mutha Police Station**. They moved to the scene where bodies had burnt beyond recognition. He picked a plastic bottle labeled Horizon beside the house and a matchbox. The 2<sup>nd</sup> bottle had no label. On cross examination he said he suspected the bottles were used by arsonists but he did not know if petrol was inflammable.

9. PW8 **No. 2008133743 AP Constable** arrested the 2<sup>nd</sup> Accused who went to the AP Police Camp and took him to **Mutomo Police Station**.

10. PW9 **No. 40305 Corporal Charles Wachira** moved to the scene and saw a water bottle within the compound that was picked by the Assistant Chief. Later he was sent to collect the 1<sup>st</sup> Accused who had surrendered at **Diani Police Station, Ukunda**.

11. PW10, **No. 217756 C. I. Jones Sandoka** the lead investigator in the matter investigated the case and caused the Accused to be charged.

12. PW11 **Dr. Mutisya Cosmas** did the autopsy on the bodies of the Deceased and adduced in evidence the postmortem reports.

13. When put on their defence, the 1<sup>st</sup> Accused (DW2) who gave sworn evidence, stated that after they buried his son his co-accused stayed over because there was an outstanding bill of **Kshs. 12,000/=** at **Mutomo Hospital** and they had to raise funds to settle it. Further, he testified that on the material date after they took alcohol that was provided by PW1's younger brother and tea he went to sleep at about **11.00 p.m.** He was woken up by screams and only managed to tie a 'lesso'. He heard the voice of PW1 that he was familiar with. He was screaming. PW1 ran to their gate and told him that his mother's house had been set ablaze. He went with him to their homestead and he found **Mutisya**. The fire was fierce. Many people gathered. Their attempt to put out the fire were fruitless. He (1<sup>st</sup> Accused) called the Sub-chief. He arrived with the police who advised them to continue putting out the fire. The exercise went on until morning. After the bodies were removed from the house he went back home. His co-accused were present. He stayed until **10.00 a.m.** when he left for **Mombasa** to collect money that he had been promised by his younger brother who lives there. Thereafter he received a call from the Assistant Chief **Titus Mbithuka** who notified him that the police at Mutomo were looking for him and advised him to go to the nearest police station which he did.

14. DW2 (Accused 2) stated in his sworn statement that he went to condole his brother, the 1<sup>st</sup> Accused following the death of his son. He stayed over because they were to raise funds to pay off the hospital bill. On **5<sup>th</sup> March, 2014** they drunk alcohol and he slept at **11.00 p.m.** He was woken up by his mother and he heard screams. He ran to the scene of the incident and found his co-accuseds already there. He participated in putting out the fire until **6.25 a.m.** when he left going home. He went home to attend to his sick child. A day later while at **Ikutha**, he was arrested.

15. The 3<sup>rd</sup> Accused (DW3) stated that he represented his sick mother at the funeral. After the funeral they were to raise funds to clear the hospital bill. They met on **5<sup>th</sup> March, 2010** and raised **Kshs. 6,840/=**. They drunk traditional brew and retired as he was to travel in the morning. He was woken up by screams. PW1 was the one screaming seeking assistance. They went to assist. On arrival of the police, five (5) bodies were removed from the house that had burnt down. He returned to **Katheke's** home and bid them bye. Thereafter he went home then went to check on his bricks. Later he learnt that the police were looking for him and he went to **Mutha Police Station**.

16. Written submissions were filed that I have taken into consideration.

17. Issues for determination are:

- (i) Whether death occurred.
- (ii) Whether death occurred by an unlawful act or omission of the Accused persons.
- (iii) Whether the Accused persons acted with malice aforethought.

18. Malice aforethought is defined in **Section 206** of the **Penal Code** as:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

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

19. The fact of death had to be proved beyond any reasonable doubt. In the case of **Ndungu vs. Republic (1985) KLR 487, 493** the Court of Appeal stated thus:

***“Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a postmortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”***

20. All witnesses who testified saw the burned charred dead bodies after they were removed from the house. **Dr. Mutisya (PW11)** did a postmortem on the five (5) bodies. He concluded that the bodies burnt beyond recognition. The cause of death was **100% burns**. Medical evidence adduced proved beyond reasonable doubt the fact of death of all the five persons who passed on.

21. None of the witnesses who testified saw the person(s) who set the house ablaze. Therefore evidence against the Accused is circumstantial. Principles to apply in relying on circumstantial evidence were set in the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** where it was stated thus:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***

***(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

22. In the case of **Teper vs. Reginam (1952) AC 480** the test of applying circumstantial evidence was stated thus:

***“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

23. The Accused and witnesses called by the Prosecution attended the 1<sup>st</sup> Accused’s son’s funeral. The 2<sup>nd</sup> and 3<sup>rd</sup> Accused explained circumstances that led them to remain at the home of the 1<sup>st</sup> Accused after the burial of the child. They alleged that there was an outstanding medical bill. They were to raise money to settle it.

24. The Prosecution endeavoured to prove that the 2<sup>nd</sup> Accused was in possession of some petroleum products in the cause of the day. The product was contained in two (2) plastic bottles ordinarily used to pack mineral water. It was PW2’s evidence that the 2<sup>nd</sup> Accused arrived carrying the bottles and explained that he was to fuel a motorcycle that was to take him to **Ithanga** that night. This does not seem to have been unusual as admitted by PW6 who apparently bought one litre of petrol on the same day was to fuel a motorcycle she was to use to **Isyoini**. The alleged fuel was purportedly surrendered to the police who did not adduce it in evidence.

25. PW2 identified the bottles she saw as being similar to the ones that were recovered at the scene of the incident she said the bottles had labels. One of the bottles adduced in evidence had a label but the witness did not read the writing on the label hence could not tell with

certainty if it was the one. Similarly PW6 also said that they were similar to the ones that she saw.

26. PW2 stated that she could not let the 2<sup>nd</sup> Accused keep the bottles inside the house as she was allergic to fuel. Therefore they went to keep it in a trench. The following morning she went to check to find it missing. This particular witness did not accompany whoever went to keep it. It would be unlikely that she could know where it was kept.

27. The police reached the scene in company of the Area Assistant Chief PW7 who recovered some two (2) plastic bottles that ordinarily contain mineral water. Witnesses who saw it said they sniffled it and believed the content was petrol. The bottles were found approximately 5 meters away from the house. **C. I. Jones Sandoka** the lead investigation officer stated that they found the house on fire. The fire was huge such that they sought assistance from members of public who were present. Just like other witnesses who went to the scene he was emphatic that the bottles had petrol. If this were the case, petrol being highly volatile, therefore more inflammable and combustible, it would have ignited.

28. The police having suspected that the containers contained petrol, the Prosecution having been duty-bound to prove the case beyond any reasonable doubt, the containers should have been subjected to forensic examination to establish that the containers contained inflammable or combustible substance that was used to ignite the fire. This was not done. It was insinuated that the matchbox was from the 1<sup>st</sup> Accused's house. The matchbox had no peculiar mark to prove that it could only have been obtained from the house of the 1<sup>st</sup> Accused as opposed to any other person.

29. This is a case where the police were given some bottles by the Assistant Chief and they chose not to carry out further investigations. There is evidence adduced by the Prosecution that the Accused were some of the persons who answered PW1's call of distress and went to assist in putting out the fire. Circumstances that transpired and evidence collected did not unerringly point at the Accused as persons who committed the offence. There are circumstances that I have pointed out that weaken the inference that the Accused may be guilty of the offence. This means that the case is not proved to the required standard making the Accused be entitled to an acquittal (**See Dhalay Singh vs. Republic Criminal Appeal No. 10 of 1997**).

30. In the result I find the Prosecution having failed to prove beyond reasonable doubt that the house was set ablaze by the Accused. They are acquitted of the charge of murder.

31. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of April, 2017.**

**L. N. MUTENDE**

**JUDGE**