



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO. 15 OF 2008

REPUBLIC PROSECUTOR

VERSUS

- 1. BENSON MUHINDI CHESTO**
- 2. STEPHEN CHEMENGU**
- 3. GIDEON KONES WANANDA alias EDWIN WANANDO**
- 4. NGEYWA ELIUD KIMINY**
- 5. KENNEDY KIRUI CHEREN**
- 6. WILSON CHEMONGES KAMATWAI**
- 7. KEMBOI ANDREW NDEGE**
- 8. MARTIN KIRUI NAYNORIA**
- 9. JACOB PATRICK KOMON**
- 10. FRANCIS SAKONG SAMURUMO**
- 11. GEOFFREY MAKAS.....ACCUSED PERSONS**

JUDGMENT

BACKGROUND

1. The accused persons herein namely **BENSON MUHINDI CHESTO STEPHEN CHEMENGU, GIDEON KONES WANANDA alias EDWIN WANANDO, NGEYWA ELIUD KIMINY, KENNEDY KIRUI CHEREN, WILSON CHEMONGES KAMATWAI, KEMBOI ANDREW NDEGE, MARTIN KIRUI NAYNORIA, JACOB PATRICK KOMON, FRANCIS SAKONG SAMURUNO, GEOFFREY MAKAS** were all with 8 counts of murder contrary to Section 203 and 204 of the Penal Code.

2. The particulars of the offence in brief were that on the 31st of December, 2007 jointly with others not

before court at Kimama village in Chesikaki location in Mt. Elgon they murdered **JULIAN NEKESA, ZEBEDAYO NAMBOMBI, JACKSEN MAFULA, EMMA NASIMIYU, HENRY MARUTI KADILA, SINDANI WANYONYI, FRANCIS MANYUA KHISA AND WASILWA MAFULA.**

3. The accused persons pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling a total of 20 witnesses. At the close of the prosecution case the court found that all the accused persons had a case to answer and put them on their defence.

4. The brief facts of the prosecution case was that on the 31st December, 2007 in Kimama village in Chesikaki within Mt. Elgon the deceased together with others not before court, invaded several homes within the said village singing war songs, removing the deceased persons from their homes and led them to the forest where they killed them and dumped their bodies in an old pit latrine.

5. **PW1, PW2, PW4, PW8, PW10** stated that they were among people who were escorted to the forest alongside others who were killed. In their evidence they indicated that they were able to identify those who raided their homes and escorted them to the gallows. **PW1** said that 4th and 5th accused were among the attackers, She knew them by their names. As for the 2nd and 3rd accused whose names she did not know were among the attackers. She could not identify others. 4th and 5th accused were her neighbours sons and she used to see 4th and 5th at the market. 4th, 5th and 3rd accused were doing the killing. 3rd accused received instructions and spared her. She identified 2nd, 3rd, 4th and 5th accused at an identification parade. She witnessed 4 of her relatives being killed. **PW2** was also picked from his home he identified 3rd, 4th and 5th accused whom he said he knew very well as they were neighbours. He escaped from the forest. He helped arrest 7 & 8 accused. In cross examination he said he did not see any of the accused persons slaughtering his relatives. 4th accused is his relative.

6. **PW4** stated that the 4th accused and one other person went to his home on 31.12.07 and told them they were wanted by Saboat Land Defence Force [SLDF] leader. The witness and his brother followed the 2 to the slopes of Mt. Elgon. Later at 6 p.m they were released as it was indicated by those killing that they did not want to kill twins. Him and his brother were twins. He knew the 4th accused. On cross examination he said that he does not know why the 4th accused name is missing in his statement as he gave the same to the police. He further confirmed that in the said statement he had stated that he could not identify the young men who were his neighbours. In re- examination he said that the reason he did not give the name of the 4th accused to the police is because he could not recall it at the time of writing the statement.

7. **PW8** a brother to PW4 stated that the 4th accused with one other person went to their home and ordered them to go to Kimama Primary School to see Kones the leader of Saboat Land Defence Force [SLDF]. At 6 p.m they were directed to Chesikaki where people were being slaughtered. They were released for being twins after Kones called and directed so. He did not witness the killings. 4th accused escorted them. He identified the 4th accused in a parade on 9th of April 2008. He did not give names to the police as the police did not ask for names. Neither 4th accused nor his colleague were armed.

8. **PW10** she did not know the accused persons. She was arrested together with one Juliana by a gang on 31.12.07 and were taken to Mt. Elgon first. The 7th accused is among those who arrested them. He later raped her while in the forest. She did not know his name. Juliana was slaughtered. She did not identify the people. She was raped by 2 others and later escorted to the market.

9. **PW3** stated that he saw the gang. He hid in the bush. He identified the 4th accused who was ahead of others, he was a neighbor's son.

10. **PW5** identified accused 2, 3, 4 & 5 as they resided in the neighborhood. She said the 2nd accused had a black trouser and green shirt, 3rd accused a red shirt and khaki trouser, she could not recall how 4th accused was dressed while the 5th had a light blue shirt.

It was also her evidence that the young men were armed with a rifle, arrows and pangas, the young men asked them to lie down. Some of the young men had covered their faces. They hit a child and took maize and beans from the house. They took her husband away. Later she learnt that her husband had been killed. Her brother-in-law, sisters, aunt and uncle were killed.

In cross examination this is what she said

“There were eight people who came to our house. They had covered their faces but the eyes were free. Some were tall, others were short. I knew the 2nd, 3rd, 4th and 5th accused well having stayed with them for long.”

“I reported the matter to the police after the military operation.”

11. **PW6** – identified bodies of several people allegedly killed by SLDF at the Webuye District Mortuary.

12. **PW7** testified that on 31.12.2007 raiders took away her brothers cattle. She later saw a group of people go to the river. She ran home. While in the house near Kimama market she heard people singing war songs. She went out and saw a group of young people.

Later she learnt that her parents and siblings had been captured. The following day she learnt that they had been killed. The bodies were later found in a pit. She did not see the killers.

13. **PW9** recalled that on the 31.12.07 at around noon while in farm he had people saying ***“tembea haraka nyinyi mlipigia PNU Kura”*** they were 30 meters away he hid in the plantation for fear of his life. His mother and Maureen **PW10** were being escorted. He identified 1st accused, 2nd accused and one Peter Maroka not in court. The next day his mother’s body was found in a mass grave. Maureen returned having been cut and raped.

14. **PW10** – she testified that on the 31.12.2009 as she was visiting her aunty (deceased) and while in the company of her children Geoffrey and Edwin at around 3 p.m a gang of people came to the home. They arrested her and her aunt who was outside. Her cousin **PW6** hid in the coffee plantation. 7th accused was among those who arrested them and was later to rape her. In the forest after her aunt was killed. They walked 10km from the home to the forest. On getting to the forest she identified the bodies. She cannot identify those who killed her aunt. That when it was her turn to being killed a phone call was received and she was spared as she was the 13th. She was cut on the legs after which the 7th accused raped her, two men joined in. she was raped by 3. Two of them were not in court. Later some of them escorted her to Kimama market. On the way she saw many bodies. When she got home the home was deserted and she left for her uncles home where she found no one. She slept in the bush alone and in the morning she went to look for **PW9** in his rented house. She later reported the matter.

15. **PW11** is a doctor who produced post mortem reports on behalf of his colleagues. They were 9 in total. The 1st body was of **Juliana Nekesa**. The head was disconnected from the trunk.

The 2nd body was of **Fred Kadila** he had a deep cut wound on the head.

The third body was of **Zebedayo Mabombi**. He had a deep cut wound on the head touching the spine.

The 4th body was of **Jackson Wafula**. He had a deep cut on the posterior part of the head with brain oozing, deep cut on posterior side of the neck, and a deep cut wound on the lower back on the hip. The cause of death was severe head and neck injury.

The 5th body was that of **Emma Nasimiyu**. She had deep cuts on the posterior part of the head and the neck with the head hanging almost falling.

The 6th body was of **Sidani Wanyonyi**. He had a deep cut on the head and posterior part of the neck.

The head was hanging.

The 7th body was of **Festus Khisa**. There was a deep cut on the posterior part of the neck touching on the spine. The head was hanging.

The 8th body was of **Wasilwa Wafula**. He had a deep cut on the posterior part of the neck. The 9th body was of **Henry Maruti Kadila**. Had several cuts. The main one was on the anterior part of the neck measuring 15 cm by 6cm deep. The head was hanging.

Post mortem report for 1 and 11 were missing

PW12 recalled that on 31.10.07 at about 3 p.m a group of people went to her home and picked her husband. She identified accused 4 to have been among them as she knew him. He was her neighbors son.

PW13 on 31.12.07 at 9.30 a.m. his neighbours cattle were stolen. On 5.1.08 at Chesikaki police when he went to follow up on lost cattle and relatives who had disappeared he accompanied the police to Mt. Elgon forest where the body of Jackson Wafula was recovered in a pit latrine. They saw 8 bodies. In another pit 2 bodies were recovered. The bodies were moved to Webuye district mortuary.

PW14 she recalls that on 31.12.2001 while at home at 2 p.m a gang raided and took away her husband and son. The two did not return. Later she learnt that they had been killed. The gang was armed with iron bars and sticks. She did not recognize them.

16. **PW15** – lost her son who was picked by 3 men including the 3rd, 6th and 11th accused. He never returned neither was his body recovered. She knew accused as her neighbors. She had not seen some before.

17. **PW16** recalls what happened on 31.12.2007 at 12 noon. He saw the 9th accused dressed in jungle green uniform with one other person. Accused 9 ordered accused 1 and 3 to grab a bukusu man Francis Murunga and they obeyed. They raided homes of Bukusu and frog marched them to the two. He ran to his home. He was mistaken to have been a member of SLDF and arrested. He was beaten and he gave the names.

18. **PW17** – stated on 31.12.2007 at 12 noon while at home she saw people chasing others **PW1** was one of them she knew him. He is her neighbor and son of Chesiro.

19. **PW18** – a minor she recalled somewhere in December 2007 people came to their home and took her parents. She was slapped by the 2nd accused.

20. **PW19** – produced age assessment of

accused 1– 30 years fit to plead.

Accused 2 – 34 years fit to plead

Accused 3 – 16 years fit to plead

Accused 4 – 16 years fit to plead

Accused 5 – 16 years fit to plead

21. **PW20** produced mental assessment for accused 7 – 11.

22. The court found the accused persons had a case to answer and they were all placed on their defence. They all gave sworn statements as follows

23. **DW No. 11 – Geoffrey Makasi Kiptumo** – recalled that on 31.12.2007 at 12 noon he was at his home. He was arrested on 1.7.2008 during army operations. No identification parade was done. He was taken to Kipkota army camp. He was not involved in the murder of the deceased person. He denied being a member of SLDF.

DW10 Francis Sokong Samurumo he recalled the 31.12.2007 when some people were killed. He was on his farm on the said day. He was arrested on 26.8.08 by military police from his home and taken to Kipkota camp where he stayed for a day and then taken to Kapsinero police station where he was kept upto 17.7.08 when he was arraigned in court. There was no identification parade neither was he interrogated. He believes that no investigations were done. None of the witnesses mentioned his name. He was not involved in the murder of the 12 people.

24. **DW9 Jacob Patrick Komon** he lives in Kipiti village which is 10km away from Kimama. On 31.12.07 he was at home he had not gone to Kimama. There was a military operation where men and women were arrested. He was arrested from his home. Over 400 people were arrested and taken to Kipkota camp. He stayed there for three days and was thereafter taken to Kapsikirom police station. He was later charged as his brothers failed to bribe the police. He does not know **DW6. PW6** failed to identify him even in court. He does not know accused 3 they met in prison. He is not Soskomon. None of the witnesses mentioned him.

In cross examination he denied being second in command after Matakwei. His area had not land issues.

25. **PW8 Martin Kitui Maynorria** on 28.4.2008 army officers were in their area. He was arrested. They were arresting Sabaoti men. He was taken to kakpota and after 2 days Kapsikorom police station. He received an injury to his eye in 2007 as he tendered to his goats when he fell. He had an amputation on 24.4.2014. None of the witnesses mentioned him except **PW2**. He has not been in Kimama in a long time. His is a case of mistaken identity.

26. **DW7 Andrew Kemboi Ndege** on 31.12.2007 he was at his home in Chengono village. He was not involved in the killings. He was arrested on 5.5.08 from his house. He was taken to Kapsokwony and stayed there between 5.5.08 and 13.5.08. He was not in Kimama on 31.12.08

There was no identification parade. He was not a member of SLDF. He did not know any of his co-accused. He has no relationship with 3rd accused. He did not rape PW2.

27. **DW6 Wilson Chemonges** he is a pastor with Redeemed Pentecostal Power Ministry (R.P.P) since 1994. He denies murdering. On 31.12.2007 he was in church for a vigil. His church in Kaptoboi is very far from Kimami. It is not in the same ward. He was only named by **PW15**. He was arrested by the military on 13.3.08. He was taken to Kapkota where he remained till 11.4.2008. He was later charged on 24.4.2008. He stays in Kaimukul not Chebyuk. He has no association with SLDF. He did not kill **Julian Wekesa**. In his church he has people from different tribes. He does not know Matakwei. He has no proof that he is a pastor. He lost his ID card.

28. **DW5 Kennedy Kirui Cheren** – in 2007 he was a student. He had just finished his class 8 exam, he was 15 years.

On 31.12.2007 he had visited his uncle in the next village. His name is Isaac Nakinai. There was insecurity in the area he heard gun shots closed his uncle's posho mill and headed to his grandmothers. **PW1** is related to his stepmother. In 2008 he joined St. Josephs School. On 3.4.2008 during the military operation he was arrested, taken to Kapkota where he was severely beaten and taken to Chesikaki police station. Although witnesses named him he was not involved in the murders. He knew Dickson who was his class mate and related to his stepmother and **PW1**. He does not know **PW17**. He did not own a phone in 2007. Phones were not common. It is a lie to say he communicated with leader of SLDF.

29. **DW4 Ngeywo Eliud Kiminy** – he was a student in 2007 was not involved in the killings that took place on 31.12.2005. It was during school holidays and he was helping his parents. He was 16 years and

attending St. Thomas in Chesikaki. He was picked with other young men and beaten for having voted for PNU. He was later released. His mother is Bukusu and his father Sabaot. While in school in April 2008 askaris went to school and asked Sabaot's to line up asked for their names. He gave his name and he was arrested and taken to Kapkota, they were beaten and later taken to Kapsokwony and later charged. PW1 is their neighbor. Dickson is his cousin. He did not pin point any one he was also a victim. PW2 may have seen him as he was at the front. He was not a member of SLDF.

30. **DW3 Gideon Kones alias Edwin Leonango** – he is from Chemondi. On 31.12.07 he was 17 years old. On the said day he was home. He did not get to know of the murders. No one in his area was killed. He was arrested on 26.3.2007 during the military operations. He was taken to Kapkota then Kapsokwony. He had not phone at the time. He had never rented a house or lived in Kimana.

31. **DW2 –Stephen Chemongo** – he stays in Kiptabus Cheptais. He has no house in Kimana. On 31.12.07 he was herding cattle with his brother Richard Chemungo. His brother betrayed him because he wanted his land. PW1 had been to the cells and his brother pin pointed him and hence PW1 was able to pick him at the parade. PW9, 16, 17 and 10 lied as they had previously not reported him to the village elder or police.

32. **DW1 Benson Muhundi Chesoro** – he stays in Teremi in Kapsiro. He has never been in Kimama neither Chebyuk. The places are far from his home. He does not know David Juma and was not involved in the murder. He is not Benson Mulingi. He was arrested and taken first to Chesikaki then Kapkota camp and on 7th Kipsigon police station. There was an identification parade at Kapsokwony and none of the witnesses picked him. He met 4th accused in court. He is not a member of SLDF.

33. It is the golden rule in criminal cases that the burden of proof squarely lies with the prosecution to prove the charge against an accused person beyond all reasonable doubt. See the case of **Woolmington vs. Director of Public Prosecutions [1935] A.C 462** a land mark house of Lords case which todate applies to the criminal cases in this country Lord Sankey in delivering a unanimous judgment of the House of Lords made this famous “Golden thread” speech

“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoners guilt subject to ... the defence of insanity and subject also to any statutory exception. If at the end of and on the whole case, there is reasonable doubt, created by the evidence given by either the prosecution and the prison..... the prosecution has not made out the case and the person is entitled to an acquittal no matter the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

34. There are three ingredients of murder that ought to be proved

- a). Proof of the fact and the cause of death
- b). Proof that the death of the deceased was the consequence of an unlawful act or omission. On the part of the accused which constitutes “*actus reus*”.
- c). proof that the said unlawful act or omission was committed with malice afore thought which constitutes “*mens rea*” of the offence.

35. In **Wamunya Vs. Republic [1989] KLR 429** the Court of Appeal stated

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis for conviction.”

36. In the notable case of **R. Vs. Turnbull [1976] 3 ALL ER 521** dealt with the issue of a Identifying the court said

“... The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in anyway? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even then the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of a close relative and friends are sometimes made.”

37. Having set the law I will now consider the evidence before court. Notable is that there were no investigations brought forth of how the accused person were linked to the 12 killings subject matter leading to their arrest. Secondly it is quite clear that all were arrested after several months in a military operation.

38. **Accused II Godfrey Makas** was not mentioned by any of the witnesses he was therefore not linked to any of the killings subject of the case. That being the case this court must of necessity acquit him.

39. **Accused No. 10 Francis Sakong Samuromo** likewise was not linked by any witness to the killings subject matter of this trial. He is accordingly acquitted. The acquittal of 10th & 11th accused was also supported by the State.

40. **Accused No. 9 – Jacob Patrick Komon** – he was named by **PW6** as having been with one other person wearing a jungle uniform. That the two commanded young people who initially brought Francis Muniyua to them and later removed Bukusu men. He then ran away and saw nothing else.

He did not see the accused or any other kill, he did not report the incident to the police immediately. He only gave the names upon being arrested as he had to tell the “truth” I find the statement of **PW16** hard to believe. Did he name others to save his skin as the military was carrying out an operation?

This evidence is uncorroborated and unsafe to be relied on. Accordingly I give the benefit of the doubt to accused no. 9.

41. **Accused No. 8. Wilson Chemonges** – in regard to this accused I am inclined to agree with the defence that he is linked to the death of one Fred Chengani yet the death of the said Francis Chengani is not subject of these proceedings neither did the prosecution prove his death. Indeed **PW15** failed to identify the accused consequently his case must fail. He is accordingly acquitted.

42. **DW7 Martin Kirui Maynona** – this accused person was named by the **DW2** and 7. As regards this witness **PW2** said they had been in their neighbor lived for about 3 months but he did not know his name. He however did not identify the accused as one of the men who took them to the slaughter place. He said the 7th accused used to make knives. This allegation was not corroborated. Indeed no such report against the backdrop of the violence in the region was reported anywhere.

The court does not find this evidence safe to return a conviction.

PW10 was visiting the area. She says that her aunt Juliana and herself were arrested by people one of who was the 7th accused. He later raped her alongside two other men. She did not know his name. Since she was unknown to the person who arrested her and later raped her she ought to have informed the court what in the circumstances that were prevailing at the time made her remember him. Did he have a peculiar mark? What was this that struck her to enable her recognize him. This did not come out clear and in the absence of corroborating evidence again this evidence is clearly not safe for the court to arrive

at a conviction. This accused person is also acquitted.

43. **Accused No. 6 Kwemboi Andrew Ndege** – there was no evidence linking him to the murder a fact admitted by the prosecution.

44. **Accused No. 5 Kennedy Kirui Cheren.** This accused was implicated by **PW1 & 2.** **PW1** stated that accused 4 & 5 were among the group that raided her home and wanted to kill her. She said she knew them as they were sons of her neighbor. 4th and 5th accused were doing the killing armed with pangas. She was able to identify accused 3, 4 & 5 at an identification parade.

The environment was hostile, and threatening how did she recognize them? Did she report the incident to the police immediately? This is not clear. Can this evidence in the absence of corroboration be safe? **PW2** shared that 4th accused was amongst the new people they had accommodated for 3 months. The 5th accused were among those who arrested them. He did not identify most of the people what made him identify the 5th accused person in the circumstances prevailing? He does not give the time that this happened. Was **PW5** at his place yet he was at **PW1's** and when did he manage to take him to the forest to be killed and be with **PW4.** This evidence without corroboration is not safe to be relied upon. Accordingly this accused is acquitted.

45. **Accused No. 4 Ngeywo Eliud Kiminy** – much of the evidence against **DW5** by **PW1** points at him. **PW2** however is not too sure whether **PW4** was a member of SLDF. There is also contradiction between **PW4** and **8** as regards this accused person.

PW5 named him however in cross examination she said that the people who went to her house had their heads covered. The evidence against this witness is not only contradictory but totally unsafe for this court to return a conviction. He is also acquitted.

46. **PW3 Gideon Kones- PW5** had mentioned this witness however she later said their heads were covered. **PW16** mentions him but already the court has doubted the credibility of the said witness. There was dock identification of this witness by **PW18** who said he was amongst those who abducted her parents. Is this dock identification in the absence of no other evidence against an allegation that **PW18** had been shown the accused sufficient? The evidence against this witness false short of the required standards for that reason he is acquitted

47. **Accused 2 Stephen Chemengu** – he was mentioned alongside accused 3, 4 & 5 by **PW2.** **PW5** similarly mentioned him alongside accused 3. The evidence of **PW5** has credibility issues. **PW2** stated he knew him and the others as their neighbors for 3 months but did not know the name. What made him recognize him in the circumstances then prevailing. It is not clear. The evidence of **PW2** is uncorroborated likewise I find the same unsafe to be relied on to return a conviction. This accused is also acquitted.

Accused 1 Benson Muhundi Cheseto. He was named by **PW9 & 16.**

PW9 had this to say, that he saw 1st accused Cheseto with others lead his mother to the forest. He did not see them again until at the hearing. He does not say whether the 1st accused was a neighbor or how he was known to him, what made him recognize him the circumstances then.

PW16 says he saw them take a Bukusu man to the 3rd accused. He however did not see much after that. Again in the absence of further evidence linking the 1st accused to the killings subject matter, the scanty evidence will not be safe for this court to return a conviction. This accused is also acquitted.

48. The activities in Mt. Elgon in 2007 were uncalled for, inhuman and barbaric. No human being deserves to be killed under whatever circumstances unless sanctioned by law and for whatever reason leave alone to be butchered in the style and manner that happened in Mt. Elgon and elsewhere in the country. Such atrocities ought not to happen and to be tolerated in any civilized society and the

perpetrators ought to face the wrath of the law.

49. However the above can only be achieved if citizens keep vigil and inform the law enforcement agents immediately when this happens, are able to identify the perpetrators without fear and within reasonable time and when the police and other law enforcement agencies investigate the crimes thoroughly and charge those who were involved based on cogent and credible evidence.

50. The case before court was not investigated; several of the accused persons were arrested after a military operation and charged without proper investigations, others may be lucky in that the prosecution failed to adduce evidence to the required standard.

51. The accused are let free but are warned that those who may have participated have merely gotten free based on technicalities. They should go out there and reform, become good citizens of this country and desist from crime.

52. The upshot of this judgment is that since the prosecution did not prove its case against each of the accused persons as by law required "beyond all reasonable doubt" each one of them is acquitted unless they are otherwise lawfully held.

Dated at Bungoma this 1st day of August 2016.

ALI-ARONI

JUDGE.