



No. 2937

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 21 OF 2009

STATE PROSECUTOR

-VERSUS-

DOUGLAS KAKA ONGUBO & 8 OTHERS ACCUSED

JUDGMENT

The nine accused persons were charged with five counts of murder contrary to section 203 as read with section 204 of the **Penal Code**. The particulars of counts were that on 27th February, 2009 at Bomatara village, Iranda sub-location in Kisii Central District within Nyanza Province, jointly with others not before court murdered **Boyani Gichana, Bosibori Agirio, Yobensia Ongubo Matioka Ongubo** and **Sandimu Mageto** respectively. These are the victims in respect of all the 5 counts. The nine accused all returned a plea of not guilty and their trial commenced in earnest initially before **Muchelule J.**

The brief outline of the prosecution case is that on 27th February, 2009 at about 7.00a.m, one, **Sota** with **Hesbon Masese** who allegedly had been made dumb through witchcraft went to a village elder, **Josephine Ondieki**. **Sota** complained that the village had become unsafe, a den of witchcraft and required change. The village elder then ordered **Richard Omari Kota, Gekonya, Innocent, Henry Nyachoti** and **Dennis Omolo** to blow whistles to alert the villagers so that they could assemble at the tea buying centre for purposes of identifying and dealing with the witches in the area. When the villagers gathered, they were made to que and spit on the victim of witchcraft, **Hesbon Masese**. When the 1st deceased, **Boyani Gichana** spat on the victim he immediately started talking. **Boyani Gichana** and the other deceased who were in the crowd and were suspected to be witches were then set upon by the crowd that included all the accused, beaten senseless and set on fire. Some of them were frog matched to their houses and set on fire. One such victim was **Boyani Gichana**. At the end of the day all the 5 deceased were killed. The incident was reported to Kisii Police Station who conducted investigations, had the accused arrested and charged with five counts of murder.

In support of this brief synopsis of the prosecution case, the prosecution called a total of 5 witnesses.

PW1, **Richard Omari Kota Ongubo** testified that the deceased, **Ongubo Matioka** was his father. On 27th February, 2009 at about 7.00a.m he was standing besides the road near Iti tea buying centre in the company of **Innocent Gekone** and **Henry Nyachoti**, the 4th and 5th accused herein when a village elder by the name of **Josephine** came and ordered them to blow whistles to call villagers to a meeting. She informed them that the son of **Gichana, Hesbon Masese** had been bewitched. She gave them whistles for that purpose. Acting on the instructions, they went about blowing the whistle in the village calling people to gather at the tea buying centre. When the villagers gathered, **Josephine** ordered them to line up and spit on the boy, **Hesbon Masese**. When **Boyani Gichana** spat on him, the boy started to speak. **Boyani**

Gichana was incidentally the boy's grandmother. She was later burnt by the villagers. The 2nd accused chased people from the centre leaving behind **Christopher Ongubo, Boyani Gichana, Mary Agirio, Yobensia Ongubo** and another person. They were all set on fire. It was the 3rd, 6th, 7th 8th and 9th accused who set them on fire. Before then, they had been beaten with bricks for over 4 hours. This was happening inside the building. The deceased were thereafter brought near the road and whilst alive, set ablaze using tree branches. The match box was lit by 2nd accused. The deceased tried to escape fire but were kicked back. They burnt for an hour. They were burnt beyond recognition. Among those burnt was **Christopher Ongubo Matioka**, the witnesses father. All the deceased were suspected to be witches and that is why they were beaten and burnt by the crowd. Police later came to the scene and took away the bodies to the mortuary.

PW2, **Fredrick Nyabaga**, knew **Sandimu Mageto**, the deceased in count 5. She was his mother. He identified; her body for purposes of post mortem.

The case was thereafter taken over by me after **Muchelule J.** left the station on transfer. Parties agreed that I should carry on from where **Muchelule J.** left and that there was no need to recall and or resubmit the witnesses who had already testified.

PW3, **CPL Richard Langat** testified that on 7th April, 2009 at about 4.30p.m whilst at CID offices, Kisii, he received information that there was a suspect in this case spotted within Nyamataro area. He was detailed to arrest him. Accompanied by **PC Bakari** and an informer they proceeded to Nyamataro area and arrested the 9th accused.

PW4, **CIP Shadrack Ruto** on his part testified that on 27th February, 2009 at about 1.30p.m whilst in his office at Kisii Police Station as an officer in charge, received a call from the Deputy OCPD who informed him that lynching was going on at Bomataro involving 5 alleged witches. He proceeded to the scene in the company of **PC's Lelei, Koech and Manyu.** They found the bodies of **Boyani Gichana, Bosibori Agirio, Yobensia Ongubo, Ongubo Matioka** and **Sandimu Mageto.** Except for **Boyani Gichana**, the other bodies were on the road side with serious burns and assault marks. The body of **Boyani Gichana** was however in her grass thatched house which had been burnt. She had been locked in the house and thereafter the house set ablaze. He summoned scene of crime support staff to photograph the scene. They did so and he thereafter collected the bodies to Kisii level 5 hospital mortuary. On 4th March, 2009, he attended the post mortem of the deceased persons conducted by **Dr. Momanyi.** After investigations he established people behind the lynching and arrested them. These were 1st, 3rd and 7th accused.

PW7, **Dr. Matiko Giabe**, a medical officer testified on behalf of **Dr. Momanyi** who had gone back to the University for post graduate studies. He confirmed that **Dr. Momanyi** carried out post mortem examination on the 5 deceased persons on 4th March, 2009 at Kisii level 5 hospital mortuary. His common findings in all the 5 cases were that they all succumbed to death due to cardio respiratory arrest secondary to severe burns. They were extensively burned. The burns ranged from 2nd to 3rd degree and were all between 70% to 90% burnt surface area. He tendered the respective post mortem reports in evidence.

This then marked the close of the prosecution case. Having ruled that each accused had a case to answer, all the accused elected to give unsworn statements of defence and called no witnesses. They all denied their involvement in crime. They all raised alibi defences. They all claimed that there was a grudge between them and the persons who connected them to the crime. The case was therefore a frame up.

At the conclusion of the defence hearing, **Mr. Sagwe, Okenye, Minda, Kaburi** and **Omwega** learned counsel for the accused and **Mr. Mutuku**, learned senior principal state counsel for the prosecution opted to file and exchange final written submissions. This they subsequently did. I have carefully read and considered them.

It is common ground that the deceased's person were all burnt to death going by the evidence of PW5, **Dr. Matioku** who produced their respective post mortem reports on behalf of **Dr. Momanyi** of Kisii level 5 hospital who had conducted the post mortem on the bodies after they had been identified. In a nutshell,

the fact of death and its cause was established. However were the accused responsible for the death of the deceased? The only evidence tending to link the accused to the offence was given by PW1. However his evidence is suspect in my view bearing in mind that he had also initially been arrested as a suspect in the crime but was later turned into a state witness. He was among the three who went around the village blowing whistles on the instructions of the village elder, **Josephine**, calling upon the villagers to gather at the tea buying centre to deal with witches who had allegedly bewitched **Hesbon Masese** and made him dumb. The other two who accompanied the witness around the village also blowing whistles for the same purposes were **Innocent Gekone** (4th accused) and **Henry Nyachoti** (5th accused). If these accused played a similar role just like the witness, why should they be the ones to face the music whilst the witness remains scot-free. If they are guilty for the offence as the prosecution would want us to believe then this witness is just as guilty. His evidence must of necessity be handled with caution and great circumspection. Indeed in his own evidence in chief and cross-examination, he did concede that he could accept anything the police told him so long as it set him free. He went on to concede that the police had even told him to implicate one, **Mwasi** and **Alloys** as having taken part in the incident. He went on to say again, that all the victims were burnt near the road and that tree branches and shrubs were used to burn them. But later he said that one victim, **Boyani Gichana**, was burnt in her house situate quite a distance from where other victims were being burnt. Indeed from his own testimony he stated that the house was situate about 200metres away from where he was. Yet he was allegedly able to see some of the accused herein commit the offence 200metres away. How is that possible? There is also evidence that this witness could not see what was happening inside the tea buying centre either. That at one point he had gone out to whistle for the people to assemble and had infact covered 20kilometres. He could not know therefore what had happened to the victims before his arrival. I also doubt very much the evidence of this witness that he covered 20km of the village blowing the whistle in a span of 1 hour.

There is evidence that a large multitude of people were at the scene. Indeed according to the witness, there were over 1000 people. In those circumstances, it is difficult to point at any particular person to bear responsibility. I think that the evidence of PW1 has been seriously discredited and rendered completely unreliable. In the premises, I reject the same totally.

The responsibility for the death of the deceased's must be placed on the shoulders of the village elder, **Josephine**. She is the one who instructed PW1, 4th and 5th accused to respectively, go round the village urging people to assemble at the tea buying centre with the sole purpose of identifying and dealing with the alleged witches in the village. How come she was not arrested and charged alongside the accused. That, that did not happen beats logic.

The upshot of all the foregoing is that no credible evidence was adduced to connect the accused to the charge they are facing. No malice aforethought was established that the accused had a common intention and planned to kill the deceased. If anything the crowd was convened and or assembled by the clan elder with the sole purpose of rooting out perceived witches in the village. The clan elder was neither charged for the consequences of her action nor was she even called as a witness to shade light as to the reasons behind her actions though listed as prosecution witness no. 2 in the information dated 4th April, 2006. The prosecution having failed to prove its case against each of the accused beyond reasonable doubt, they are entitled to an acquittal and I so order.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE