



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO.9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL GITAU MAINA alias STRANGER.....1ST ACCUSED

STEPHEN WAWERU NDUNGAI alias STEVO.....2ND ACCUSED

ANTONY KAMWENJI NDUNGU alias Ibrahim.....3RD ACCUSED

STEPHEN MWNGI MUTHONI alias ARSHAVIN.....4TH ACCUSED

MICHAEL THUO GIKARU.....5TH ACCUSED

JUDGEMENT

The five accused persons are facing two counts of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the charges are that on 23rd December 2012 at Mathare 3C in Starehe District within Nairobi County jointly with others not before court murdered Johnson Kiruthu Kagio (Kagio) and David Njoroge Kiige (Kiige). All the five accused persons denied the two charges.

The case for the prosecution can be summarized as follows that following the death of one Michael Ndonge, a resident of Mathare 3C near where Kagio, deceased, operated a bar and butchery, his mother threatened Kagio and his family with death. A meeting was held at a place known as Wembley Video attended by the accused persons to discuss and organize a revenge mission and that on 23rd December 2012 some people mobilized and attacked the business premises of Kagio by stoning. Kagio was attacked as he attempted to stop the attack. His car which was parked outside the premises near the bar was doused with some inflammable substance and set ablaze. The flames from the burning car spread to the whole business premises razing it to the ground. Kagio and Kiige died inside. According to Dr. Peter Muriuki Ndegwa (PW4) Kagio and Kiige died as a result of 100% third degree burns.

The five accused persons were said to be among the people who attacked Kagio and burned his business to the ground. They were arrested at different times and all charged together with the two counts of murder.

The crime of murder is created under section 203 of the Penal Code thus:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

The prosecution bears the burden of proof. The threshold is proof beyond reasonable doubt. The prosecution must prove that there is a person or persons responsible for an unlawful act or omission causing the death of another person and that the responsible person intended to cause that death or possessed malice aforethought in the unlawful acting or omitting to act.

Nine witnesses testified on behalf of the prosecution. From their evidence, specifically from the evidence of Dr. Ndegwa, this court has no doubt that the deaths of the two deceased persons Kagio and Kiige occurred. These deaths were as a result of an unlawful act, setting ablaze the house (Kagio's business premises) in which the two deceased persons were. The persons who set the premises on fire had intended to cause the death of the people inside the premises or at the very least to cause grievous harm to them. It is the finding of this court therefore that there is no doubt that the act causing the death of Kagio and Kiige and the intention to cause those deaths have been proved beyond reasonable doubt.

The issue that requires attention of this court in resolving is the identity of the persons who set into motion a series of events that culminated into the death of the two deceased persons. The prosecution evidence is that the five accused persons in company of others not before court are culpable. This court placed all the five accused persons on their defence. All the five accused persons testified under oath.

Samuel Gitau Maina, 1st accused, denied taking part in the planning meeting or being involved in the attack. He denied knowledge of Michael Ndonge said to have been killed. He told the court that on 23rd December 2012 in the evening he was at the house of his friend Salim which was 70 meters from the scene; that he heard stones falling on the rooftop and went out to find out what was happening and that he saw about 40 people throwing stones at Kagio's bar but he did not go near. He told the court that he was arrested on 9th January 2013 at Kawangware and taken to Pangani Police Station where in company of others he was charged with arson which was later withdrawn. He said that at the scene there was no light on the night of the attack. On cross examination he denied he knew Kagio or his children but admitted he lived 100 meters from the Kagio Pub and used to see the Pub. He denied his name is "Stranger" and said he could not approach the scene because of gun shots.

Stephen Waweru Ndungai, 2nd accused, also denied committing the two murders. He said he was arrested on 10th January 2013 as he was playing football in Eastleigh. He told the court that he spent the day, 23rd December 2012, at Dandora in a soccer tournament and went home in the evening; that he found many police officers near Moi Air Force Gate on his way home and learned that there had been fracas in the area. He denied that he knew Kagio but said he knew Kagio Pub as he used to see it. He said he was charged together with others with arson but the charges were later withdrawn.

Antony Kamwenji Ndungu, 3rd accused, denied involvement. He told the court that at the time of the incident giving rise to these offences, he used to live in Githurai and that he saw in the news on televisions that a bar had been burned at Mathare; that he was arrested on 27th February 2013 with the offence of touting and taken remanded at Pangani Police Station; that he was taken to court and charged with this offence which he did not know anything about. He denied knowledge of Michael Ndonge or the deceased persons.

Stephen Mwangi Muthoni, 4th accused, denied committing the offences. He testified that on 23rd December 2012 he was working in his boutique until the evening when he took his girlfriend to Thika for the evening. He said they stayed in Thika until the following day when they returned home. He said he was arrested in February 2013 around 9.00pm after alighting at Kwa Chief Stage in Mathare. He said there was heavy presence of police in the streets due to the coming elections. He said he was charged with these offences which he knows nothing about. He denied he is known as Arshavin. He also denied knowledge of the scene where the offences occurred.

Michael Thuo Gikaru, 5th accused, also denied committing the offences. He testified that he spent 23rd

December 2012 at home with his family and went to work on 24th December 2012. He said he closed work due to Christmas Holiday and resumed on 2nd January 2013. He said that he was arrested on 19th November 2013 at Mathare from brewing illicit alcohol and placed in cells at the Chief's Camp Mathare; that he was later taken to Pangani Police Station and charged with these offences. He denied he is known as Bubas.

At the close of the case for the defence all counsels submitted, Mr. Jumba for the 1st and 2nd accused persons submitted that the prosecution has failed to discharge its duty of proving this case beyond reasonable doubt. Counsel took issue with the evidence of prosecution witnesses especially that of Philip Kagio Kiruthu (PW1) and that of Michael Ndung'u Gachie (PW5) stating that it was contradictory and inconsistent. He took issue with the identification of the accused persons by PW1 who had told the court that he went to hide between two walls; that PW5 said the street lights went off during the incident; that the investigating officer did not visit the place during the night and could not tell if lights were properly working or not; that evidence of the alleged planning meeting at the Video was hearsay and inadmissible and that the events of that night were purely out of a chaotic mob situation and it was not easy for anyone to identify those involved.

Mrs. Omungala for the 3rd accused submitted that the 3rd accused did not live in Mathare but lived in Githurai and that he was not involved in the incident giving rise to this offence.

Mr. Oundu for the 4th accused person submitted that the events of 23rd December 2012 happened at night and identification of the accused person must be beyond reasonable doubt; that the prosecution has not met this threshold; that 4th accused was not at the scene; that PW1 and PW5 gave contradictory evidence; that the police officer who arrested the 4th accused did not testify to tell the court why he arrested the 4th accused and that the 4th accused person's defence is unchallenged.

Mr. Tanui for the 5th accused submitted that the prosecution has failed to prove the case against the 5th accused person beyond reasonable doubt; that witnesses said one "Bubas" who was a suspect in this case has died but the investigating officer said the 5th accused is the one by that name; that the pathologist could not conclusively say what caused the death of the deceased persons, whether the fire or cut wounds and that the prosecution evidence is contradictory.

On the other hand, Mr. Okeyo for the prosecution submitted that the prosecution has proved the case beyond reasonable doubt; that 1st accused admitted having been at the scene; that PW1 and PW5 knew 1st and 2nd accused persons since childhood and could not have mistaken them; that three witnesses pointed at the 5th accused person as the "Bubas" and therefore he was positively identified; that malice aforethought has been proved because the attack was planned beforehand; that the accused persons raised alibis but they failed to prove they were away from the scene.

Of all the nine prosecution witnesses only PW1 and PW5 were at the scene. PW2, Peter Chege Kiruthu, was at his shop a few metres from the scene; PW3, Police Constable David Kipchumba, took photographs of the two bodies of the deceased persons inside the Police Vehicle. He said he could not access the scene due to the volatile nature of the area at the time. He confirmed that the bodies were burned beyond recognition. PW4 is the pathologist; PW6 is Dr. Joseph Maundu who examined the accused persons; PW7, Geoffrey Muriu Kiige, is brother to Kiige the second deceased persons. He identified the body to the doctor for post mortem; PW8 Peter Githaiga Kagio, is brother to Kagio the first deceased person. He identified the body to the doctor for post mortem and PW9, CPL Owuor, is the investigating officer.

In my view and as I have stated elsewhere in this judgment, identification of the accused persons is central to this case. Out of all the nine witnesses I have mentioned above only three, PW1, PW2 and PW5 are crucial in respect of the issue of identification. I will summarize their evidence as regards identification of the accused persons for purposes of clarity.

PW1 said he was with his father when *mama* Ndongye and *baba* Ndongye went to his father's bar carrying

Ndonye. Since Ndonye was dead, this would mean they were carrying the corpse of Ndonye. Mama Ndonye is said to have issued a threat to Kagio that because Kagio was involved in killing Ndonye, someone from Kagio's family must die that day. PW5 also said he was present when these threats were issued. However, PW5 said *mama* Ndonye came with another woman PW5 did not know. PW5 did not mention that the two women were carrying the corpse nor did he mention *baba* Ndonye as having been present. Neither PW1 nor PW5 mentioned the presence of each other at that time death threats by *mama* Ndonye.

PW1 said that 3rd accused cut Kagio with a panga as Kagio was struggling to close the door of the bar. PW1 said he went to hide but could still see from his hiding place. He further said that **"I saw Kamwenji stab my father on the stomach. Stranger cut my father with a panga as father was trying to close the door..... Stephen and Mwangi who is not in court poured petrol on the car and the bar. They set it on fire."**

PW5 told the court as follows:

"I saw Johnson pushed by young men. I saw the *jiko* had been pushed down. Johnson entered the butchery. I heard Bubas, now deceased, he has entered here. He took a stone and hit the window. Kamwenji cut Johnson on the hands as he tried to push the door. Johnson was overpowered. The people pushed the door and entered. There was street light outside. There was no light inside. Arshavin (4th accused) and Macharia poured petrol on the car parked outside the bar."

It is clear from this evidence that both PW1 and PW5 were witnessing totally different scenarios! Kamwenji is 3rd accused and Arshavin is an alias of 3rd accused which he denied. It is not clear whether this is the Mwangi referred to in the evidence of PW1. There is also discrepancy in evidence as to who cut and who stabbed Johnson.

PW2 on his part told the court that he was hiding in his shop and while in there he heard Kamwenji, Arshavin, Mark, Bubas and Macharia talking outside telling him to get out. This shop was a few metres from the scene. Could Kamwenji and Arshavin have been at the scene as well as near PW2's shop at the same time?

There is the issue of the meeting held to plan the revenge attack. This was said to have been held at the Video Shop of one Mathai. The person who informed Johnson of this meeting is not disclosed. Was it Mathai or another person? Whoever had first-hand information about this meeting did not testify and what was adduced in court is hearsay evidence and inadmissible.

There is also the issue of who Bubas is and in the same breath, the aliases given to the 1st and 4th accused persons. They have denied those names thereby casting doubts in that evidence.

CPL Owuor, PW9, testified that an informant identified the 1st and 2nd accused person to him. He said that he found the 3rd, 4th and 5th accused persons in cells having been arrested by other officers. PW9 confirmed that **"there was no identification parade for any accused. They were known before."**

Courts have held in various authorities that the trial court must consider with utmost care the circumstances under which an accused person was identified. These factors include how long did the witness have the accused under observation; at what distance; in what light; whether there was obstruction to the observation of the accused; the nature of the light and how strong the light was, among others.

Recognition of an accused is said to be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, extreme care must be take because mistakes in recognition of close relatives and friends are sometimes made. (See R. v. Turnbull & Others (1973) 3 All ER 549.)

My careful analysis of the evidence in this case leads me to conclude that the identification of the five accused persons is not free from error. As stated in this judgement, witnesses contradicted themselves as to the role each accused person played in attacking the deceased or burning his business down. The source of the light is also in issue given the contradictions in evidence on the matter. There was need for other evidence, whether circumstantial or direct pointing at the guilt of the accused persons. (See *Abdala Bin Wendo v R*, (1953)20 EA CA 166.)

In conclusion, I wish to empathize with the family of the deceased persons about the loss of their kin. Despite this pain, this court must be faithful to the spirit and letter of the law. The prosecution has failed to discharge the duty placed on it to prove this case beyond reasonable doubt. Investigations were poorly conducted. From the evidence adduced in court it is obvious that the situation was chaotic and many people must have been involved in the attack that led to the death of the two deceased persons. Police took time to arrive and when they did arrive, the situation was so bad that all they could do was to quickly whisk the bodies away due to volatile nature of the scene. In such a situation it was not easy for the police to gather evidence as soon as the attack occurred.

The evidence leaves doubts in my mind. The law is clear that where doubts exist, they must go to the benefit of the accused person. Consequently, it is my finding that the five accused persons are not guilty of the two charges of murder. They are free to enjoy their liberty unless for any other lawful cause they are held in custody. It is so ordered.

Dated, signed and delivered in open court this 17th August 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Okeyo for the prosecution

Mr. Jumba for 1st and 2nd accused persons

Mrs. Omungala for the 3rd accused person

Mr. Oundu for the 4th accused person

Mr. Tanui for the 5th accused person

All the five accused persons

Mr. Daniel Ngumbi, court clerk