



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA Criminal Case 41 of 2008

REPUBLIC

VERSUS

GILBERT ATULO OMUNG'ALA Alias MBOLEA.....ACCUSED

JUDGMENT

1. The accused herein, **GILBERT ATULO OMUNG'ALA alias MBOLEA** was arraigned in this court and charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the penal Code. It was alleged that on 8TH September, 2008 at Hubanilo village Ejuhala Sub-location, Eshirombe Location, of Khwisero Division in Butere District of the Western Province, jointly with others not before the court they murdered **Alex Omboko Kochwa**. He denied the charge and the evidence tendered against him and of relevance to the charge was as follows;
2. PW1, **Rose Nyamtondo Omboko**, wife of the deceased stated that on the material night, she was asleep in her house together with the deceased when she saw torch light outside and suddenly “**many people entered the house including the accused**”. She recognized five of the attackers as the accused together with Edward Anyangu Onyondi, Calisto and another one she could not recall. All of them were armed with pangas, iron bars and sticks and they set the house on fire. As to how she could identify the accused and others, she said that there was moonlight and also light from the fire the attackers had lit, helped her to see them.
3. She also said that the said accused person attacked the deceased and stabbed him with a knife on the ribs and hit him on the left hand and thigh as well as the mouth. She added that the attackers all had clothes like masks covering their heads. PW1 then ran out

and her shouts for help went unanswered. In the morning, she was taken to hospital by a good samaritan and after burying her husband, she recorded her statement and on 16.9.2008, she attended an Identification Parade where she picked the accused person as one of the attackers.

4. When PW1 was cross-examined, she stated that her husband had been charged in the Butere Law Courts with the offence of stealing iron sheets and the charges were instigated by the accused person. That her son, John, was at the time of the incident serving a prison sentence on a charge instigated by the accused person and she added that after the death of her husband, her other son, James Alwang'a was killed by unknown persons on 24.10.2008 and that in the village, it was claimed that her sons were thieves.

5. PW2, **John Matakwa Ondago**, stated that on the material night, when his parents' house was torched, he came out of his own house nearby and which was also starting to burn. While outside, he saw a group of people including the accused person, one Wycliffe Ongaro, Lombo, Osore Anjeriko, Oyondi and Omengo. They all had pangas, iron bars and jembes and one hit him on the head and he ran away. As he ran, he allegedly heard the accused person saying;

“Leo, tumemuweza.” (Today we have defeated you).

6. Later, in the morning, he was taken to hospital and together with his mother, PW1, he was hospitalized for three days and on 16.9.2008, he identified the accused person at an identification parade.

7. In cross-examination, he stated that the accused person **“had taken”** his relative's wife, one Ariene and made her his wife. That after the attack he did not go to the police but his brothers, Christopher and James were the ones who made the initial report and that the accused person did not hit him but one Ongware did so. He confirmed that he did not tell the police that he had heard the accused say;

“Leo, tumemuweza.” (Today we have defeated you).

8. He also said that after he was hit on the head, blood poured all over his face and he dashed into a plantation nearby and that he could not see properly until he went to a river and washed his face.

9. He also said that he saw the accused person five metres away and his face was covered and only his eyes were visible

10. PW8, **Christopher Kochwa Omboko** stated that on the same night, he was woken up by shouts in his house and people shouting;

“Kabeni kwa manyumba” (trap them in their houses)

11. He jumped out through his burning door and he saw seven (7) people and one hit him on the head with a club. He identified the person as the accused person. PW8 fled into bushes and when the attackers later fled, he returned and found his mother screaming and saying;

“Leo wamemuweza.”

(today, you have been defeated)”

12. In the morning, PW8 reported the incident at Butere Police Station and his father’s body was taken away.

13. In cross-examination, PW8 said that it took him two (2) minutes to come out of his house and run away into the bushes where he hid himself.

14. PW3, **Christopher Aswani Openda** stated that on the material night, he was at his home and only heard of the incident, subject of the charge, when one Jeniffer Ogonji told her that his brother had been burnt in his house. He went to the scene, found no one there and on his way to make a report to the area sub-chief, he met police officers and he returned with them to the scene and the deceased, burnt to death, was taken away.

15. In Cross-examination, he added that he did not know why the accused person was in court and that Jeniffer did not tell him who had

burnt the deceased person.

16. PW4, Matayo Abdi Amateshe, Sub-chief of Ejuhala Sub-locationsaid that on 9.9.2008 at 7.30 a.m. he received information about the deceased's death from one Ben and before he proceeded to the scene, one Raphael also telephoned and passed on the same information. He proceeded to the scene at 10.00 a.m. and he noted that the deceased's body had been burnt beyond recognition. He spoke to PW3 and Alwanga, sons of the deceased and none of them gave them the name of the suspect(s) in the murder.

17. PW6, C.I.P. Francis Kiprop conducted an Identification Parade on 16.9.2008 and PW1and PW2 picked the accused person as the main suspect in the murder case. It was his evidence that the suspect said that the witnesses came from his home area and they were all known to him but had no objection to the way the parade was conducted.

18. PW7, PC Stephen Kamau went to the scene on 9.9.2008, noted that all the houses in the deceased's compound had been burnt and the deceased charred to death. He took a sketch plan of the scene and took the deceased's body to the St. Mary's Hospital Mortuary. On 11.9.2008, the witness was present when PW5 performed a post-mortem on the deceased's body.

19. PW10, PC Stanley Maritim is the one who arrested the accused person on 9.9.2008 at Butere together with PC Wanja. The accused person was riding his bicycle towards Butere when he was arrested based on a report made at Butere Police Station on the same day.

20. PW11, PC David Nderitu went to the scene on 9.9.2008 at 8.00 a.m. saw the burnt houses in the deceased's compound and that the deceased's children named their attackers as "**Mbolea, Osore, Musee and Olombo.**" That when he returned to the Police Station that morning, the accused had already been arrested.

21. In cross-examination, the witness stated that the community had claimed that the deceased and his children were cattle thieves and the deceased was killed by a mob.

22. When the accused was put on his defence, he raised an alibi that he was not at the scene on the material night and that he was at his home, ¾ kms away, asleep. Further, that in the morning of 9.8.2008, he woke up and proceeded to Butere where he was going to testify in a case in which the deceased had been charged with being in possession of stolen goods. While at the Butere Law Courts, he was arrested at 9.30 a.m. and later charged with the murder of the deceased.

23. He denied the offence and while admitting that his family and that of the deceased had a grudge, he denied that he had any reason to kill him. That he had used the path of the law to settle disputes with the deceased and had no reason to resort to unlawful means to do so.

24. From the above evidence, it is not in doubt that on the night of 8.9.2008 at Hubamilo village, Butere District, Alex Omboku Kochwa was burnt to death when arsonists torched his house. His wife, PW1, and sons PW2, PW3 and PW8 confirmed that fact and all other witnesses testified to a homestead decimated by fire and PW5 confirmed that the deceased was charred beyond recognition. The theory advanced by the Republic was that according to PW11, the deceased and his sons were cattle thieves and that the community mobilized itself and attacked his home, burnt all his houses and in the course of their rage, the deceased was trapped in his house and burnt to death. What was the role of the accused in the attack, if at all?

25. The deceased's wife and sons said that they identified him at the scene and later in an Identification parade conducted on 16.9.2008, PW1 and PW2 picked him out as the chief suspect in the murder. The other evidence given was that according to PW2 and PW8, they also separately heard the accused utter the words;

“Leo tumemuweza.” Or “Leo wamemuweza.”

(Both loosely translated as ***“today we have defeated you”*** or ***“today they have defeated you”***)

26. No other evidence on record connected the accused to the offence and the question is, was that evidence strong enough to prove beyond reasonable doubt that the accused murdered the deceased?

27. In *Kiarie vs R [1984] KLR 739*, it was held inter-alia that;

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.”

28. The above holding is pertinent because in the instant case, PW1 said that when they were attacked, she could identify the accused person from light emitted by the burning fire and also from moonlight. I have a problem with that proposition. In a scared state, in a burning house, I cannot understand how moonlight can help a witness inside the burning house to identify her attackers. Similarly I am not satisfied that PW2 and PW8 had any opportunity to identify the accused person in the night and in a large group of people who were obviously intent on harming them. It should be noted that the attackers wore masks and how the accused could be identified by his eyes at night defeats all logic.
29. What of the Identification Parade? It was useless for reasons that the accused person was arrested in the morning of 9.8.2008 long before either PW1, PW2 or PW8 had made their report to the police. He was well known to those witnesses and he was a witness against the deceased in a criminal trial and it is unclear why the Police thought that it was necessary.
30. In any event and following up on the last issue, why did PW10 arrest the accused person before a report was made that he was implicated in the murder?
31. I ask the question because PW11 was one of the first officers to go to the scene and when he returned to the police station, the accused had already been arrested and locked up. His being mentioned after arrest was expected when everyone already knew that he was the suspect. All evidence was thereafter tailored to focus on him.
32. Without the identification evidence being watertight and the conduct of the police being suspect, the benefit of doubt must favour the accused person. I say this because his conduct on 9.8.2008 was telling; he proceeded to court in Butere to testify against the deceased and PW10 confirmed that he arrested him in Butere. His defence that he used lawful means to settle his dispute with the deceased is inconsistent with the conduct of a person who was intent on committing a murder most foul. .
33. In the end, the accused person's alibi is consistent with the circumstance that he was at his home on the material night and not with the hostile crowd that eventually caused the death of the deceased person.
34. I find that the Republic has not proved its case beyond reasonable doubt and the accused person is acquitted of the charge of

murder. He shall be released unless he is otherwise lawfully held.

35. Orders

accordingly.

Dated, Signed and Delivered at Kakamega, this 21st day of April, 2010

ISAAC LENAOLA

J U D G E