



No. 2768

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

REPUBLIC.....STATE COUNSEL

-VERSUS-

CHARLES OMARIBA OROKKO AND 23 OTHERS.....ACCUSED

RULING

On the morning of 11th May, 2008, a Black note book was picked by a pupil next to Mesaria Primary School and handed over to the head teacher. The book contained names of people who had allegedly been bewitched and died as a result in Kegogi location. It also contained the names of people behind witchcraft in the area. The headteacher in turn passed over the book to the D.O Marani who in turn gave it to D.C.I.O Kisii. On 21st May, 2008 following allegations of suspected witchcraft, the D.O called a baraza to discuss the issue. At the baraza held, Members of public demanded that the D.O reads out the names of the suspected sorcerers. The D.O resisted the temptation but the crowd became unruly and rowdy. The D.O managed to calm them down by requesting anybody present who suspected that his name was in the book to step forward. Five people came forward and D.O fearing for their safety took them to Rioma Police Station and members of the public dispersed. However on that same night, angry members of public set upon people they suspected to be witches in their neighbourhood and set their houses ablaze. As a result 54 houses were torched and 12 people were burnt to death. The matter was reported to D.O Marani and together with police, they were able to arrest the accused who initially were 24 in number and charged them with various counts of murder. They all entered a plea of not guilty. However, before the trial could commence, the 9th accused passed on and his case thereby abated.

On 16th June, 2009, the trial of the accused commenced before **Muchelule J. Vincent Bosire** testified that he was the chief of Kegogi location. On 12th May, 2008 at 9.00a.m. he was in the office when the assistant chief for Metembe sublocation, **Wilson Omoyo** rung him to say a book had been found at Kisii Central/Rachuonyo Districts border at Mesaria Primary School. The book had names of suspected witches and on top was written "**Nyalgunga volume 4**". The witches in the book had been ranked and those who had died ticked off. Those remaining were intended to die shortly. The book was brought to him by the Headteacher, Mesaria Primary School, **Bathlomew Onyicho Ogembo**. He perused the book and confirmed what the assistant chief had said. He instructed him to take the book to D.O Marani. In

turn the D.O instructed them to organize baraza in the location.

On 20th May, 2008 a baraza was held where a crowd numbering over 4,000 attended. The crowd did not want to hear anything else except about witches. The D.O asked those in attendance and suspected to be in the book to step forward. 5 people did so. Security officers present rounded them up and took them to Rioma Police Station. The crowd then dispersed. At about 7.00p.m the Assistant Chief rung him to say that houses were being burnt. He contacted the D.O and OCS Rioma Police Station. Houses were burnt the whole night. In the morning he found 11 people burnt in their houses. Over 50 houses had been burnt though.

On 25th May, 2008, at about 10.00p.m, the OCPD, A.P Commandant, Deputy OCPD, DCIO, OCS Rioma and himself participated in an operation to round up the arsonists. By 8.00a.m. they had arrested 16 people whom they took to Kiaki Police Station. The bodies of those burnt were found inside their burnt houses.

Duke Nyambane Makori testified that, on 20th May, 2008 at 10.00p.m he was at home just about to sleep. All of a sudden he noticed that the house was on fire. He opened the house, dashed out and saw 2 young men holding his mother. They were **Duke Nyakundi** and **Orina Boera**. He knew them before. **Duke** was his cousin and neighbour. **Orina** was a schoolmate in a Primary School and his home was only 700 metres away. There was a lot of light from the burning house which assisted him to see and recognize them. His mother's house was not burnt but she was being removed from it. **Duke** had a slasher which he used to cut his mother on the back. Duke's brother, **Samuel Morara** had an axe which he used to hit his mother on the head. There were over 300 people in the compound. Among them also were **Elijah Boera, Gichana Boera, Dickson Matoke**. However, he only managed to recognize the two. The crowd were saying his mother was a witch. They threw his mother into her burning house. They went away after they made sure she had died. One, **Morara Samuel**, had petrol which he poured on his mother before she was thrown into the fire. Among those people only **Duke Nyakundi** (11th accused) was charged. **Elijah Boera, Orina Boera** and **Gichana Boera** were still free and he frequently sees them. On 21st May, 2008 the chief came with police officers and took the remains of his mother to Kisii Mortuary. It had been burnt beyond recognition.

Zachary Moti was the Area Assistant Chief for Ngikoro sub location. On 22nd May, 2008 at 6.00p.m. he was at home when the Area Chief **Vincent Bosire** called him. He told him that there was locational operation to get those who had burnt others. At 3.00a.m in the company of police officers they proceeded to Metembe. The OCS Rioma Police Station had names and he was asked to identify them for arrest. He took them to their homes and they were arrested. They were 11th accused and another, **Matoke** who was not among those charged.

Agnes Nyombara recalled that on 21st May, 2008 at about 5.00p.m she was at home when she received a phone call in the evening from her brother-in-law, **James Ogembo Asimba**. He informed her that her father, **Solomon Monda Mokae** had been killed. She went to her father's home and found his body having been taken to Kisii Hospital Mortuary. On 28th May, 2008 she went to Kisii District Mortuary and identified the body for purposes of post mortem. Thereafter they collected the body for burial.

Wilson Omwoyo Kombo, the assistant chief Metembe sub location testified that on 12th May, 2008 at 8.00a.m he was in the chief's office. He was rung by an anonymous caller who told him a book had been found at Mesari Primary School which had names. He asked the headmaster to bring the book. It had names of people who were alleged to be sorcerers, among them were the deceased. The chief instructed him to take the book to the D.O. The D.O in turn asked him to take it to the CID. The D.O subsequently called a baraza on 20th May, 2008 which he attended at Nyamokenye Maranda church. Over 5,000 people attended. The public demanded that all suspected witches come forward. Five of them stepped forward. They were **William Monari, Peris Nyamaturu, Peris Suranda, Josephine Kemunto** and **Peris Simeon**. The crowd wanted to attack the 5 people. The 5 people were however taken to the police

and the crowd dispersed. Between 7.30p.m to 8.00p.m he saw many fires in the area. Houses were burning. He contacted the chief, D.O, DCIO and AP superintendant over the incident. They came between 2.00 and 3.00a.m with police officers and restored security. Next morning they found dead bodies which had been burnt in several houses.

Priscah Nyaboke Moku recalled that on 21st May, 2008 at about 9.00a.m she was at home. Her husband left for Miruka market. Apparently he met someone on the road who killed him. On receiving information she ran to the scene and found his body lying on the ground. She met with **Ouuru** running towards his home away from the scene. She met him about 100metres from the scene. She knew **Ouuru** as they came from the same area. He had a panga and a walking stick. The front part of his body was blood stained. The panga that **Ouuru** was carrying had blood too. **Ouuru** knew her but he did not talk to her. He just passed her. They had a land dispute with **Ouuru**. It had not been resolved. She found her husband dead with cuts on the head. The scene was deserted. She went back home crying. However, **Ouuru** was not among those charged.

Abel Kigwaru Omweya testified that on 20th May, 2008 at about 11.00p.m he was in his house when he heard **Nyariki Otaro** knock on his door. He was pleading with him to open for him. He lit his lamp and opened the door. He came in and had 2 legs of goat meat. **Nyariki** told him that he had been at a funeral and there was fight. He had to run away with the goat meat. He met vigilantes on the way and feared them and that is why he came to his house. He was hungry and was drunk. He asked **Abel's** wife to give him ugali that had remained. She roasted some of the meat for him but he refused to eat. When the witness protested he cut a little meat to eat but he did not. He fell down saying he had stomachache. Suddenly many people came and he woke up and opened for them. They had torches and pangas. He recognized one of them as **Samuel** alias **Rasta**. They went for his wife who was in a separate room. **Otaro** is the 17th accused. **Samuel** was pointed out as the 20th accused though. They dragged him to sitting room and then outside where he was made to sit down. He was struck on the back with a rungu. He never saw **Otaro** again. He recognized **Samuel** outside because of moonlight that was bright. When the attackers left he saw houses being burnt in the neighbourhood. He found his wife dead in fire. Attackers did not say what they were looking for. The next morning he went to assistant chief to report. He found the chiefs and askaris who came and took the body away.

Dr. Cheruiyot Kipng'eno Robert of Kisii Level 5 hospital on 29th May, 2008 carried out 6 post mortems for **Milka Moraa, Teresia Nyamweno, Hellen Bonareri, Chrisantus Onyiego, Clemencia Nyangara** and **Oncheku Rot**. All the bodies had severe burns and head injuries. He signed each report which he tendered in evidence. He also knew **Dr. Momanyi David** having studied with him in the same University, graduated together and had worked together for 2 ½ years at Kisii level 5 since. He was therefore familiar with his handwriting and signature. Dr. Momanyi was doing his post graduate studies at University of Nairobi at the time. He carried out post mortems for **Monda Moku, Peris Kemunto, John Masese, Priscah Kemunto, Priscah Kerubo Ketusi** and **Priscah Nyambeki**. He had completed and signed the reports. He produced them in evidence on behalf of **Dr. Momanyi David**.

P.C Charles Kituni from Kisii scenes of crime, testified that on 21st May, 2008 at about 8.00a.m. he visited the alleged scenes of murder and arson which had happened the previous night. He saw burnt remains of semi permanent houses next to which were burnt bodies of **Priscah Kemunto Bosire, Teresiah Nyarangi, Priscah Kerubo** and **Clemencia Okari**. In Mwamonyi village he found burnt semi permanent houses and burnt bodies of **Jane Moraa Makori** and **John Masese**. In **Mosomio** he found burnt body of **Hellen Bonareri** which had visible injuries. In Borangi village he found charred body said to be of **Milka Moraa Nyangara**. In the same village he found burnt body said to be of **Peris Kemunto** and burnt furniture. In Nyandoche village he found the body said to be of **Munda Moku** which had injuries and beside it were stones. In Mesaria village he found a burnt semi permanent house and body of **Chrisantus Onyiego Ogembo**. He took 22 photos of these scenes and bodies. Most of bodies were

burnt, some beyond recognition. He produced the photographs as exhibits.

The case was thereafter adjourned to 6th July, 2010 for further hearing. Come that date and **Muchelule J.** had left the station on transfer. Parties agreed that I take over the case and proceed with it from where **Muchelule J** had left. I then set down the further hearing of the case for 23rd February, 2011. Come that day and the prosecution could not proceed for want of witnesses. **Mr. Gitonga**, learned state counsel pleaded with the court to give him an adjournment. The application was vehemently opposed by respective counsels for the accused. Considering that some of the accused were minors and had been in custody for a while, and that the prosecution had not advanced any reasons, good or otherwise as to why the witnesses had not been bonded I declined to accede to the request for adjournment. At that juncture the prosecution elected to close its case. The advocates involved elected not to make any submissions on no case to answer. They instead elected to leave it to court to determine.

Having considered the evidence so far adduced by the prosecution, I am satisfied that no case has been made out by the prosecution to warrant any of the accused or all being called upon to defend themselves against the information. First and foremost, no evidence linking all the accused save for the 12th, 17th 20th and 21st accused to the crime has been led. In other words no witness testified as to the participation of those accused in the crime. None of the witnesses complained, testified and identified the accused as having participated in the crime. On that score alone those accused have no case to answer.

With regard to 12th, 17th, 20th and 21st accused, much as some witnesses claimed to have recognized them in the act, I am satisfied that the conditions obtaining could not have made for positive identification. I am fortified in this holding because even when some of the witnesses were called upon in court to identify the accused, they ended up picking on different persons. This casts doubt as to whether these witnesses really saw, identified and or even recognized the accused in the act.

From the evidence on record, it appears that so many people were involved in the burning of the houses. As many as 300 or even 500 people would descend on a house and burn it. For instance, PW2 testified that over 300 people were in their compound. From this crowd he was only able to recognize 11th accused and one, **Orina Boera**. How was that possible? He claimed to have seen them courtesy of the bright light from the burning house. This was a witness who had suddenly jumped out of his house which was on fire. He comes out only to see his mother's house on fire as well with over 300 people in the compound. I do not think that in that state, he had the presence of mind, to see the 11th accused sufficiently to be able to recognize him. He must have been in a state of panic fearing for his own life. It is also instructive that some of the people he alleged to have seen participate in the burning of the house were never arrested nor charged. He still sees them walk free in the neighbourhood. That tells me that perhaps the police were not satisfied with his alleged recognition of those people and that is why, they opted not to prefer charges against them. If that be the case, why then should the 11th accused be allowed to carry the cross alone or treated differently. Further, when called upon to identify the said **Duke Nyakundi** in court, the witnesses ended up picking on the 11th accused who was **Festus Yohana Onsumu** according to the information before me.

With regard to PW7, he testified that **Nyariki Otaro** came to his house pretending to be drunk and running away from vigilantes. Later the vigilantes stormed his house. According to the witness he was able to recognize **Samuel** among them. It was his evidence that he recognized **Samuel** because of the moonlight. However, no evidence of the moonlight's intensity, where it was in relation to the accused and for how long the witness had observed **Samuel** as to have been able to recognize him was not led. Considering that there were very many people in the compound, some of whom even beat him up, it is difficult to discern how in those circumstances, the witness would have been able to recognize any of those people. Called upon to identify **Otaro** and **Samuel**, he picked on 17th and 20th accused. According to the information before me, the 17th accused is **Peter Nyariki Onchuru** whereas the 20th accused is **Thomas Marita Ondieki**. Those names do not belong to the accused who the witness proclaimed to have identified during the commission of the offence. In any event, this witness under cross-examination stated that he could not say categorically that it was **Otaro** who opened the door for the crowd. He could also not tell whether the same **Otaro** ran off in fear after his house came under attack.

It is apparent from the foregoing that conditions favouring a correct identification, nay, recognition of some of the accused by the witnesses were difficult. Secondly, the alleged identification and or recognition was by single witnesses. Although it is trite law that a fact may be proved by the testimony of a single witness, such evidence require testing with the greatest care knowing mistakes in identification or recognition are often made even where friends and relatives are involved. Having subjected the evidence of identification or recognition to exhaustive evaluation, I am satisfied that the conditions obtaining could not have favoured identification or recognition of the accused by the witnesses who claimed to have done so.

In the result, I hold and determine, that the prosecution has not made out a prima facie case to warrant the accused being put on their defence. Accordingly they are jointly and singularly acquitted of the information.

Ruling dated signed and delivered at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE