



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CRIMINAL CASE 13 OF 2007

REPUBLIC.....PROSECUTION

VERSUS

JAMES MASOMO MBATHAACCUSED

JUDGMENT

The accused, **James Masomo Mbatha** is charged with four counts of murder contrary to section 203 as read with section 204 of the Penal Code as well as one count of attempted murder contrary to section 220(1) of the Penal Code.

In respect of murder counts, the accused is alleged to have murdered **Phyllis Kanini Ndundu** (count 1), **Elijah Kasyoki Koki** (Count II), **Nditi Nyamai** (Count III) and **Susan Mbuta Masomo** (Count IV) on the 19th March, 2007 at Manza Village in Machakos District of the Eastern Province. With regard to the attempted murder information, it is alleged that on the same day and place, he attempted to cause the death of **Regina Koki Mwangangi** by cutting her head with a panga. On 7th May, 2007, and 30th September, 2008 respectively the accused took his plea before **Sitati,J**, and **Lenaola,J**. On both occasions he entered a plea of not guilty on all the counts and he was subsequently tried.

The prosecution evidence briefly stated is that **Jane Mumbua Francis** is the wife of the accused. They got married on 1st June, 2007 under kamba customary law. She had a child before the marriage but subsequently had 2 children with the accused. Between 2002 and 2004, they were cohabiting in Nairobi peacefully. However, from April, 2004 problems started afflicting the family. It all had to do with the accused's infidelity. Fed up with the accused's immorality, she decided to part company with the accused in April, 2006. She went back to her parents in Kilungu. By then she was pregnant with their 3rd child. After staying home for 3 days, the accused telephoned her and she agreed to go back to the matrimonial home. She stayed on until October, 2006 when she gave birth. The accused stayed with her for 2 days and then disappeared. She had nothing to feed on or to give to the children. She contacted him and he promised to come but did not until the next day. This habit continued until 29th December, 2006, when they separated. She took all the children and went to stay with her parents at Manza village. Prior to this, the accused had in November, 2006 in the presence of his parents threatened to kill her, his family and himself if she walked away on him. He did so while holding a knife. His parents and brother however managed to take away the knife. They spoke to him thereafter until night fall. He again repeated the threat that night. In December, 2006, the accused came from work having slept elsewhere the previous night. When she enquired where he had been and with no answer forthcoming she sent their daughter **Susan** to call his brother, **Peter**. When he came and held discussions, the accused picked a knife and tried to stab him. However, **Peter** managed to take the knife away. In December, 2006 at night he asked for a rope. He locked himself in the bedroom and attempted to commit suicide. She asked his father to talk to him. He did so and managed to persuade him against taking his own life. Those killed, **Phyllis Kanini**,

Elijah Kasyoki Koki, Nditi Nyamai and Susan Mbuta Masomo were her mother, nephew, niece and daughter respectively. All that she knew was that she parted company with the accused before 5th March, 2007 and also changed jobs. On 17th March, 2007, the accused went to her place of work and told her that he was going home.

Benard Mbithi Mutua (PW2) was related to the accused. **Phyllis** was his aunt, **Elijah** was a nephew, **Nditi** and **Susan** were nieces whereas **Regina** was a cousin. He never knew the accused before the incident. On 20th March, 2007 he went to **Phyllis's** house and found burnt cushions, beds bedding and blood all over. On 30th March, 2007, he went to Machakos General Hospital and identified the bodies of **Elijah, Nditi, Phyllis** and **Susan** for purpose of postmortem. He saw several cuts on **Phyllis** thighs, ribs and the head. She was also partly burnt. **Susan** had cuts as did **Elijah** and **Nditi** on their heads. There were gaping holes on their heads. **Kanini's** left hand was almost severed. He came to know that those injuries were caused by the accused.

Regina Koki (PW3) is the mother of **Elijah**. She is a sister to PW1. Her son's death was as a result of being cut by the accused, a brother in law. She was at home when the accused came. The accused never said what had brought him to their house. On being pressed by the witness, the accused owned up and said that he had come for his daughter, **Susan**, then aged 4 years who was who staying with them. When he wanted to take the child, she, together with her mother, **Phyllis** resisted and told him to come with his parents. He left promising to come over Easter. On 19th March, 2007, he came back at about 8.00 p.m. The witness welcomed him and gave him tea which he took. He talked to the children until they retired to bed at 10.00 p.m. He told the witness and **Phyllis** though that he wished to take his child to Nairobi, but **Phyllis** told him to wait until the next day. He insisted on having the child that night as he wanted to leave. At about 11 p.m. he stood up, removed a panga from a sofa set cushion, he approached the witness slashed her on the left cheek as well as the right shoulder. She ran out to her uncle's house and sought his assistance. He did not come out immediately and the witness went back to her mother's house. She found the door locked from inside. She rushed again to the uncle's house and this time he came out with his wife and they started screaming. When the accused first entered the house, a hurricane lamp was on the table in the sitting room. She saw the accused clearly as she knew him quite well. Indeed they spent quite some time with the accused in the house. Following the injuries, she lost consciousness and was rushed to Machakos District Hospital. She came to the next day. After 8 days she was told of the death of her mother, **Phyllis**, and the children. She had left them all in the house after her attack. **Phyllis** was in the sitting room whereas the children were sleeping in the bedroom. There were 3 children in the house and all died that night. She did not see the accused person until she was being taken to hospital. He was on the floor but she could not tell his condition.

Francis Mutuku (PW4) is an uncle to both PW2 and 3. He is also a brother to the late **Phyllis**. On 19th March, 2007 at about 11p.m whilst asleep in his house, PW3 came and knocked at his door and told him that her mother and herself had been injured. He came out armed with a bow, arrows and slasher. He proceeded to the scene. Her sister's house was engulfed in smoke. He shouted for the person who had lit the fire to come out and face him. When there was no response, he kicked the door open. There was fire in the sitting room but could not tell what was burning. He called out for water which was brought and he started putting off the fire in different rooms. When the fire died, he saw the body of **Phyllis** partly burnt on the floor. She also had cuts on the thighs, hand and head. She was dead. Other bodies were in the other room. He heard someone coughing. It was the accused. When the police arrived they found the accused sleeping with a child who was dead and had also been cut. The accused was unconsciousness. The police then arrested the accused. The police later came and took away the bodies.

Jackson Musyimi Mwangi (PW5) was **Phyllis's** nephew. On 19th March, 2007 at night, his aunt, **Anastasia** came to their house and told them that the accused had injured his in laws. He rushed to the scene where he met his uncle (PW4) and neighbour. His aunt's house was burning. PW4 broke the door and they started putting of the fire. That done, they heard someone coughing, that person was the accused. A dead child was on a mattress. The accused was under the mattress. 2 children were dead but not in that room.

Dr. Virginia Musau (PW6) performed the postmortem on the bodies of **Phyllis, Nditi, Susan** and **Elijah**. In respect of all the deceased, she established the cause of death as being cardio –pulmonary arrest secondary to the head injury.

Anne Mutuku alias **Anastasia** (PW7) is the wife to PW4. She recalled that on 19th March, 2007 after retiring to bed she was at about 11 p.m. woken up by PW3. She informed her that the accused had attacked the deceased, **Phyllis**. They immediately started screaming.

Damiana Kambua (PW8) was a sister in law to PW1. On 18th March, 2007 between 3 and 4 p.m, the accused met her and asked for the whereabouts of his wife. When she told her that she had no idea, he became furious and warned her that someone was going to sleep in the police cells that night. He then gave her, his mobile phone number and asked her to tell her husband to call him. Her husband came at about 6 p.m. and she relayed the information. All this was happening at Mukuru Kwa Reuben area in Nairobi.

The husband went looking for the accused to no avail. On 19th March, 2007 between 7 – 8 a.m. the accused's brother's wife called her and when they met she told her that the accused had caused trouble in their rural home. The witness, her husband and accused's wife all left, for the village. At home she saw burnt cushion and bed. She was informed that her mother in law and her daughter, **Nditi** had died. Later she learnt that her niece, **Susan**, nephew, **Elijah** and **Regina** (sister in law) had all died. He knew that the accused had marital problems and he even used to threaten her with knives.

Jane Koko Itumo (PW9) was a sister of **Phyllis. Elijah** was her grandson. Both **Nditi** and **Susan** were her granddaughters. On the other hand **Regina** was her niece. On 30th July, 2007, she attended the post mortem in respect of the 4 deceased at Machakos District Hospital Mortuary and identified the bodies to the doctor for that purpose.

When the case next came up for hearing on 1st March, 2010, **Lenaola, J**, had left the station on transfer. The task of concluding the case therefore fell on the incoming judge, **Waweru, J**. He directed that proceedings so far be typed on priority basis to enable him hear the case further. However, by the time the proceedings were typed and availed, **Waweru, J** too had left the station on transfer. He had been replaced by **Kihara Kariuki, J** (*as he then was*). However, the latter judge did not have opportunity to hear the case as proceedings had not been typed then.

On 15th November, 2011 further hearing commenced before me after the accused elected that the case proceeds from where **Lenaola, J** had left. He however sought that PW1 be recalled for further cross-examination. An order to that effect was subsequently made.

Dr. Catherine Syengo Mutisya, (PW10) is a Consultant Psychiatrist at Mathare Mental Hospital. She examined the accused on 29th March, 2007. The history given was that he had been arrested in connection with the death of 4 relatives. He had taken 2 beers, purchased a panga, knife, diazonal and 3 packets of red cat chemical when he arrived at his in laws residence and demanded for his child. There was resistance from the mother in law as well as sister in law. He then slashed them as well as 3 children who all died. He then swallowed the red cat and diazonal chemicals, took paraffin, lit a calendar ad mattress and set the house ablaze. When she did her mental evaluation of the accused, she found him conscious and well oriented. His memory, mood, effect, thoughts, speech, judgment and abstract were good. He was able to explain what happened and understood the implication of the charges. In her opinion the accused was mentally stable and could stand trial. Based on the fact that the accused did not have a history of mental illness and also that there was no such history in the family and because he had been taking alcohol before with no associated violence, that he planned and purchased all the items he used at the time he was arrested and also because she had examined him soon after the offence, she was of the opinion that the accused was normal at the time of the alleged commission of the offence.

Cpl Shem Ondieki Mosaka is a Scenes of Crime Officer. On 20th March, 2007 at 7.30 a.m he arrived at the scene of crime and took photographs. He was in the company of **Cpl Mbaluka** of CID, Machakos. He

was shown the house and inside there were 4 bodies of deceased persons, as well as a bottle of diazonal, packets of red cat, nokia phone, grey jacket and a business card belonging to Nairobi Plastics with the name of the accused on. All in all he took 38 photographs which he tendered in evidence

Dr Patrick Litunya (PW12) is a dentist at Machakos Level 5 hospital. On 9th May, 2007, he examined **Regina Koki Mwangangi** who had been referred to him by Machakos Police Station following a case of assault. Upon examination he noted a deep cut on the face in the cheek area extending to the anterior or the left ear. There was also a deep cut on the forehead and right shoulder. He filled the P3 form which he tendered in evidence. The injuries were probably caused by a sharp object.

Paul Waweru Kangethi (PW13) is a Government Analyst. On 5th April, 2007 he received various items from **Cpl Mbaluka** – blood samples of the deceased, mobile phone handset, panga and employment card. It was desired that he ascertain the source of blood stains. He carried out an analysis on the items. **Nditi's** and **Susan's** blood samples were found to be of blood group 'O'. The other blood samples of **Elijah** and **Phyllis** did not yield any blood groups. Nokia phone could not as well yield blood group. The panga was not stained with blood. The employment card could not yield a blood group as well. He tendered in evidence his report.

Habil Akech Omondi (PW14), a Government Analyst was detailed to ascertain the cause of fire and secondly, whether some items contained poisonous substances. After his analysis he found that there were no fire accelerants, the plastic bottle was found to contain diazinon, toxic organ phosphorus pesticide. The empty sachets were found to contain zinc phosphate. They are toxic roundendicate which may cause harm if injected. He tendered in evidence his report.

Cpl. Elijah Mbaluka (PW5) was the last prosecution witness. On the night of 19th and 20th March, 2007 whilst on patrol duties with **Phoebe Nanzala** they were alerted of an incident at Manze Village. They proceeded there and found a big crowd in the homestead of the late Phyllis. They entered the house and found 4 dead bodies of different persons. The house had 3 rooms. The body of Phyllis was on the table. The one of **Nditi** was in one of the bedrooms and was partially burnt. The bodies of **Elijah** and **Susan** were in the third room. The accused was lying on the floor unconscious. He was arrested by the OCS and taken away. He did a thorough search of the scene and recovered a panga, mobile phone, employment card of the accused, 3 sachets of red cat poison, empty bottle of diazonal, a jacket of the accused and a knife. On 20th March, 2007 the police photographer from Nairobi took photographs of the items and bodies of the deceased. They then evacuated the bodies to Machakos District Hospital to await postmortem. On 30th March, 2007 he witnessed the postmortem on the bodies of the deceased. He later charged the accused with the offence.

With that the prosecution closed its case. Having carefully considered the written submissions on no case to answer, I found for prosecution, holding that the accused indeed had a case to answer. In his sworn statement the accused stated that on 19th March, 2007 at about 7p.m. he came to see his in laws. Apparently his wife had told him that the mother in law wanted to speak to him. He was given a cup of tea which he took. No other member of the family took the tea. As he continued to talk with the mother in law, he suddenly blacked out only to find himself in hospital. He conceded that his relationship; with his wife was strained. For a week they had been staying apart. She had relocated to her saloon. From the hospital, the accused was taken to Mathare Mental Hospital where he was treated for a mental condition for 4 months. With that, the accused closed his defence.

The offence of murder is committed where any person who of malice aforethought causes death of another person by an unlawful act or omission. So for the prosecution to succeed in this case against the accused, it must establish;

§ Death of deceased

§ Such death was caused by the accused by unlawful act or omission.

§ The death was accompanied by malice aforethought

Of course the accused also faced a charge or attempted murder of Regina Koki Mwangangi. The prosecution thus has to prove that in attacking **Regina Koki Mwangangi** Accused intended to kill her but just fail short of doing so.

However, I intend to deal first with murder charges. The fact of the 4 deaths has not been challenged by the accused. Indeed postmortems were conducted on their bodies by PW6. She went ahead and produced as exhibits, the 4 postmortem reports in evidence. So that the fact of the death of deceased is a non-issue. Infact there were even photographs of the deceased taken at the scene which were also tendered in evidence confirming such death

Did the accused cause the death of the 4 deceased? I have no doubt at all in my mind that he did. PW1, the wife of the accused testified as to several times that the accused had threatened to kill himself and members of his family. However, it is PW3 who bore the brunt of the accused's mission. She was an eyewitness and a victim of the event of 19th March, 2007. She was the mother of the 2nd deceased. It was her testimony that on the material night she was in the 1st deceased's house together with the accused and the 3 deceased children. She identified and indeed recognized the accused as she is the one who opened the door for him when he came calling. There was a lantern lamp which was on. Indeed the accused does not dispute being in the house on the material day and time. He admits that much in his own sworn statement of defence. Accordingly, the issue of mistaken recognition or visual identification is a non-issue. The accused when he arrived in the 1st deceased's home, was given tea which he took, talked to both this witness and the 1st deceased. He wanted to go away with 4th deceased. This was resisted by the 1st deceased. This sent him into a rage; he stood up and savagely attacked the witness cutting her with a panga on the left cheek, head and right shoulder. Following the attacks, the witness fled from the house and on coming back, found the house locked from inside. PW4 responded to PW3 SOS and proceeded to the 1st deceased's house which he found burning. Using a flash light, he saw the body of the 1st deceased burnt and slashed as well as other bodies inside the rooms. He saw the accused lying with one of the deceased person. He observed that the deceased child had been cut and burnt. There is no evidence that there was any other person in the house that fateful night apart from the accused, the 4 deceased persons and PW3. The accused attacked PW3 with a panga and she fled. She left behind in the house, the accused, his mother in law and 3 children all a life. Shortly these people were subsequently found dead with panga cuts and bodies burnt to some degree. It was only the accused who did not have any panga cuts. The panga that was blood stained lay nearby. Having first attacked PW3 with a panga, in a fit of rage, the irresistible conclusion or inference is that it is the accused who cut up all the deceased with a panga in a fit of blind rage. He is the one who hacked and burnt the bodies of the deceased. The nature of the injuries inflicted on PW3 being deep cut wounds on her head, are consistent with those observed on the bodies of all the 4 deceased persons. All the postmortem reports of the deceased refer to deep cuts on all the heads of the deceased. The cause of death in every case was attributed to cardio-pulmonary arrest secondary to head injury. It would appear that soon after P3 escaped his wrath the accused locked the house from inside, keeping or preventing the deceased' person from escaping. After hacking the 4 deceased persons, the accused lit a fire in an attempt to burn down the resident. This comes out quite clearly from the evidence of PW10, **Dr. Catherine Syengo Mutisya**. This was infact an overkill on his part, especially considering the fact that the 2nd to 4th deceased persons were minors and the 1st deceased an elderly lady. All the evidence on record places the accused at the scene crime. He was the only one who was found alive in the house. He has not said in his defence that there was another person who could have caused such mayhem. I have no doubt in my mind therefore that the accused had something to do with these deaths.

Did the accused have the necessary intention to kill? Another words, was there malice aforethought? The accused seems to be advancing the theory that he was mentally ill at the time of commission of the offence. However this defence is discounted by the evidence of PW10. She was of the view that based on the fact that the accused did not have a prior history of mental illness and also that there was no such history in his family and because he had been taking alcohol before with no associated violence, that he planned and purchased all the items he used at the time he was arrested, and also having

examined him soon after the offence, it was her opinion that the accused was of normal mental state at the time of the alleged commission of the offence. Cross-examined, the witness remained firm that at the time she examined him, he was of normal mental status. However, that could not rule out the fact that the accused could have subsequently broken down. This may explain why he was subsequently taken to Mathare Mental Hospital. In so far as this witness was concerned, the accused could not have been abnormal mentally at the time of commission of the offence because of the careful planning he undertook. I agree with the doctor's assessment of the accused at the time that he committed the offence. He had even earlier on been furious with PW8 a sister in law to his wife. When she answered him that she did not know where his wife was, he was not amused. He warned her that someone was going to sleep in police cells that night. This was ominous sign no doubt. The accused bought a panga, diazonal and red cat poison. The intention was clear. He intended to kill whoever stood in his way, cause mayhem and poison himself.

Section 206 of the Penal Code sets out the ingredients that would show malice aforethought. It provides as follows:-

“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. an intent to commit a felony***
- d. an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.”***

The accused had malice aforethought of the rankiest kind. He first cut PW3 locked himself, together with the deceased's persons in the house, armed with a panga, he cut all the deceased and focusing his attacks on their heads and subsequently attempted to burn down the house. In so doing the accused only intended one result, death of the deceased either from the cuts he had inflicted upon them or from the fire burns after he set the house ablaze. There is sufficient evidence as to the accused's motive, in his previous threats, in his choice of weapon, in locking himself in the house, in the focus of his attacks, and in his attempt to burn down the house whilst his victims were *insitu*. All these go towards establishing malice aforethought.

With regard to the 5th count, as aforesaid demonstrated by PW3's testimony and PW12 as well as the P3 form, the accused intended to cause her death. She however miraculously managed to escape by running away. By attacking her when armed with a panga and cutting her head twice and once on the shoulder, the accused intended to cause PW3's death. She just escaped in the nick of time. Otherwise he could as well have been the 5th body. There is no question of mistaken identity here. The victim came face to face with the accused. They had been talking for while before the attack. The lamp was on.

All in all I am persuaded that the prosecution has managed to prove its case against the accused to the required standard. Accordingly, I convict the accused on all counts.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH DAY of JULY 2012.

**ASIKE-MAKHANDIA
JUDGE**

