



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 24 OF 2010
LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

EUSOBIA KOBIA RUGONJI.....1ST ACCUSED
EDWARD GUANTAI RUGONJI.....2ND ACCUSED
AYUB MUCHUI RUGONJI.....3RD ACCUSED
PATRICK MUTWIRI RUGONJI.....4TH ACCUSED
STEPHEN MWINGIRWA RUGONJI.....5TH ACCUSED
PITOLIO KATHURE VENACIO alias
REGINA KATHURE MURINGI.....6TH ACCUSED.
TIMOTHY GITONGA MUNGANIA alias
TIMOTHY MURIUNGI.....7TH ACCUSED.

JUDGEMENT

1. The accused persons **EUSOBIA KOBIA RUGONJI, EDWARD GUANTAI RUGONJI, AYUB MUCHUI RUGONJI, PATRICK MUTWIRI RUGONJI, STEPHEN MWINGIRWA RUGONJI, PITOLIO KATHURE VENACIO alias REGINA KATHURE MURIUNGI, TIMOTHY GITONGA MUNGANIA alias TIMOTHY MURIUNGI** are charged with one count of murder contrary to section 203 of the Penal Code. The particulars of the charge are that on the 17th day of April 2010 at Marega Village, Mikinduri West Location, Tigania District in Eastern Province jointly murdered Simon Iguna Rukwaro.

2. The Prosecution called six witnesses. The Chief Facts of the prosecution case are that the deceased went to home of Caroline, his niece, PW2 and asked for casual labour. she gave him a piece of land to till which he did quickly and was paid 50/-. He then went away only to return running and screaming followed by a large group of people. The deceased was eventually forced out of PW2's house where he had locked himself, and was led away by all seven accused and in addition by in addition by Murungi's sons Gichubiri, Philip, Danis, Henry, Francis Ayub and Mwimenti.
3. According to daughter of deceased who came later, PW3, deceased was beaten by the 2nd, 4th, 5th and 7th accused and Murungi's sons before they led him away. At 11 am, an hour or so later, PW3 received the news that her father had been killed and burnt. She saw his body with smoldering fire from a distance.
4. The cause of death according to Dr. Macharia, PW1 was multiple injuries and bruises. He said he noted multiple fractures of the scalp, cut on front abdomen with some internal organs hanging outside and severe and deep burns involving the whole body.
5. The accused persons were all placed on their defence. Each put forward an alibi in answer to the charge. In their sworn defences. The 1st, 3rd, 4th and 5th accused persons corroborated each others that at 8.30 am on 17th, they all met in the farm of 3rd accused to assist him cultivate. They each said that they received two customers who bought miraa from the 3rd accused one Kilema and one Zakayo. They said that they worked upto 5 pm when they went home. DW8, Kilema corroborated their statements.
6. DW2, the 2nd accused stated that he proceeded to Athwana, 4 kilometers from home where he was hired to till land with a youth, one Hamson. He said he worked until 5 pm when he returned home. DW9, one John Kiruja corroborated his statement. He testified that he saw the 2nd accused and another walking on a neighbouring land. DW9 stated that at 4 pm he asked the 2nd accused to assist him place traces on the roof he was working on which he did.
7. The 6th accused, only lady in the gang stated that she had spent the day at Macharia's farm where she got casual labour and worked from 8 am to 4 pm.
8. The 7th accused, a youth, stated that he had gone to his sister's place in Athwana to assist her with house chores as she had given birth. The 7th accused stated that he went to her house after schools closed at beginning of April holidays and did not return until early May in order to go to school.
9. The sister of 7th accused was DW10, Maitha Nkirote. She corroborated 7th accused and defence. She stated that after seeking permission from their mother, he stayed with his brother the 7th accused from 3rd and 4th April to beginning of May at her house in Athwana, 5 km from home.
10. I have carefully considered the evidence adduced by the prosecution and the defences of the accused and the evidence of their three witnesses. I have also considered submissions by the defence counsel, Mr. Rimita and the state Mr. Moses Mungai.
11. The accused persons are facing a charge of murder. S.203 of the Penal Code which creates offence of murder stipulates.

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

Circumstances which constitute malice aforethought which forms an integral part of the offence of murder are set out under section 206

“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. ...

(d) ...

12. The Prosecution has the burden of proof in this case. They must prove the case against the accused on a standard of proof beyond any reasonable doubt. The prosecution should adduce evidence to establish.

(a) That the accused persons unlawfully caused the deceased death by an unlawful act omission.

(b) that they had formed the necessary intention to cause either death or grievous harm.

(c) Since the seven accused are charged jointly of committing this offence, the prosecution must adduce evidence to establish that the accused persons were acting with a common purpose or were executing one common purpose when the act or omission causing death was committed.

13. Section 21 of the Penal Code defines who joint offenders and what common purpose is as follows:

“21. 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.”

14. In this case there is no eye witness account of how the deceased met his death. There is however, evidence of events one day before the date of incident that is 16th April, 2010 and those of 17th April 2010 just before incident occurred.

15. Before I get to these events I wish to describe the relationships of the accused and the prosecution witnesses. The 1st to 5th accused persons are brothers. The 6th accused is mother of the 7th accused. According to PW2 the 6th accused is her aunt because she is her mother's sister. PW4 who is PW3's brother also stated so. Further PW4 said that the 6th accused was the mother of Francis, M'Imenti, Timothy and Ayub. He did not identify them. PW2 in her evidence said that her father was a brother of the deceased. It is clear that all the prosecution witnesses apart from the formal ones and the accused persons are related.

16. PW4 testified that one day before the attack on his father, he averted a cases by calming down the 6th accused who had gone to their home with her sons and the accused persons threatening to kill the deceased. According to PW 4, 16TH April 2010 was the day the 6th accused started complaining against the deceased.

17. The second set of events were those testified to by PW2 and 3, who are first cousins, being daughters of brothers. PW2 said she gave deceased manual work to do in her land which he did. Then the accused persons and Murungi's sons chased deceased back to her house. She saw them leading him away. PW3 had also rushed to PW3's home and witnessed the deceased being led away by the group.

18. Mr. Rimita for the accused submitted that the evidence of PW2 and 3 was contradictory and should not be believed. PW2 in her evidence was clear that she had put her child to sleep and was busy in the kitchen when the deceased returned with a group in hot pursuit. She said he locked himself in her house and did not leave until the mob threatened to burn him inside her house.

19. PW3 who came much later to PW2's home said he found the deceased being beaten by 2nd, 4th, 5th

and 7th accused, she also said that when she went to PW2's home, the deceased was hiding under PW2's bed. PW3 said that on hearing her, the deceased reported that he had been stabbed in the stomach and that he was going to die.

20. Regarding evidence of a witness the prosecution intends the court to rely on, that witness must be credible and should not create an impression in the mind of the court that he is not trust worthy. They was the decision of the court of Appeal in the case of In NDUNGU KIMANYI V REPUBLIC (1979) KLR 282 the court of appeal held:-

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward

person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

21. I am guided by that court.

22. PW3 was either lying or exaggerating. His evidence was taken by a colleague not myself. That evidence does not seem to flow or to be consistent. It is not possible that PW3 could have found the deceased being beaten and at the same time hiding under a bed. PW3's evidence does not demonstrate a progressive flow to enable the court determine which event occurred before the other.

23. I have considered the evidence of PW3 and analyzed it viz a viz that of PW2. The two were describing the events which occurred at the same time in their presence. PW2 did not talk of deceased hiding under a bed. She talked of the deceased locking himself inside her house. While that may not be very glaring a difference as whether he was under a bed or locked in a house, both could have occurred in a house.

24. However, there are two matters which PW2 did not testify to and therefore never saw. The first one is PW2 did not see the deceased being beaten by anyone. She saw him run into her house and bolt the door. She then saw him being led away.

25. The other matter was what PW3 said she heard deceased report to her. The fact that the deceased was already stabbed in his abdomen before hiding in PW2's house. Dr. Macharia PW1 described the stab on the abdomen as big with organs of the body protruding from the wound. I would think that if there was any such injury, there should have been blood oozing from the wound. Having entered PW2's home, that blood should have been seen by many. Police would also have been called to see it as a crucial piece of evidence against the accused.

26. I find the inconsistency in the sequence events surrounding the events leading to the incident substantive and material. They are also irreconcilable. They can only mean one thing, that there is either falsehood, or exaggeration in the evidence of the prosecution witness.

27. There was another issue about presence of people at PW2's home just before deceased was carried away. PW2 said all accused were present and that she gave their names to the police. PW2 however admitted that she did not give 6th accused name and it was missing in her statement yet PW2 claims 6th accused was the ring leader. That is a serious omission which may lead to a conclusion that the reason PW2 does not mention her is because she was not there. Strangely PW5 the Investigation Officer testified that PW2 had given him the name of the 6th accused as one of the suspects. PW5 was clearly not telling the truth.

28. There was also the fact that neither PW2 nor PW 3 detail what role each of the persons they saw at PW2's played in the entire incident. All they said is they were there.

29. There was further contradiction in regard to the weapons each had. According to PW2 all the accused

persons and the son of Muriungi present at her house that morning were each armed with a panga. PW3 on her part said that the attackers were armed with pangas, stones and sticks. That contradiction is also of material substance and further is irreconcilable.

30. The other important issue was that of motive. The Investigating Officer of this case stated that after investigations he formed the opinion that the motive for the attack was allegations that the deceased was a wizard. He said he found the claim that deceased was suspected of bewitching the husband of the 6th accused a far fetched motive as incident had occurred 2 years earlier and by that time no one could have been provoked by that incident due to lapse of time.

31. PW4 on the one hand said that the motive for the attack was a land dispute between the deceased and the 6th accused. He explained that the problem was triggered when trees on the land of 6th accused were cut. PW4 said that the land belonged to his father but that the 6th accused was the current utilizer of the land. PW4 said that the dispute was pending before the committee.

32. PW 2 stated that when the deceased was chased into her house, she was informed by Francis Muriungi that the deceased had abused them over land.

33. PW3 stated that the cause or motive for the attack was land which the 6th accused was utilizing which the deceased claimed was his.

34. PW4 in his evidence said that one day to the incident, the 6th accused had accused the deceased as the one behind her husband's death when he fell from a tree. PW4 also said that the attack was triggered when trees were cut by another person from the same land.

35. From the evidence adduced by the prosecution, the motive of the attack is not very clear. Each witness had a theory which was not supported in evidence. The wizard theory may be a good pointer particularly bearing in mind the brutal murder and lynching of the deceased. The land dispute does not make much sense as it was alleged that the 6th accused was the one utilizing the land as at the time of the attack.

36. The accused persons gave alibi as their defence. I am well guided by the case cited of **WANGOMBE VERSUS REPUBLIC [1976-80] IKAR 1683** that accused persons defence of alibi must be considered against the rest of the evidence.

The court of Appeal delivered themselves as follows:

“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi where ever possible, but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”

The same position was taken by Okubasu, J, as he then was in **WAMBIA VERSUS REPUBLIC 1984 KLR I.**

37. In cited case of Kiarie v. Republic [1984] KLR 149 the court of Appeal made important observations and held as follows:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial magistrates finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the

alibi.

The errors of law on the finding on identification and on the alibi were of such a nature that it was reasonably probable that without them the trial magistrate would not have convicted the Appellant.”

38. The accused persons have not merely put forward an alibi as their defence, all of them except the 6th accused called evidence to corroborate their defence.

39. I find their alibi defences strong. These defences have created a doubt in the mind of the court as to the veracity and credibility of the prosecution evidence against the accused persons. In light of the numerous material and substantive inconsistencies in the evidence by the prosecution witnesses, particularly PW 2 and 3, I find that the alibi defence has dislodged the evidence by the prosecution implicating the accused with the offence.

41. As for 6th accused, her name was not mentioned by PW2 either to police verbally or in her statement to police. PW3 did not mention her in court and details of role she played if any was flurry.

42. Having analyzed and evaluated the evidence before me. I have no doubt that the deceased was pulled out of PW2's house, beaten stabbed and then set on fire. From evidence of the events and the fact the eye witnesses who saw only the part where deceased was frog matched away from PW2's home and nothing more did not specify roles played by those they saw, it is my considered view that the group involved was large, it was noisy and rowdy. That is why PW2 and 3 could not register roles played by them or who were there.

43. Being a mob the challenge of joint offenders and common purpose becomes a hurdle for the prosecution. No evidence was adduced to establish whether the mob had a common purpose or which among them had any intention to injure or cause death to the deceased.

44. The other challenge to the prosecution is who threw the total blow. The doctor did not say whether the death was caused by the multiple cuts or by the fire. More importantly we have no evidence to establish who injured the deceased, the manner in which he or she injured him and also who lit the fire.

45. I have come to the conclusion that the evidence adduced against the accused persons was indirect, circumstantial weak and one which did not create any nexus between either one of the seven accused persons and the deceased death. In the circumstances I will give the accused persons the benefit of doubt and acquit them of this offence under section 215 of the CPC. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 17th DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE