



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL CASE 19 OF 2008

REPUBLIC PROSECUTOR

VERSUS

MOSOBIN SOT NGEIYWA

JAPHET SIMIYU WEKESA ACCUSED

J U D G M E N T

This was a case which was heard to conclusion by two different judges. The prosecution case was heard by Koome, J. (as she then was) and the defence case was heard by the late Judge S. M. Muketi.

This court took over the matter at the point where final submissions were expected from both sides. Indeed, submissions were filed on the 20th June, 2012 and a date was set for judgment by this court which did not have the benefit of seeing and hearing the witnesses as they testified. Much reliance has therefore been placed on the evidence on record.

Be that as it may, the two accused **Mosobin Sot Ngeiywa (Accused One)** and **Japhet Simiyu Wekesa (Accused Two)** face four counts of murder contrary to section 203 read with section 204 of the penal code. It was alleged that on the 16th January, 2008 at Kalaha Farm Trans Nzoia West District, Rift Valley Province, jointly with others not before court murdered **Gladys Nanjala** (Count one), **Alex Simiyu** (Count two), **Vincent Waswa** (Count three) and **Smith Wekhoyela John** (Count four).

A total of thirteen (13) witnesses were called by the prosecution to establish its case against the accused which was that on the material date at about 6.30 am, **Joseph Simiyu Wekhoyela (Pw1)**, a farmer at Kalaha Farm in Saboti was at the farm when his father John Simiyu Wekhoyela was killed by a group of people who raided the farm. He (PW1) responded to screams emanating from his father's house. He ran towards the house but became scared and hid nearby from where he saw his father pleading for his life but all in vain. He (PW1) had hidden in a forest within Mt. Elgon National Park. He was twenty (20) metres from his homestead. He was lying down as he looked at the attackers. He saw and recognized a neighbour as being one of the attackers. The said neighbour was commonly known as "Kilel" and was identified as the first accused herein.

Joseph (PW1) saw the first accused struggling with his father but he could not go near because the situation was dangerous. He approached the scene only after Police Officers arrived there. He noted that his mother Florence Waliulla and niece Stella Nelima had been fatally shot with arrows and cut with a

panga. He viewed the bodies of his father, mother and niece and noted that they had injuries inflicted with sharp weapons.

Linet Wasike Mukenyo (Pw2) was on the material date at about 6.30 am woken up by screams. She rushed out of her house while holding her three year old daughter. She saw smoke at the point where people were screaming. She stood by the house of the late Gladys Nanjala before running away into the nearby forest together with Gladys and her children. While in the forest, they were approached by three people whom they thought were Officers from the Kenya Wildlife Services (KWS) or were Kenya Police Reservists (KPR) out to assist them. The three people had a gun. They shot dead Gladys and her child late Alex Simiyu.

Linet fell down and pretended to be dead. She waited for some minutes before escaping with her child and a child of Gladys. They remained at the forest upto the time they were rescued by Kenya Police Reservist. Linet was able to see and recognize one of the three people. This was the person called Japheth who went by his nickname of Mose. Linet identified the second accused as that person. She said that he was arrested with a rifle.

Stella Nelima (Pw3) was at her grandfather's homestead when it was invaded by the attackers. She ran out of a burning house and went to her uncle's house. Her grandparents were however killed by the raiders. She saw and identified the first accused as having been among the raiders. He was arrested with a machete (panga) and was the person who attacked her grandfather, the late Wekhoyela. He was also the person who cut her on the head with the panga.

Joyce Mutenyawa Simiyu (Pw4) was at home with her children when she heard noises. She went out of the house and saw neighbours' houses on fire. She was joined by a neighbour called Nekesa and they ran away into a bush. From there she saw the late Mzee Wekhoyela being attacked and killed with a panga outside his house. She identified the first accused as the person who attacked the late Wekhoyela with a panga. She knew him as a neighbour.

Patrick Tuma (Pw5), heard gunshots and got out of his house. He saw houses on fire. His house was also set on fire. He went with his wife and children to the nearby National Park where they hid. From there, he saw the first accused leaving the house of the late Wekhoyela which was close to the forest. He recognized the first accused as one of the raiders.

Florence Naliaka (Pw6), was at home with her husband Wekhoyela when their house was set on fire by attackers. She lost consciousness after being cut. Her husband was killed by three people armed with pangas. She saw them slashing her husband on the head. He fell down and died instantly. Thereafter, she was cut on the hands and became unconscious. She identified her neighbours as having been among the attackers. These were one Ali, one John Masai and the first accused. She was rescued by the Police when they arrived at the scene.

Ibrahim Simiyu Wanjala (Pw7) was asleep when he heard screams and noises. He was awakened by a neighbour called Tom and informed that things were bad. He saw neighbour's houses on fire. The house belonging to Tom and that belonging to his (PW7) father were burning. He escaped into a nearby forest while being pursued by a large group of people armed with bows and arrows as well as firearms. He was at the edge of the forest from where he could see the happenings. He saw his house being set on fire by one "crane" whom he identified as the first accused. He also saw and recognized two other people i.e. one Moses and one Tito. He returned to the scene when Police Officers came to their rescue and realized that the people of Kwanza were being attacked by the Sabotis. He later attended identification parades in which he identified the first and second accused who were both his neighbours.

Anna Nasambu (Pw8), had gone to visit her son at a place called Ole Korogo when she received a report that her husband the late Vincent Waswa had been gunned down. She later went to the mortuary and viewed the body of her husband which had a bullet wound on the neck. She and others later removed the body for burial. When she returned to her home at Kalaha Farm, she found that all her houses had been burnt down. She went to stay at a camp for the Internally Displaced People (I. D. P.).

Dr. Ronald Moge (Pw9) produced post mortem report forms in respect of the late Alex Simiyu, a male child aged about six (6) years and the late Gladys Nanjala. The reports indicated that the two died from injuries caused by gunshots. The doctor also produced P3 forms respecting the first and second accuseds. These showed that both were mentally fit.

IP John Lei (Pw 10) proceeded to the scene of the attacks on 18th January, 2008 and took necessary photographs of the bodies of those who had been killed. He indicated that the scene was at Kalaha Trading Centre, Saboti Division, Trans-Nzoia District.

Wilfred Wanyonyi (Pw 11) was at home asleep at the material time of the attack when raiders invaded and set houses on fire. His house was also set on fire. He went out and saw strangers. The area was bushy. He escaped into a nearby bush and while there, saw his neighbour Kilel standing by his (PW 11's) house. He came out of the bush when Police Officers came to their rescue. He identified the first accused as the said Kilel and said that people who lived at Kalaha Farm were from the Luhya community while those in a neighbouring farm were from the Sabaot community.

P.C. Samuel Mulei (Pw 12) proceeded to the scene of the attacks with his colleagues. On arrival they found residents gathered and running away from their homes due to insecurity. The area was covered in smoke. Houses were burnt. Four dead bodies were at the scene. They were transported to the Kitale District Hospital Mortuary. P. C. Mulei later attended a post mortem examination respecting two bodies. He also secured necessary disposal affidavits for two other bodies after the relatives of the deceased declined to have post mortem examinations on the bodies.

PC. George Amasa (Pw 13) investigated this matter which was classified as a post election violence case. He looked for potential witnesses in various I. D. P's camps and recorded necessary statements. Later, on the 9th June, 2008, the first and second accused were arrested after having been mentioned as having been part of the raiders who attacked Kalaha Farm. The two were charged with the present offences after the investigations were completed.

In his defence, the first accused said that he was a farmer at Kokwo Farm and was found in a river on the 5th June, 2008 having cut a tree. He was confronted by the area Chief and informed that he had no right to cut the tree. Thereafter, he was taken to the Chief's post where the investigation Officer came and told him to defend himself with what he had. He was released to go and bring Kshs. 3,000/- which he did not get. Later, he was confronted by six Police Officers who used a bicycle padlock to hit him. He was charged in court on the 23rd June, 2008. He contended that some witnesses told him that they did not wish to have a case with him but were threatened.

The second accused said that he lived at Kalaha Farm and on the 13th January, 2008 he went to his mother's place where he tilled land. Between the 14th and 17th January, 2008, he heard from the radio that there was work at Kalaha. He went there and found houses burnt. He remained at the centre and later was told by Police Officers to proceed to Kibomet for food. He later proceeded to a showground where he stayed in a tent. On 1st April, 2008, he and others were asked to return home as there was peace but on 9th June, 2008, he was arrested and taken to Kitale Police Stadium. He was arraigned in court on 23rd June, 2008 for the offence of murder.

From all the foregoing facts, it is apparent the deceased persons herein fell victim to the post-election violence which engulfed this country towards the end of the year 2007. The evidence shows that the violence at Kalaha Farm within Trans-Nzoia District was unleashed against members of the Luhya community by members of the Sabaot Community. Needless to say that the violence was senseless and was directed at innocent people by people driven by jealousy, selfishness and greed.

Be that as it may, there is no dispute that the deceased in all the four counts died from injuries inflicted upon them by a group of people who raided their homes while armed with crude weapons such as machetes (panga), bows and arrows and firearms.

The group burnt down houses and was certainly on a murderous spree against occupants of Kalaha Farm perceived to be from a political incorrect community. The spree resulted in the death of the four deceased herein. Therefore, the basic point for determination in this case is whether the two accused were positively identified as having been part of the murderous group of people.

The residents at Kalaha Farm were attacked at daybreak. The evidence showed that the time was between 6.00 and 6.30 am. Conditions were therefore favourable for the identification of the attackers and in particular those who were previously known to the victims. In their respective defence, the two accused indicated that they were not part of the group of attackers and that they were arrested and charged with the present offences without good cause. The first accused indicated that his arrest was prompted by his cutting a tree. He implied that witnesses were forced to testify against him.

However, there was ample corroborative and credible evidence by Joseph (PW1), Stella (PW 3), Joyce (PW 4), Patrick (PW 5), Florence (PW 6), Ibrahim (PW 7) and Wilfred (PW 11) showing that the first accused was positively identified as having been among the raiders. The said witnesses saw and recognized him very well. He was not a stranger to them. He was a neighbour. He was seen by Joseph (PW 7) cutting the deceased Wekhoyela with a panga. This was confirmed by Stella (PW 3) and by Joyce (PW 4) and further by Patrick (PW 5) and Florence (PW 6).

The second accused indicated that he was also a victim of the violence but the evidence by Linet (PW2) and Ibrahim (PW 7) placed him as having been part of the raiders.

Linet (PW 2) witnessed the deceased Gladys Nanjala and her son the deceased Alex Simiyu being shot dead by one of the three people who confronted them while they (victims) were under the impression that the three were either Kenya Police Reservist or KWS Officers out to rescue them. She (PW 2) saw and recognized the second accused as one of the three people. She knew him by the name Japheth and the nickname Mose. She said that it was him who shot dead Gladys and her son with a firearm.

Ibrahim (PW 7) indicated that apart from the first accused, he was also able to see and recognize the second accused as one of the raiders.

Undoubtedly, the raiders acted with a common intention to cause destruction, injure and/or kill the residents of Kalaha Farm and more so, those from the Luhya community. Each and every raider in that murderous gang of people was responsible for the consequences of their unlawful action even though not all of them were recognized and brought to face the law. However, the first and second accused were duly recognized and as such, they were criminally responsible for the deaths of the four deceased herein.

Although the two accused implied in their defence that they were innocent, the prosecution evidence against that was cogent and overwhelming. Its effect was to shatter their defence and reduce it to an afterthought. In the end result, this court must and hereby finds that the charges against the two accuseds have been proved beyond reasonable doubt. They are hereby found guilty as charged in all the four counts and convicted accordingly.

[Delivered and signed this 28th day of July, 2012]

J. R. KARANJA
JUDGE