



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL CASE NO. 7 OF 2005**

**REPUBLIC**

**V E R S U S**

**ZABLON SHIKUNZI ..... 1<sup>ST</sup> ACCUSED**  
**JOSEPH INDECHE ..... 2<sup>ND</sup> ACCUSED**  
**JOSHUA MBOYA ..... 3<sup>RD</sup> ACCUSED**  
**PIUS MOTOKA LUMUMBA ..... 4<sup>TH</sup> ACCUSED**  
**PATRICK SHIKANDA LIKHOTIO ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein are **ZABLON SHIKUNZI, JOSEPH INDECHE, JOSHUA MBOYA, PIUS MUTOKA LUMUMBA and PATRICK SHIKANGA LIKHOTIO** and they are all charged with the offence of murder contrary to the section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 26<sup>th</sup> March 2005 at Luseru village, Buyhangu sub-location in Kakamega District they, jointly murdered **HILLARY SHIKUNZI**.

2. They all denied the charge and the evidence tendered in support of the charge was as follows;

**PW1, Dr. Jason Amukonyi**, performed the post-mortem on the deceased's body on 29.3.2005 and found that the body had severe burns, the lungs had collapsed and were filled with carbon monoxide and he concluded that the cause of death was "respiratory failure caused [by] the burns".

3. **PW2, Isaiah Shikunzi**, the chief of Kambiri Location and father of the deceased stated that on 26.3.2005 at 9.p.m. he was seated inside his kitchen with his wife, **PW3, Joyce Mudeshi Luteya** and his six children when he was suddenly cut on the head by someone who had used the widow to access him. When he turned to hold his head, the assailant cut him again and his fingers were cut with his ring finger being completely severed from the hand. According to him, when he turned and looked through the window, he was able to recognize the 1<sup>st</sup> accused, Zablun Shikunzi and who was his "real brother" as well as the 3<sup>rd</sup> accused, Joshua Mboya who was a neighbour. He added that as he tried to escape through the door, he saw and recognized the 2<sup>nd</sup> accused, Joseph, and the 4<sup>th</sup> accused Pius Mutoka, persons who were from his village and who were well known to him. That when he saw them, he turned back inside the house and tried to escape through the back door and at that point he recognized the 5<sup>th</sup> accused Patrick Shikanga, who was his immediate neighbor. That the latter and another accused person who had died in custody, John Limbuka Olulu, were throwing some sort of missiles or container of five liters each which landed and exploded into flames. The witness then stated that he again turned to the main door of the

house as the house was quickly engulfed in flames and after he managed to get out, his wife called out to him and shouted that his children were burning, and he then turned back into the burning house and rescued one Hannington, a toddler and rushed out of the burning house carrying him. When he got out, he was told that Hillary had burnt. He helped to take Hillary to hospital at Kakamega and noticed that he had burns all over the body and while being treated at Kakamega P.G. Hospital for his own injuries, he learnt on 26.3.2005 that Hillary had died at a hospital in Kisumu.

4. When he was cross-examined, PW2 said that there was moonlight on the material night and although he bled heavily after he was cut on the head, he was able to recognize the accused persons from the moonlight and also from light from the hurricane lamp in the house. He however stated he did not mention the accused persons when he recorded his statement to the police but that when the District Commissioner came to see him on 27.3.2005, he mentioned the 1<sup>st</sup> and 3<sup>rd</sup> accused persons as his assailants and remembered that the 2<sup>nd</sup> accused had a t-shirt and the 3<sup>rd</sup> accused, a shirt whose colour he could not remember.

5. **PW3 Joyce Muteshi Shikunzi**, was the wife of PW2 and mother of the eight (8) year old deceased and in her evidence she stated that when PW2 was hit on the head, she rushed to the window and saw the 1<sup>st</sup> accused cutting her husband with a panga. She knew him as her brother-in-law and because she was in her kitchen with her family, she was able to see the 1<sup>st</sup> accused using light from a tin lamp and a hurricane lamp.

6. It is her further evidence that when her husband was cut, he put his hands on his head and then his fingers were also cut. That he started bleeding and according to her, she saw the 3<sup>rd</sup> accused at the window and when she ran out, she saw the 2<sup>nd</sup> accused person at another window where jerricans were being thrown in and which exploded as they caught fire. That one of those objects landed on Hillary Shikunzi and he caught fire.

7. It was the further evidence of PW3, that when she ran out, she saw one Noah Shitambasi (not an accused person) and the 6<sup>th</sup> accused (now deceased) standing near her maize store and when they saw her, they fled. She returned to the burning house and saw PW2 rescuing a toddler, Hannington, and the injured persons were taken to hospital.

8. As to how she was able to recognize their attackers, PW3 said that there was sufficient moonlight to enable her do so and that when her husband was cut, she was able to see the 1<sup>st</sup> accused using light from the tin lamp and hurricane lamp that were placed in the kitchen.

9. During cross-examination the witness stated that she did not tell the police that she recognized some of the attackers because she was never asked whether she had done so. She also stated that she did not see her husband being cut at the first instance.

10. **PW4, Hesbon Shikunzi** stated that on 26.3.2005 at 8p.m. he heard screams from PW2's home. That he then picked his torch and walked towards that house and after 50 meters, he heard voices and he hid in a sugarcane plantation. According to him, he recognized the voice of the 1<sup>st</sup> accused, 2<sup>nd</sup> accused, 3<sup>rd</sup> accused and one Charles Shimechero who was not charged. According to him, the 1<sup>st</sup> accused was carrying a panga and one of the persons said;

*"today we have overcome him"*.

11. That after they passed him he went to PW2's home and PW2 told him that the 1<sup>st</sup> and 2<sup>nd</sup> accused had cut him.

12. In cross-examination, PW4 said that when one PC Koech (PW10) came, he told him that he had seen four people but he did not tell him that he knew the four people and did not give him their names because he was never asked for those names. That he saw the people while he was hiding 5 meters from them. He

said that there was bright moonlight on that night and he could see all of them clearly.

**13. PW5, PC Paul Kiilu** visited the scene on 27.3.2005 and took photographs of the burnt house and produced them. He also took a photograph of a finger that had been chopped off, and which was later said to belong to PW2.

**14. PW6, Peter Shitababi Temba**, stated that on 29.10.2004, the 1<sup>st</sup> accused who was his neighbor went and told him to lead a delegation to the District Commissioner, Kakamega as some people wanted to remove PW2, the area chief. PW6 refused to do so, and twice thereafter, he refused to accede to the request. That on 26.3.2005, he heard screams in his neighbourhood but he took no action and the next day he went to PW2's home and saw a kitchen that had been burnt.

**15. PW7, Christopher Shedekho Sachita**, said that he attended a meeting on 29.4.2004 at Buyangu where the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons told the District Commissioner that PW2 was not fit to be a chief and after the meeting, they threatened to take action against the chief, PW2, and on 27.3.2005, he learnt that PW2's son was burnt.

**16. PW8, Christopher Mamba Ingotsi**, was allegedly present when an altercation occurred on 9.2.2005 between the 2<sup>nd</sup> and 3<sup>rd</sup> accused on one hand and PW2 on the other hand. That the two told PW2, in his presence, that they will still get him and on 27.3.2005, PW8 received a report of the death of PW2's son.

**17. PW9, Josephat Mukhwana**, was present during the alleged attack on PW2 and his family, and according to him because it was dark, he was unable to identify any of the attackers. He added that he saw someone cutting PW2 with what looked like a panga. He also saw someone throwing a jerrican into the kitchen and when it exploded, fire erupted in the kitchen and he was burnt on the face and legs.

**18. PW10. PC. John Koech**, investigated the case and visited the scene and after taking the statements of witnesses, he decided to charge the accused persons with the offence of murder.

**19.** When they were put on their respective defence, Zablon Musabi Shikunzi denied committing the offence and in a lengthy statement in his defence, stated that his family (including PW2) had differences with the 2<sup>nd</sup>-5<sup>th</sup> accused persons because PW2, his brother, had become the area chief. That on 26.3.2005, he was abducted by his co-accused who tied him up and some strangers were left to guard him. His co-accused then proceeded to PW2's home and he managed to escape and went into hiding. He was arrested the next day and later charged.

**20.** The 2<sup>nd</sup> accused, **Joseph Indeche**, denied the offence and stated that on 26.3.2005, he had driven his matatu to Kitale twice as he did on most days and then went home at 5 p.m. He never left his house the whole night. He blamed his differences with PW2 for his arrest. His witnesses, John Ligale Aburilli and Damaris Sambula confirmed that he was with them at his house up-to 9.30p.m on the material night.

**21.** Joshua Mboya, the 3<sup>rd</sup> accused stated that he was at "A-Z Bar" in Lubao on the material day and went home at 10p.m. He denied the offence and his witness, Laban Milimo confirmed his evidence in that regard.

**22.** The 4<sup>th</sup> accused, Pius Limumba Mutoka, said that on the material night, he was at home and slept at 9.30 p.m. He denied the offence.

**23.** The 5<sup>th</sup> accused, Patrick Shikanga Likhoto also denied the offence and said that he was at home that night and when he heard screams from PW2's home, he went there at 5 a.m. and later assisted in preparations for the deceased's funeral. He denied any involvement in his death.

**24.** I have taken account of the following issues;

i. I never recorded the evidence of all the prosecution witnesses and I only took the evidence tendered by

the defence and conducted the summing up to the Assessors (G.B.M. Kariuki J. heard the case for the State).

ii. The Assessors who remained in the case and who heard all the evidence on record, returned a finding of “guilty” against all the accused persons.

**25.** What is my opinion in this matter;

Firstly, from the evidence of PW2, and PW3 as well as PW9, on the material night they were seated in the kitchen when they were attacked by persons who threw jerricans with an inflammable substance and which caught fire on landing. That evidence, consistent as it was, was later corroborated by PW5 who produced photographs of the scene as well as PW4 who was one of the first persons at the scene.

**26.** Secondly, during the attack, PW2, PW9 and the deceased suffered burns and in the case of PW2, severe head injuries and his ring finger was also chopped off. PW2, PW3 and PW5 gave consistent evidence in that regard as did PW9. Pw5 in fact came to the scene after the incident and took a photograph of the chopped finger and PW1 confirmed that the deceased died of respiratory failure caused by severe burns.

**27.** I believe the evidence of all the witnesses mentioned and in respect of the two issues that I have isolated above.

**28.** Thirdly, the only issue that I need to address is whether it was the accused persons, who, jointly and in an orchestrated attempt at causing injury to PW2, ended up burning a kitchen in which the deceased was and later died of those burns. To address that issue, I must necessarily start by focusing on the issue of recognition and/or identification of the accused persons by PW2, PW3 and PW4.

**29.** From the evidence of the three witnesses above, the accused persons were previously known to them either as a close relative (in the case of the 1<sup>st</sup> accused) or as neighbours (in the case of the rest). PW 2 was also the area chief and there is no doubt that he knew those in his area of jurisdiction.

**30.** In any incident like the present one, what matters is whether the witnesses were able, at night, and in the bizarre circumstances of this case, to recognize people they primarily knew. The proof of the offence will stand or fall on that one issue.

**31.** In Francis Thuku & 2 others Vs R [2010] e KLR (also KLR monthly, May 2010) the Court of Appeal held that where the evidence of recognition was mostly of belief and where the lighting was sufficient, then the evidence cannot be faulted.

**32.** In the instant case, PW2 and PW3 had light in the kitchen and their evidence that there was bright moonlight was amply corroborated by PW4 who recognized the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons at a separate spot. It is very instructive also that both PW2 and PW3 were able to state what each of the three accused persons were doing during the incident and PW4 had the added advantage of giving evidence of voice recognition. I have said elsewhere that he had known the accused persons very well and so that evidence is not misplaced – see Choge Vs R [1986] KLR.

**33.** I am satisfied that each of the five accused persons were recognized at the scene and the circumstances were favourable for the witnesses to do so.

**34.** Has malice aforethought been proved? S.206 of the Penal Code provides as follows:

*S.26. 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 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 of any person who has committed or attempted to commit a felony.*

35. When persons conspire to hurt PW2 and instead end up hurting the deceased, malice aforethought is clearly proved and so compiled with the actions elsewhere above enumerated, the charge of murder as set out above was proved beyond reasonable doubt and I so find. I wholly agree with the Assessors in that regard.

36. Regarding their respective defences, once I have placed them squarely at the scene, and I have done so, neither the 1<sup>st</sup> accused's fantastic story against his co-accused or the alibi defences by the rest can be taken seriously. The overwhelming evidence against them is far too strong. I will dismiss these defences as afterthoughts.

37. Having so stated, each accused person is convicted of the charge of murder contrary to **S.203** and **S.204** of the Penal Code.

Orders accordingly.

***Delivered, dated and signed at Kakamega this 13<sup>th</sup> day of April, 2011***

**ISAAC LENAOLA  
JUDGE**