



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL CASE NO 6 OF 2015**

**REPUBLIC**

**VERSUS**

**VINCENT MAGANGA MWASIGHWA.....1<sup>ST</sup> ACCUSED**

**RICHARD NYAMBU MWANDOE.....2<sup>ND</sup> ACCUSED**

**DONCIA NYAMBU MGHANDA.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

**INTRODUCTION**

1. The Accused persons, Vincent Maganga Mwasighwa, Richard Nyambu Mwadoe and Doncia Nyambu Mghanda, were jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that :-

**“On the 21<sup>st</sup> day of May 2015 at Bura Mission area in Mwatate Sub-County within Taita Taveta County, jointly murdered PAUL RIGHA MWAKOSHI.”**

2. This matter was initially registered at the High Court of Kenya Mombasa as by the time the offence occurred, there was no High Court at Voi within which jurisdiction the same fell. The matter was subsequently transferred to the High Court of Kenya, Voi by Chepkwony J on 10<sup>th</sup> February 2016.

3. The Prosecution called a total of six (6) witnesses to demonstrate the following ingredients of murder found in Section 203 of the Penal Code:-

**a. Proof of the fact and cause of death of the deceased;**

**b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and**

**c. Proof that the said unlawful act or omission was committed with malice aforethought.**

4. On 15<sup>th</sup> December 2016, this court found that a *prima facie* case had not been established against the 2<sup>nd</sup> Accused person to warrant him being put on his defence. It therefore ordered that he be released from custody forthwith. However, on 15<sup>th</sup> February 2017, it found that a *prima facie* case had been established against the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons warranting them to be put on their defence. Their defence cases

were heard on 16<sup>th</sup> March 2017.

5. At the conclusion of their cases, the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons' filed their Written Submissions dated 19<sup>th</sup> April 2017 on the same date. Their counsel indicated that he would also be relying on their Written Submissions filed on 29<sup>th</sup> November 2016 in respect of the question of whether or not they had a case to answer. The State filed its Written Submissions dated and filed on 18<sup>th</sup> April 2017.

6. When the matter came up on 19<sup>th</sup> April 2017, counsel for the Accused person and counsel for the State informed this court that they would rely on their respective Written Submissions in their entirety without highlighting the same. The Judgment herein is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

7. The State summarised the evidence that was adduced by the Prosecution witnesses. The same has been set out in detail later on in the Judgment herein. In demonstrating that it established proof of fact and cause of the deceased's death, it pointed out that Joseph Nyambu Maghanga (hereinafter referred to as "PW 2") and the 3<sup>rd</sup> Accused herein testified that the 3<sup>rd</sup> Accused person was the last person who had contact with Paul Righa Mwakoshi (hereinafter referred to as "the deceased).

8. It pointed out that although the 3<sup>rd</sup> Accused person testified that the deceased would at times not sleep at their house, she still felt uneasy and called PW 2 in the morning of 22<sup>nd</sup> May 2015 to inform him that the deceased had not come home, which it said was highly suspect.

9. It stated that the fact that the deceased never slept home at all times was not indicative of loving marriage. It said that this was corroborated by PW 2 who testified that the deceased had informed him that the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons had a love affair. It averred that the 3<sup>rd</sup> Accused person had confirmed that PW 2 and the deceased were close and that the deceased would confide in him.

10. It also stated that the 1<sup>st</sup> Accused person contradicted himself when he contended that he attended the deceased's funeral meeting on 22<sup>nd</sup> May 2015 when in fact the deceased was found along Bura- Mghange Road on that date. It was its submission that the 3<sup>rd</sup> Accused person denied that the deceased had a cousin by the name of Cosmas as the 1<sup>st</sup> Accused person had averred. It contended that the 1<sup>st</sup> Accused person knew the deceased and that is why he went for his funeral as the 3<sup>rd</sup> Accused confirmed that the deceased did not have a cousin named Cosmas.

11. It said that the 1<sup>st</sup> Accused person's evidence that Tungulu Village was two (2) and a half (1/2) kilometres was contradicted by that of the 3<sup>rd</sup> Accused person who stated that Tungulu village was one hundred (100) metres from Mndendelei Village.

12. It added that although there was no direct evidence of who inflicted the fatal injuries which resulted in the deceased's death, there was evidence to show that both the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons played a role which led to his death and formed a common intention to execute an unlawful purpose in conjunction with one another that resulted in the commission of the offence.

13. They relied on the case of **Francisca Ngina Kagiri vs Republic [2009]eKLR** where the principle of common intention was addressed. The court held that:-

**“Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with.”**

14. It was its submission that no one could corroborate that the 3<sup>rd</sup> Accused person stayed at home the whole day on 21<sup>st</sup> May 2015 or corroborate the 1<sup>st</sup> Accused person's whereabouts between 21<sup>st</sup> May

2015 and the following morning. It argued that the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons also raised their alibi at the time they were adducing their sworn evidence instead of doing so very early during the trial.

15. It referred this court to the case of **Stephen Ondieki Ongeto & 2 Others vs Republic [2016]eKLR** while citing the recent cases of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** and **Karanja vs Republic [1983] KLR 501** where the court rendered itself as follows:-

**“...in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused’s guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that it is afterthought.”**

16. It was therefore its submission that the totality of the evidence that was adduced by the Prosecution witnesses irresistibly proved that the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons caused the death of the deceased and that there were no co-existing circumstances weakening the chain of circumstances.

17. On their part, the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons, submitted that the evidence that was adduced by the Prosecution witnesses did not support the charges that had been preferred against him. They contended that the entire Prosecution case was largely circumstantial with many gaps hence it was inherently weak.

18. They further argued that none of the Prosecution witnesses alluded to them having *mens rea* or having been directly connected to the *actus* in the alleged offence and that suspicion or speculation alone were not sufficient to sustain a conviction.

19. They denied having murdered the deceased and submitted that if they chose to remain silent, then the circumstances of the case would warrant their acquittal under Section 210 of the Criminal Procedure Code. They therefore urged this court to acquit them accordingly.

20. In determining whether or not the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons were guilty as charged, this court analysed the evidence of the Prosecution witnesses. Dr Nashat Fadhloon (hereinafter referred to as “PW 1”) submitted the Postmortem report relating to the deceased. Her conclusion was that the cause of the deceased’s death was asphyxia (suffocation) secondary to 4<sup>th</sup> degree burns to the face which was burnt beyond recognition. During her Cross-examination, she stated that they did not open the body as they had seen the external injuries and there were no fractures.

21. PW 2 was the deceased’s elder brother. He testified that he received a call from the 3<sup>rd</sup> Accused person on 22<sup>nd</sup> May 2015 at about 7.00 am informing him that the deceased never slept home. He said that it was unusual that the deceased had not been seen from 3.00 pm the previous day. He stated that while he was in a matatu, he heard passengers talking about a person who had been burnt but could not be recognised.

22. He said that when he arrived at the 3<sup>rd</sup> Accused person’s house, he found her alone. He asked her to report the matter at Mwatate Police Station as there was a person who had been burnt and could not be recognised. He averred that he came to know of the deceased’s death the same day.

23. He testified that the deceased had informed him that he had stopped the 1<sup>st</sup> Accused person from working in his farm as he was having a love affair with the 3<sup>rd</sup> Accused person.

24. During his Cross-examination, he said that the 3<sup>rd</sup> Accused person told him that they killed the deceased in the house during the day and threw him on the road at night, a fact that he reiterated during his Re-examination. He said that the deceased had told him that if he was ever killed, then the person to be asked was the 1<sup>st</sup> Accused person.

25. Hope Mghoi Mwangura (hereinafter referred to as “PW 3”) had a shop near Bura Mission and lived at Tungulu Village, Bura Location. She stated that on 21<sup>st</sup> May 2015 at about 4.00 pm, the 1<sup>st</sup> Accused person, who was her customer, asked her to sell him paraffin (mafuta ya taa) on credit, which she did. The evidence of Robert Maghanga Mjomba (hereinafter referred to as “PW 4”) was that he attended the Postmortem examination.

26. No 235243 Inspector Peter Kyalo J (hereinafter referred to as “PW 5”) was the Scene of Crime Officer. He confirmed having visited the scene of crime at Bura-Mghange Road where he took photographs that showed the deceased dead and burnt beyond recognition. During his Cross-examination, he stated that he could not confirm if petrol, kerosene or paraffin was used at the scene as the deceased was down in a steep area beside the road.

27. No 40936 Sergeant Stephen Samkuli (hereinafter referred to as “PW 6”) was the Investigating Officer. His evidence was that after he received a report of the burnt body, he booked the report in the Occurrence Book and went to the scene of crime where he saw a body that had been burnt beyond recognition. He said that a Paul Righa, who informed the police that his uncle had disappeared, identified the deceased’s body at Moi Referral Hospital.

28. He contended that on 27<sup>th</sup> May 2015, he was informed that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons had been arrested while attending the deceased’s funeral and taken to the Administration Police (AP) Camp. The 3<sup>rd</sup> Accused person was taken to the AP Camp later that day.

29. He said that he interrogated the 1<sup>st</sup> Accused person who informed him that the 3<sup>rd</sup> Accused person was his long- time friend. He said that the 1<sup>st</sup> Accused person told him that on 21<sup>st</sup> May 2015, the 3<sup>rd</sup> Accused person was going to the Posho Mill when she passed by his house. Shortly thereafter, the deceased came and started pushing the door open. While the 1<sup>st</sup> Accused person was struggling with the deceased, the 3<sup>rd</sup> Accused person hit him with a stone and escaped. The 1<sup>st</sup> Accused person then took the same stone and hit the deceased on his head.

30. He added that the 1<sup>st</sup> Accused person told him that the deceased lost consciousness and died on the spot. He then dragged him for about fifty (50) metres and hid him in a bush. At about 11.00pm, he transported the deceased in a wheelbarrow to the spot where he burnt him with paraffin having wrapped him with a blanket. He averred that he also interrogated the 3<sup>rd</sup> Accused person who confirmed what the 1<sup>st</sup> Accused person had told him.

31. He further stated that he visited the 3<sup>rd</sup> Accused person’s house where the 3<sup>rd</sup> Accused person showed him the stone they had used to hit the deceased, the wheelbarrow he used to transport the deceased to the scene of crime, a bloodstained brownish jacket recovered from the bush the 1<sup>st</sup> Accused person had first hidden the deceased. He also found a torn petticoat, a brownish polka dot blouse and blue chiffon blouse that were partly burnt. He produced all these items as exhibits before this court. His further evidence was that neighbours informed him that the 3<sup>rd</sup> Accused person used to visit the 1<sup>st</sup> Accused person’s regularly.

32. During his Cross-examination, he admitted that no DNA was conducted to establish whose blood was found in the brownish jacket and he could not really say to whom the jacket belonged. He also stated that they did not recover any container of paraffin although PW 3 told him that he had bought paraffin from her shop. He was, however, emphatic that neighbours informed him that the deceased and the 3<sup>rd</sup> Accused person had a troubled marriage for about eight (8) months which was after the deceased stopped the 1<sup>st</sup> Accused person from cultivating in his land.

33. In his sworn evidence, the 1<sup>st</sup> Accused person said he was a casual labourer and he lived next to the deceased’s cousin at Mndendelei Village. He said that on 22<sup>nd</sup> May 2015 at about 11.00am, the deceased’s cousin, called Cosmas, asked him to take him to the deceased’s funeral. He said they went to the funeral meeting but at about 2.30 pm, a mourner asked him what work he did and he told him that he

did causal jobs. He said that before he could leave, mourners descended on him accusing him of having caused the deceased's death.

34. During his Cross-examination, he clarified that he went to the deceased's funeral on 22<sup>nd</sup> May 2015 and was categorical that he had never known or seen the deceased. He denied ever having known PW 3 or going to her shop on 21<sup>st</sup> May 2015 as Tungulu was two and a half (2 ½) kilometres from where he lived and there were other shops near his house. He also denied knowing the 3<sup>rd</sup> Accused person or PW 2. He denied ever having been with the 2<sup>nd</sup> Accused person during the funeral. He was emphatic that he was at his home on 21<sup>st</sup> May 2015 but he could not get any witnesses to corroborate his alibi.

35. The 3<sup>rd</sup> Accused person denied that she was involved in the deceased's death because they had been married for about eight and a half (8 ½) years and had two (2) children. She testified that she was at home on 21<sup>st</sup> May 2015 and never left the house. She said that PW 6 called her and asked her to go to Mwatate Police Station whereafter she was charged at Wundanyi Law Courts. She said that she saw the 1<sup>st</sup> Accused person for the first time at Wundanyi Law Courts.

36. In her Cross-examination, she reiterated that she had no marital problems with the deceased and that she never had any love relationship with the 1<sup>st</sup> Accused person. She said that the deceased left the house at 3.00pm and that she called PW 2 because the deceased had taken long to come back home. She said that if he slept outside, he used to come home at about 10.00am-11.00am. She said she called PW 2 using the deceased's phone.

37. When she was Cross-examined, she stated that from Mndedelei Village to Tungulu, it was about one hundred (100) metres. In her Re-examination, she stated that the deceased left his phone at home on 21<sup>st</sup> May 2015 at 3.00pm because they used to use one (1) phone.

38. As was rightly pointed out by the State, there was no direct evidence against the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons. This case was thus based on circumstantial evidence. Circumstantial evidence can be accepted when an accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.

39. As seen hereinabove, the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons adduced sworn evidence. However, there were several inconsistencies and contradictions in their evidence. Whereas 1<sup>st</sup> Accused stated that Mndedelei Village where he stayed to Tungulu where PW 3's shop was located was two and half (2 ½) kilometres, the 3<sup>rd</sup> Accused person said the distance was about one hundred (100) metres.

40. PW 3' evidence that the 1<sup>st</sup> Accused person purchased paraffin from her shop was therefore not far-fetched as it was clear from the 3<sup>rd</sup> Accused person's evidence that PW 3's shop was near where the 1<sup>st</sup> Accused stayed and it was therefore easily accessible to him. The 1<sup>st</sup> Accused person's assertions that he could not go to PW 3's shop because it was far and there were other shops nearby, thus fell by the wayside.

41. This court found it strange that the 1<sup>st</sup> Accused person purchased paraffin about an hour after the deceased left home. Notably, the 3<sup>rd</sup> Accused person testified that the deceased left their home on 21<sup>st</sup> May 2015 at about 3.00pm while PW 3 testified that the 1<sup>st</sup> Accused person went to her shop to purchase paraffin on 21<sup>st</sup> May 2015 at 4.00pm. Whereas this could have been coincidental, the fact that the deceased was found burnt beyond recognition the following day on 22<sup>nd</sup> May 2015 led this court to infer that the deceased was burnt with the paraffin the 1<sup>st</sup> Accused person purchased from PW 3's shop.

42. Going further, from the 3<sup>rd</sup> Accused person's and PW 2's evidence, it appeared that it was not a

common occurrence for the 3<sup>rd</sup> Accused person to call PW 2 whenever the deceased delayed in coming home. This court was therefore baffled by the 3<sup>rd</sup> Accused person's call to PW 2 on the morning of 22<sup>nd</sup> May 2015.

43. If as she had testified that the deceased would at times not sleep at home but would come between 10.00 am-11.00am the following morning, there was no logical explanation why she decided to call PW 2 at 7.00am, three (3) or four (4) hours from the times that the deceased would ordinarily come home in the morning.

44. The 3<sup>rd</sup> Accused person's explanation that her heart was not at ease on the morning of 22<sup>nd</sup> May 2015 only served to raise suspicions in the mind of this court as her conduct was unusual and out of the ordinary. In fact, her conduct was highly suspicious as was rightly pointed out by the Prosecution. It did appear to this court that the 3<sup>rd</sup> Accused person's call to PW 2 was a cleverly calculated tactic to remove herself from the deceased's disappearance and eventual death because by that time she already knew very well that the deceased had already been killed the previous day on 21<sup>st</sup> May 2015.

45. Whereas the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons denied ever having known each other, this court was persuaded by the Prosecution's submissions that they had in fact known each other before the deceased died. Although no neighbours were called to testify that the 3<sup>rd</sup> Accused person used to frequent the 1<sup>st</sup> Accused's house as had been contended by PW 6, this court was satisfied by PW 2's evidence that the deceased had told him that he stopped the 1<sup>st</sup> Accused person from cultivating in his farm because he was having an affair with his wife. Indeed, this court could not admit PW 6's evidence that the 1<sup>st</sup> Accused person told him that he was a long-time friend to the 3<sup>rd</sup> Accused person as it was not a confession that was properly recorded,

46. It was apparent that the 1<sup>st</sup> Accused person was trying to extricate himself from the 3<sup>rd</sup> Accused person. However, his evidence that he used to live next to the deceased's cousin called Cosmas, who invited him to go to the deceased's funeral, seemed to have put him in a fix as it did not appear to have been truthful. Indeed, that evidence was contradicted by the 3<sup>rd</sup> Accused person who said that the deceased never had a cousin called Cosmas. Appreciably, the 3<sup>rd</sup> Accused person had been married to the deceased for over eight and a half (8 ½) years and she would definitely have known if he had a cousin called Cosmas especially since they lived in the same Location.

47. This court was further puzzled why the 1<sup>st</sup> Accused person would be attacked by mourners without any provocation. It did not make sense for a total stranger, the 1<sup>st</sup> Accused person herein, to go for a funeral meeting with a relative of the deceased only to be accused of having caused the deceased's death and eventually being arrested.

48. It was evident that the 1<sup>st</sup> Accused person was not being truthful even about when and where he was arrested. Indeed from PW 2's and PW 6's evidence, the 1<sup>st</sup> Accused person was accosted by mourners during the deceased's funeral and not during a funeral meeting as the 1<sup>st</sup> Accused person had contended. In fact, the deceased's funeral was not on 22<sup>nd</sup> May 2015 as the 1<sup>st</sup> Accused person also told this court because that was actually the day the deceased was found dead along Bura-Mghange Road.

49. As was rightly argued by the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons, no DNA analysis was done to establish to whom the blood on the brownish jacket belonged to. However, the 1<sup>st</sup> Accused person did not deny that the house from which PW 6 said he recovered the wheelbarrow, the bloodstained brownish jacket, the petticoat, the polka dot blouse and blue chiffon blouses was his. As PW 6 was not conversant with the 1<sup>st</sup> Accused person's house, he would then not have known that the bloodstained brownish jacket was in the bush. That was only information that was within the 1<sup>st</sup> Accused person's knowledge.

50. Bearing in mind the evidence that was adduced in this case, it was the considered view of this court

that if the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons would have remained silent as they had a right to do so, the evidence of the Prosecution witnesses was still overwhelming against them. Their defence of alibi was not supported by any witness.

51. The fact that the cause of the deceased's death was as a result of asphyxiation secondary to serious burns on the face was indicative of the fact the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons intended to cause his death. The injuries were not merely to cause him harm but rather, they were intended to cause his death.

52. Whereas it was not known who between the 1<sup>st</sup> or 3<sup>rd</sup> Accused persons hit the deceased with a stone or burnt him as PW 2 and PW 6 told the court that the 1<sup>st</sup> and 3<sup>rd</sup> Accused person's had confessed to the crime, the circumstances of the case showed that each of their actions made the other liable for the deceased's death as contemplated under the law.

53. Section 21 of the Penal Code provides as follows:-

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

54. It was therefore the considered opinion of this court that the Accused persons did not present any other co-existing circumstances that would have weakened or destroyed this court's inference of their guilt as was set out in the case of Musoke vs Republic [1958] EA 715 in which it was held as follows:-

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

55. This court was satisfied that the Prosecution had demonstrated that the deceased died as a result of the Accused person's unlawful commissions or omissions and that the said commissions and/or omissions were committed with malice aforethought, which is defined in Section 206 of the Penal Code as follows:-.

**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 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.**

56. In this respect, this court came to the firm conclusion that the Prosecution had proved beyond reasonable doubt that the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons were involved in the death of the deceased and that they were both guilty of the offence that they had been charged with.

## **DISPOSITION**

57. For the foregoing reasons, the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

58. It is so ordered.

**DATED and DELIVERED at VOI this 22<sup>ND</sup> day of JUNE 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Were-for Accused Person

Miss Karani-for State

Josephat Mavu– Court Clerk