



REPUBLIC OF KENYA

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MAGARA ONDUSO ALIAS THOMAS SOMOITA

JAMES ONDUSO ALIAS MOSE.....ACUSED

JUDGMENT

The accused faced three counts of murder contrary to section 203 as read with section 204 of the penal code.

It was alleged that on the 20th day of December, 2004 at Nyabisia sublocation in Gucha District, the accused, jointly with others **not before court, murdered Peninah Kwamboka Juma, Yucabeth Nyaboke Juma and Moses Samoita Juma, hereinafter referred to as “the deceased”.**

The prosecution evidence can be summarized as hereunder.

Wilfrida Kemunto, PW6, testified that on 19th December, 2004 at about 9.00 P.M., she was with her grandmother, Peninah Kwamboka(deceased), her mother, Yucabeth Juma(deceased), her uncle, Moses Samoita Juma(deceased) and her cousin, Pascalia and some children. They were all in her grandmother’s house. Her uncle, Moses, left them because he wanted to go to bed. He returned after about five minutes and told them that he had seen many people outside their neighbour’s house which was not far from the house they were in. He said that when the people saw him they dispersed, saying that it was their day to rejoice. Suddenly PW6 heard some people shouting outside her grandmother’s house. They said in Kiswahili language-“KAA NANE NANE”, meaning- “Arrange yourselves in groups of eight”. Shortly thereafter the group of people began to demolish the house. They ordered the occupants therein to come out but PW6 and the others feared to do so. The people poured petrol on the wooden window and door and lit the house. The house was roofed with corrugated iron sheets.

Those who were inside the house started putting off the fire using water. The fire went off. When the fire went off Moses got out of the house and PW6 rushed to her mother’s room. Suddenly a person who was holding a big rungu entered the house and told the mother of PW6 to say her last prayers. He said that they had already killed Moses and they were going to kill the mother of PW6(Yucabeth) and burn her. PW6 did not identify that person. At that time a lantern lamp that had been lit had gone off but there was light from torches that had been lit outside the house.

PW6 further testified that some of the people who were outside the house demanded that the children in the house be taken out. After a short while two people entered the house through the window and took her and some other children outside. At the time PW6 was about 12 years old. She was 17 when she testified. Inside the house remained the mother and grandmother of PW6. However, the two managed to leave the house. Outside the house there were over forty people and

PW6 said she managed to recognise some of them who are her uncles and other family members. She named the two accused, Paul Nyabuto, John Samoita, John Mangera and Evans Onduso as some of the people she recognized. The assailants started beating her grandmother and PW6 heard one of them saying-“Evans, come with your rungu”. Evans proceeded to hit her grandmother on the head and she died.

PW6 ran upto a nearby road. She proceeded to a certain home and told the people therein what had happened. She spent the night there. Before she ran away, PW6 had seen her mother being beaten. Early in the morning PW6 decided to go and find out what had happened at their home. She found her brothers looking for her. She realized that the heads of her mother and grandmother had been burnt completely but other parts of their bodies were partially burnt. Her uncle’s body had been completely burnt. Later in the day police officers went there and removed the three bodies.

In cross examination, PW6 said that she did not see the two accused assaulting her grandmother but she was sure that they were among the people she saw outside her grandmother’s house. At the time, their grass thatched kitchen was on fire and there was sufficient light from the burning kitchen that enabled her to see and recognise the accused among others. The kitchen was about five metres from her grandmother’s house, PW6 added. The witness said that there had been a land dispute amongst her family members but she did not know the details of the dispute.

Adams Juma Samoita, PW3 is a brother of Moses Samoita Juma(deceased). He said there was a land dispute involving some of their family members. PW3 learnt about the death of his brother and the two others on 20th December, 2004. Prior to that they had received threats from Bogongo Samoita and Obwayo Samoita. In cross examination, he stated that the first accused was also among the people who had threatened him and his deceased brother.

James Kaunda Arika, PW7, was the Assistant chief, Masiga sub-location. He was told about the death of the deceased on 20th December, 2004. He went to the deceased’s home and confirmed about the incident. He went and reported the occurrence to the police at Ogembo police station. When he went to the scene with police officers they found the main house partially burnt but the kitchen was completely burnt. The three bodies of the deceased were removed to Kisii District Hospital Mortuary. None of the accused was named as a suspect on that day. PW7 was aware of the land dispute that existed among the family members of the deceased.

The bodies of the deceased were identified for purposes of post mortem by James Mangera Nyanjou, PW4. The post mortem was conducted by Dr. Ogado. The cause of death was identified as cardio pulmonary arrest following trauma and burns.

In his unsworn defence, the first accused said that on 19th December, 2004 he was at Mogonga market where he had a business. On the following day when he was at Ogembo he was informed that three people had been murdered at his village. He went there and verified the information.

On 9th January, 2005 at Mogonga market he was arrested by three police officers and taken to Ogembo Police Station. The officer commanding the station said that he was not the person he had ordered to be arrested. He was returned to the cells and on the following day their area Assistant Chief, PW7, was arrested. He further alleged that PW6 tried to identify him at the police station but was unable. He wondered why PW6 had not mentioned him earlier if indeed she had recognized him. The first accused said that although he was related to PW6, he did not know her as they were a fairly large family. He further stated that he was kept in police custody for 32 days before he was arraigned in court. He denied having committed the offences as charged with.

The second accused also gave unsworn defence. He said that on the night of 19/20th December, 2004 he was asleep in his house at Matuta Market. When he heard about the death of his relatives, he rushed to their home, about 2 kilometers away. He enquired as to what had happened but no

one seemed to know. The area Assistant Chief caused a whistle to be blown and many people went to the home. PW6 was asked to identify their attackers but she was unable to do so.

The second accused said he was arrested on 3rd March, 2007 following a disagreement with his wife. He alleged that PW6 had been coached by his estranged wife.

Mr. Okeyo for the first accused submitted that the evidence of PW6 was insufficient to warrant a conviction of the first accused. He said that she was unable to pick him up during the identification parade. Counsel further submitted that the first accused's constitutional right as enshrined in Section 72(3)(b) of the Constitution had been violated because the first accused was held in unlawful custody for a period of 31 days. He urged the court to acquit him of the three counts of murder.

Mrs Asati for the second accused submitted that the evidence of PW6 was insufficient to warrant a conviction. This is because the witness was a minor and her evidence required corroboration. She wondered why none of the other children who were with PW6 at the material time were not called as witnesses.

Mrs Asati further submitted that there were no favourable circumstances for a positive identification since the incident occurred at night when there was a lot of commotion and when PW6 was in extreme shock. Although there was a burning house which allegedly provided sufficient light, counsel's view was that the light intensity was so high as to cause PW6 not to see properly. She added that shortly after commission of the offences, no one alleged to have recognized the perpetrators thereof.

Regarding the second accused's defence, counsel submitted that the same was credible. The second accused had explained the circumstances that led to his arrest.

I have considered the above submissions and weighed the same against all the evidence on record. On the night of 19th and 20th December, 2004 the deceased were attacked by arsonists who assaulted and burnt them and their houses. The only eye witness was PW6 who was about 12 or 13 years at the time. Apart from the deceased persons, PW6 was with her cousin, Pascalia, and other children, among them her brothers known as Dennis and Pius. All these children were taken out through the window by the arsonists because they did not want to hurt them. When PW6 and the other children were taken out of her grandmother's house, the kitchen was on fire and PW6 said that there were more than forty people in their compound. PW6 said that she recognized the accused as being members of the group of the assailants.

PW6 spent the night at a neighbour's house but returned to their home on the following morning. There were many people who had gathered there. The area Assistant Chief and the police also visited their home. There is no evidence on record that on that day she told anyone that she had recognised any of the accused persons the previous night. If she had actually seen and recognised the accused as she alleged, nothing would have stopped her from reporting that to her other family members, even if she was not able to report to the area Assistant Chief and the police officers who went to their home to investigate the incident and remove the bodies of the deceased.

A report of recognition of an assailant ought to be made by a witness at the earliest opportunity. Where there is unexplained delay in making such a report, serious doubt is created in the mind of the court as to whether a witness actually saw and recognised an accused person.

There is no evidence that any of the accused persons went into hiding after the material incident such that they could not be arrested if at all there was a report implicating them.

Police Constable Adan Dima, PW1, told the court that on 9th January, 2005 he was instructed by the area District Criminal Investigations Officer (D.C.I.O) to proceed to Mogonga market and arrest the first accused. The D.C.I.O was not called to testify as to what report he had received,

from whom and when, which led him to order the arrest of the first accused. The same can be said of the second accused who was arrested on 3rd March, 2007. If indeed the accused had committed such serious offences on 20th December, 2004 and on the material night they had been positively recognised by PW6, a report to that effect ought to have been made promptly and their arrest effected forthwith.

The investigating officer ought to have been called to testify and state when PW6 recorded her statement. This was a serious act of omission on the part of the police and the prosecution.

One other reason that tends to water down the evidence of PW6 is that she was a minor when the offences were committed and when she testified yet her evidence was not corroborated as rightly submitted by the defence counsel. It is trite law that in a case of this nature corroboration of PW6's evidence was required, see *Obiri VS Republic* [1991] K.L.R. 381.

Why were the other children who were with PW6 not called as witnesses? The prosecution did not give any reason for that omission. They would have been very important witnesses. Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would have been unfavorable to that party, see *Nguku V Republic* [1985] K.L.R. 412.

For these reasons, I find and hold that there is insufficient evidence to sustain a conviction on charges of murder against the accused. Consequently I acquit both accused persons of the aforesaid charges. They are set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at KISII this 11th day of June, 2009.

D.MUSINGA.

JUDGE.