



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA Criminal Case 45 of 2002 REPUBLIC.....PROSECUTOR

V E R S U S

MAUREEN CHEUMBA MASHETI}
MILDRED MASHETI SHIMALI }ACCUSED

JUDGEMENT

The accused persons are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the two accused on the 8th day of January, 2002 at Shivagala village, Idakho Location in Kakamega District of Western Province, jointly murdered HABEL OKANG'A.

The prosecution called five witnesses. PW1, JOHN MUSILA MAMBELI was a brother to the deceased. He was informed about his death on 9th January, 2002 while he was asleep by PW2, John Makama Milupe. He testified that his brother lived with the accused persons. He went to the scene and found his brother lying outside the accused's house. His arm had been cut thrice and had been stabbed on the neck. He was still alive. He reported to the police at Isulu Patrol base. The deceased used to work for the accused.

PW2, JOHN MAKAMU MULUPE is a neighbour to the accused. His house is about 30 feet away from that of the accused. He testified that the deceased used to work for the accused and used to live in the kitchen. On 8th January, 2002 at about 8.00 p.m. he heard someone knocking the accused's house. He recognized that it was the deceased who said he had gone to beg for cigarettes as the accused had not given him money. The 2nd accused told the deceased that he would not sleep at their house. He heard the 1st accused asking the 2nd accused to bring a panga. PW2 went out of his house and asked the accused why they wanted to commit a crime but they did not respond.

PW2 further testified that he went back to sleep and assumed that the accused had heard him. At about 1.00 a.m., PW2 heard the deceased talking saying "why have you cut me repeatedly and we live together and I work for you?" He went to the fence and saw the deceased supporting himself on the wall of the accused's house. He went back and informed his wife. In the morning at about 5.00 a.m. he went and informed the deceased's brother, PW1.

PW3, LABAN LIPOMBOLO is the area village elder. He was informed about the incident by one Andrea Livondo on 9th January, 2002. He arrested the 1ST accused at the road and testified that the 2nd accused was arrested at her home by the area chief. PW4, Sergeant George Awili received 2nd accused who was taken to him at Isulu Patrol Base by PW3. He also visited the scene and found blood stains outside the accused's house. The neighbours wanted to hurt the accused and the 2nd accused collected her clothes and cash from the house and was taken back to the Patrol Base. He saw the accused's compound that had about 4 houses. The houses were burnt down later.

PW5, DR. WICLIFFFE WALUSIOLA performed a Postmortem on the deceased on 12th January, 2002. The deceased had a cut on

the shoulder and another cut on the back of the same shoulder, cut on the right forearm across the wrist. When he opened the body, there was smell of chang'aa.

The accused were placed on their defence and gave unsworn testimony. The first accused, Maureen Chaumba Masheti, testified that on 8th January, 2002 she was asleep at her home with a one year old baby. She heard loud noise from stones hitting doors and the roof. The homestead had been attacked before. she screamed for help. In the morning her mother, 2nd accused came out and they found other houses had had their doors demolished and some things stolen. Her mother left to report to the police. People came to the compound while she was inside with her baby. The Chief rescued her and she was taken to the Police Station and was told to wait until when the matter would have cooled down before returning to her home. After three days she was informed by the police that their houses had been burnt. They stayed at the police for four months before being charged in court. She knew the deceased who came from the neighbourhood.

The 2nd accused, Mildred Masheti Shimoli (also known as Gladys Masheti) gave unsworn testimony. She stated that near her home there is Shivakala Secondary School and a road. She bought the plot in 1982. She does business at the local market. Her compound is fenced with 7 houses and three of them are permanent houses.

On 8th January, 2002, she slept at her house and at night she heard stones hitting all her houses, on the roof and doors. She screamed with her daughter, the 1st accused but nobody went to rescue them. The stone throwing continued but later stopped. In the morning she found her 5 bags of sorghum, 40 chicken and githeri that was in the kitchen had been stolen. At the back of the house she found the deceased's body that had been cut. The fence to the neighbouring compound had also been cut with scissors. She told the 1st accused to lock herself inside and went to report at the Isulu Police base about 2 km away.

On entering the matatu, she found PW3, the village elder who entered the same vehicle and they both alighted at Isulu. Before she could report to the police, PW3 told the police that she had killed someone and she was made to sit down.

The 2nd accused testified that she had a court case No. Kakamega 451 of 1992 against John (PW2) who had sued her for defamation. The case was about chicken whereby her chicken used to be stolen and she suspected John, (PW2) who sued her for defamation but she won. She knew the deceased and denied that he was her employee. She bought the plot from PW2. PW2 has three sons who are married and live with their wives at PW2's home and accused stated that they never came out that night.

From the prosecution evidence, it is only PW2, John Makamu Mulupe who testified that it is the accused persons who killed the deceased. He testified that on 8th January, 2003 at 8.00 p.m. he was at his house when he heard the voice of Gladys – 2nd accused, saying "bring that panga". PW2 went out of his house and he shouted "why do you want to commit a serious act and you live with the deceased." The accused did not respond.

PW2 went back to his house and slept. At 11.00 p.m. PW2 heard the deceased saying he would not leave. Once again PW2 went out and called the deceased and told him to go but the deceased said he would not leave. PW2 went back to sleep. At 1.00 a.m. he heard the deceased alone talking. At 5.00 a.m. he left his house and went to inform the deceased's brother, PW1.

PW1 did not go to the accused's home. He testified that he shouted from outside his house. There is a fence between his house and that of the accused. The second accused in her defence stated that PW2 lived in his house with his wife and three sons who are married. The incident started at 8.00 p.m. It is not explained why PW2 did not go to the accused's house and find out what was happening. When he woke up for the second time at 11.00 p.m. he did not go to the accused's house and states that he called the deceased to leave. PW2 woke again at 1.00 a.m. and states that he saw the deceased holding himself against the wall. He did not go where the deceased was.

From the prosecution evidence, I do find that it will be unsafe to convict the accused on the basis of the evidence adduced. The conduct of PW2 that evening raises doubt as to whether his testimony is reliable. He could have gone to report to the village elder or

deceased's brother that night at 8.00 p.m. He could also have gone to the accused's home and take away the deceased to his house. He could have reported the incident at 11.00 p.m. when he woke up for the second time.

PW2 did not go to the accused's home. He did not see the accused assaulting the deceased. No blood was found inside the deceased's house. The 2nd accused went to the police to report in the morning although PW3 testified that he arrested her on the road and took her to Isulu Police Station. The 2nd accused testimony is that they boarded the same vehicle with PW3 in the morning and when they reached the police station PW3 caused the accused to be arrested.

From the evidence of PW2 and the 2nd accused, it is clear that the 2nd accused bought her land from PW2. It is also clear that the two families have not been living harmoniously as good neighbours. At one time case number Kakamega 541/1992 was filed by PW2 against the 2nd accused. I do not find PW2's evidence reliable. I further do not find the motive for the accused to have killed the deceased.

In the end, I do not find the accused guilty of the charge of murder and they are hereby acquitted. The accused shall be set free unless otherwise lawfully held.

Dated, Signed and Delivered in Kakamega, this 30th day of November, 2009.

SAID J. CHITEMBWE

J U D G E