



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Case 87 of 2004

REPUBLIC PROSECUTOR

versus

1. JAMES MWEU MUIA

2. FREDRICK MUTUKU NYAMAI

3. JUSTUS MUTUA NZIOKA ACCUSED

JUDGMENT

James Mweu Muia, Patrick Mutuku Nyamai and Justus Mutua Nzioka, hereinafter referred to as 1st, 2nd and 3rd accused, are jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 8/12/03, at Kusyethuku village, Mbooni location in Makeni district, jointly with others not before the court, murdered Philip Mbalu Ndeti. The three accused denied the offence. The matter proceeded to hearing with the prosecution calling a total of 10 witnesses to prove the charge, whereas all the accused gave sworn testimonies in their defences and called a total of five witnesses.

The accused 1 was the Senior Chief of Kithungo location, accused 2 was a businessman at Munyetani market and accused 3 was a farmer in Kithungo location and also worked as a youth of the area, assisting the Assistant Chief and Chief in maintaining law and order in the area.

The key witness in this case is Jackson Kimeu Muthoka (PW2) a resident of Kithungo location, He recalled to having been at Munyetani market on 8/12/03, at about 2.00 pm when he found the 1st accused with two ladies, Agnes Keli Lonzi (PW4) and Josephine Muthina (PW3). PW3 alleged to have lost 7 bananas from her shamba and had found them with PW4. When asked, PW4 alleged that Philip Mbalu Ndeti, the deceased, had sold the bananas to her. PW3 reported the loss to accused 1 who sent accused 3 and other youth wingers to go and get the deceased from his home. Once the deceased was brought to the market, PW4 repeated the allegation that she had bought the bananas from deceased but deceased denied it. Deceased was ordered to sit down. Accused 1 then sent one Joseph Kituta Mulwa, for ropes to tie up the deceased. Accused 3 then tied up Mbalu. Accused 1 threatened deceased with being burnt if he did not admit the offence. Accused 1 claimed that deceased had been stealing from people. Accused 1 then sent accused 2 for a match and paraffin. Accused 2 also collected some banana leaves and heaped them on Mbalu. Accused 3 then lit a match and threw it at Mbalu and accused 2 poured kerosene on the banana leaves. A big fire broke out. Accused 1 who was seated about 3 paces away stood up and tried to put out the fire and his hands got burnt in the process. PW2 assisted accused 1 remove clothes from Mbalu but by

then he was burnt on the stomach and back. The deceased's brother Kithuka Ndeti (PW6) and wife PW5 took deceased to Tawa for treatment but accused 1 refused to assist them. PW2 saw PW3 and 4 sitting at a distance as this incident unfolded. PW2 later recorded his statement with Criminal Investigations Department at Wote and Mbooni police station, He was later taken to Mbooni police station to change his statement but the officer in charge declined to allow him. The statement at Wote was recorded on 5/1/04, and he was forced to record another on 29/11/04, by Mr Kakonzi. It was recorded in the English language that he did not understand as he can only read and write Kikamba. He did not know the contents of that statement that he was forced to write although he signed it while with Mr Kakonzi. PW2 denied writing a letter exhibited as DEX No. 1 addressed to the state counsel though he recognised the signature on the letter to be his.

In a declaration (DEX No. 2) which PW2 denies making, the letter to the state counsel DEX No. 1 and DEX No, 3 dated 3/12/04 and 5/12/04, the witness denied ever implicating accused 1 in the setting ablaze of Philip Mbalu in his statement to the police at Wote Criminal Investigations Department. PW2 went on to say that the handwritten statement DEX No. 1 was written by accused 1 and he was only forced to sign it, He urged the court to disregard the other statements allegedly written by him and only accept the statement made at Wote Criminal Investigations Department as the correct one and the truth. In cross-examination, PW2 admitted to having visited accused 1 in the remand prison upon being summoned by accused 1.

Josephine Muthina Mutia (PW3) testified that on 8/12/03, she found that her 7 bananas had been stolen from her 'shamba' farm. She followed footsteps from the shamba up to Munyetani market, She found the bananas under a mango tree. Keli Lonzi (PW4) claimed to have bought the bananas from Philip Mbalu. PW3 reported the matter to accused 1 who then sent youth wingers to get Mbalu. Upon Mbalu being brought, he denied having stolen bananas when asked. Accused 1 decided that Mbalu, PW3 and 4 be taken to Tawa but soon thereafter a crowd gathered and pushed towards Mbalu. PW3 ran off. She denied seeing who set Mbalu ablaze. She did not see PW2 at the scene though people were many and she did not identify any of those who were present.

Agnes Keli Lonzi, (PW4) a business lady dealing in bananas, cassavas and potatoes recalled having bought 7 bananas from Mbalu on the said date at about 11.30 am. While still at Munyetani market, PW3 enquired from her how she got the bananas and she told PW3 that Mbalu sold them to her. PW3 went to call the chief, accused 1 who interrogated PW4. Accused 1 then sent accused 3 and three others to go and get Mbalu which they did. Once Mbalu was brought, people crowded at the scene. Mbalu denied having sold the bananas on being questioned and it is then accused 1 said he would take Mbalu to Tawa. People pushed and crowded round him. PW4 ran off but on looking back, she saw the chief fall. She stood about 50 metres away and saw smoke and fire. Accused 1 used banana leaves to try and put the fire off. She went back near and saw that Mbalu had been burnt but was able to talk. PW4 denied knowing anybody in the crowd that surged towards Mbalu. Mbalu was taken to Tawa in a Nissan Matatu in company of PW3, 4 and Kithuka Ndeti. She did not see the person who set Mbalu Ndeti ablaze.

Elizabeth Nthoki Mbalu (PW5), was the wife of the deceased Mbalu. She came back home from the shamba on the fateful day only to learn that Mbalu had been taken away. She found him at Munyetani market standing under a mango tree. He had been burnt on the stomach, shoulders, head, hands and legs and saw a depression on the right side of the head. Accused told her how he was questioned over bananas, he denied stealing, was tied up and accused 2 brought paraffin, piled rubbish on him and accused 3 set him ablaze. He was admitted at Tawa and later transferred to Machakos General Hospital where he later died. According to PW5, deceased told her that those who set him ablaze were accused 2 and 3.

Kithuka Ndeti (PW6), a brother of Mbalu (deceased) was called from home and informed of deceased having been burnt. Deceased told him that accused 2 and 3 set him ablaze. He denied the statement he made to police that deceased was burnt by a mob.

PWI Samuel Muia, who works as a clinical officer examined Mbalu on 9/12/03 and found he had 32% burns. He started deceased on treatment. On 10/12/03 he noticed that deceased had developed oedema i.e. swelling of the face and neck and referred to Machakos General Hospital. He produced treatment notes as

Exh. No. 1 .

Postmortem on the deceased was performed by Doctor David Kaburu, who found that deceased had 3rd degree burns to the chest, abdomen and back, face. Respiratory system had soot material and he found the cause of death to have been 55% burns. He said 3rd degree burns are deep and involve muscles and are fatal.

The Assistant Chief of Kaliani sub-location is Pius Kiio (PW8). On arrival at Munyetani market, he found the deceased had already been burnt. Efforts to find out who set deceased ablaze were unfruitful. He never heard the deceased talk after he was injured.

Corporal David Kambi (PW9), who was then in charge of Tawa police post received the deceased and members of the public at the base. Deceased was alleged to have stolen bananas. He talked to the deceased who had burns and alleged to have been set ablaze by accused 3 Mutua Nzioka. When interrogated by the clinical officer, the deceased claimed to have been set ablaze by the mob.

Police Constable Richard Ndambo (PW10), took over investigations of the case from Inspector Vitalis Aura. He is the one who recorded PW2's statement on 5/1/04. PW10 denied that Mbooni police station ever investigated the case but Wote police station did. He said that later, PW2 went to the police station and wanted to withdraw his statement but PW10 declined to allow him to do so. The police file was then forwarded to District Criminal Investigations Officer and it was ordered that suspects be arrested. Accused 1's testimony was lengthy but what it all boils down to is that he was the senior chief of Kithungo location. His duties were to maintain law and order. He had no security personnel but worked with youth wingers. On 8/12/03, he received a report of theft of bananas from Josephine Muthina (PW3). The bananas had been recovered at Munyetani market. Accused 1 later went to the market where PW3 pointed out some bananas which were with PW4, Keli Lonzi, who in turn claimed to have bought them from Mbalu Ndeti, the deceased. Accused 1 asked Mutua Nzioka accused 3, Kiio Kioko and Mwendwa Kisungu to go and get Mbalu. They brought Mbalu at about 3.30 p.m. It was a market day and there were many people at the market. As the youths with Mbalu approached people started coming where they were and started to make noise. Mbalu denied selling the bananas to PW4, when asked. Accused 1 decided to take Mbalu, PW3 and 4 to Tawa Police Post but people surged towards them saying he would not take them. They snatched Mbalu from his hands, made accused 1 fall down and on getting up accused 1 saw a fire about 15 metres away, He rushed there and using his bare hands, tried to put out the fire. He managed to put it off using banana leaves. Accused 1 sustained burns to his hands as a result. He was not able to recognise any of the people present because they were many. He denied ever seeing accused 2 at the scene. After rescuing Mbalu, accused 1 said he sought transport from Daniel Mulwa (DW8), who took deceased the wife and deceased's brother to Tawa while he followed behind in his own car. Accused 1 said that at Tawa Police post, the deceased reported that he was burnt by a mob. After the deceased was admitted in hospital accused 1 also sought treatment for his hands. He later recorded a statement at Tawa, was interrogated by police and was arrested one year later. He denied that he ever sent for ropes to tie or paraffin to pour on the deceased. Although he sent accused 3 to get the deceased, he never saw him at the scene after that. Accused in his sworn testimony said that he owns two shops one at Munyetani and another at Kusyongeli. On 8/12/03 he woke up and went to purchase goods for his shops at Masii. He spent the whole day at Masii as he awaited a vehicle to transport his goods to the shops. He denied having seen the deceased on that day nor did he ever go to Munyetani,

Accused 3 Justus Mutua Nzioki, a youth winger, recalled that one of his duties was to run errands for the chief or his assistant. On 8/12/03, he was from working on the shamba when the chief called him and asked him to go and get Mbalu to go to Munyetani market. He complied. He was accompanied by other youth wingers and got Mbalu. On reaching the market, people followed them as they made noise. He could not tell what the people were saying. He handed over Mbalu to the Senior Chief who was with PW3 and 4 and he went home. He never went back to the market and he later learned that Mbalu had been burnt.

DW 4 Samuel Teli Kyungu and Josephat Kivuitu (DW6) testified that on 8/12/03, they were with Jackson Kimeu Muthoka at Kikima market up to about 5.00 p.m and walked back home together and went straight

to DW4's home where they drunk traditional beer till about 8.00 p.m. It is therefore their evidence that PW2, Kimeu was not at Munyetani market on 8/12/03, as he alleged in his evidence in court.

DW5, David Ndungi an advocate of the High Court of Kenya based at Machakos recalled that on 31/12/04, Jackson Kimeu PW 2, made a statutory declaration before him. He commissioned it. He said that PW2 presented to him the statement when already prepared (DEX No. 2) and DW5 took time to explain the contents of the declaration to PW2. The declaration purported to repudiate the statement he had made to police.

Kioko Musangi (DW7) a resident of Kithungo location testified that as of 8/12/03, he was employed by Mutuku Nyamai (accused 2) as a shop attendant, He said that on the said date, accused 2 did not open his shop as he went to buy shop goods at Masii. DW7 went to work on accused 2's shamba on that day.

DW8, David Munyenze Mutua, a friend of accused 1 recalled having been asked by accused 1 to take the deceased to Tawa Health Centre for treatment. Accused 1 paid for petrol of Kshs, 1,000/=.

I have now carefully considered the evidence adduced by both the prosecution and defence witnesses and submissions by all counsels. There is no doubt that it is accused 1 who summoned the deceased to Munyetani market after a report by PW3 that her bananas were stolen from her farm. He was a Senior Chief and though the deceased was a suspect, and accused 1 knowing it was a market day, the safety of the deceased could only be guaranteed by accused 1. The key witness in this matter is PW2 who claims to have witnessed all that transpired on that fateful day from the time the deceased was delivered at the market to the time he was burnt and taken to hospital. However, I find that PW2's evidence has been punctured by inconsistencies and his demeanor was generally questionable. PW2 wrote a statement with the police implicating the accused persons and specified the roles they played in the setting ablaze of the deceased. The defence however produced in evidence letters allegedly written by PW2. The first is DEX No. 1 dated 3/1/04 addressed to the state counsel in which PW2 was allegedly denying that he ever implicated accused 1 in the murder of the deceased. In essence he was retracting his statement with police. Though he denied writing this letter, he recognised the signature as his. Another letter written to the state counsel is dated 15/12/04 (DEX 3) in which the witness also denounced his statement with the police and denied implicating accused 1 in the murder. He said accused 1 wrote the statement and he was forced to sign. The court was not told how that was possible and what force was exerted on him to copy it and why he did not report to the police. There is then the declaration allegedly made before Mr. Ndungi advocate on 3/12/04 in which PW2 again disclaims the statement made to police implicating accused 1 in the murder. PW2 ultimately told the court to ignore all the other statements and go by his first statement to police, but that is not possible. These statements which I believe were written subsequently to the statement to the police just go to show how unsteady and unreliable PW2 is. He either witnessed accused 1 take part in the burning of Mbalu or not. Besides, later in cross-examination, PW2 did accept that even after accused 1 's arrest, he used to go and see accused 1 at the prison. The reason he gave was that accused 1 had summoned him there. He had no obligation to go and see accused 1 in remand and bearing in mind his allegation that accused 1 had even forced him to copy false statement and sign it. PW2's conduct is very suspect. His conduct of changing his story also seems to indicate that there was interference with this witness so that the court cannot take his testimony as gospel truth. It is tainted with lies and falsehoods that the court cannot rely on in such a case. The court can of course rely on the evidence of a single witness especially considering that the offence was committed in broad daylight but under the circumstances PW2 proved a very unreliable witness and the court needs other independent evidence to go by. The defence evidence of DW4 and 5 that PW2 was in Kikima market with the two on the fateful day goes further to cast doubt on the truthfulness or otherwise of PW2's testimony. In the end even counsel for the state admitted that PW2's evidence was not creditworthy. The court will accordingly dismiss PW2's evidence in its totality as being unreliable and uncreditworthy.

What is then left of the prosecution evidence? PW3 and 4 who were present at the scene denied seeing any of the accused take part in the setting ablaze of the deceased. If anything they said accused 1 tried to rescue the deceased but was overpowered by the crowd.

The only other evidence that the prosecution case would stand on is the alleged dying declaration by the

deceased. It is PW5, 6 and 9 who testified to the deceased having told them how he was set ablaze.

In her evidence in court, PW5 said that the deceased who was her husband narrated to her all that had transpired. She said that deceased said accused 1 interrogated him as to the theft which he denied. Accused 1 then tied him and made him fall and it is then accused 2 piled some rubbish on him whereas accused 3 lit a match and set him ablaze. PW5 went on to say that the deceased also talked of Ngui Maingi lighting a fire to the deceased's legs. In the same testimony she said that the deceased blamed accused 1, 2 and 3 for the injuries that he sustained. In cross-examination, PW5's statement to the police was produced as DEX No,4. In that statement, PW5 narrated that it is during interrogation by police at Tawa police post that the deceased named Mutua Nzioka (accused 3), Mutuku Nyamai (accused 2), Wambua Mutisya, Mwendwa Kisonge, Mukeku Mutinda and Nyamai Makau as the people who set him ablaze, It is obvious that the statement to the police materially differs from what PW5 told court. She did not mention 4 names which she had given to the police. She never told the court that she had forgotten some names of the assailants. When she gave her statement to police, the facts were fresh in her mind as the statement is dated 18/12/03. The question then is, what happened to the other 4 people named in that statement and why were they not charged? The prosecution never gave an explanation as to why they were not charged for this offence. PW5's testimony viewed against her statement to police leaves the court wondering why the variance in that evidence and why was she trying to protect some suspects named by the deceased if at all. The variance in her statement to police and evidence casts doubt on her evidence as to whether she is telling the truth on what deceased told her or not.

PW6 in his testimony also said that the deceased narrated to him what had happened and that it is the accused 2 and 3 who set him ablaze. However, when his statement to police was put to him in which he claimed to have told police that the deceased told him he was burnt by the mob, PW6 denounced the said statement although he did admit that he signed it. His evidence in court was therefore totally at variance with his statement to the police which he made when all facts were fresh in his mind. Which one does he expect the court to believe? This again casts doubt as to the truth of his testimony.

PW9 told the court that during interrogation, the deceased told him that Mutua Nzioka, accused 3, set him ablaze. PW9 went on to say that at that time the deceased was in a lot of pain. Later in cross-examination, the same witness said that the deceased denied knowing who had set him ablaze. PW5 had told court that infact it is during police interrogation that the deceased had named 6 people. The prosecution evidence is therefore totally at variance and contradictory as to what the deceased said and whom he named as his assailants.

In the case of Choge versus Republic (1985) KLR the Court of Appeal held that in Kenya, admissibility of a dying declaration does not depend upon the declarant being at the time of making it, in a hopeless expectation of imminent death. The court went on to hold that there need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of an accused person.

Bearing the above in mind, I do find the evidence of PW5 and 6, contradictory and unreliable as to what the deceased actually told them before his death if at all he did, They have altered their statements made to police and the court is at a loss as to which evidence to believe. In the court's view what PW5 and 6 testified to does not amount to a dying declaration that the court can found a conviction upon for the reasons considered earlier in this judgment.

What is then left of the prosecution case? Though accused 1 was at the scene and is the one who summoned the deceased, the prosecution evidence seems to support his defence that he tried to rescue the deceased from the mob though in my view he might have indirectly contributed to what later transpired by the mob taking the deceased from him.

Accused 2 gave an alibi in his defence that he was away from Munyetani market on that day. PW3 and 4 did not place him at the scene. PW5 and 6's evidence is contradictory as to whether he was named by the deceased as one of the assailants. Against him however is strong suspicion as to his involvement which is

however not sufficient to find a conviction against him. The evidence of PW3 and 4, accused 1 and 3 place accused 3 at the scene of the crime. He is the one who was sent to get the deceased and he did bring him to accused 1. Accused 3 is a youth winger whose duty was to assist the chief in keeping law and order, If indeed he brought the deceased and saw the behaviour of the crowds as accused 1 and 3 say they did, it would be unlikely that accused 3 would have left accused 1 to handle the situation alone. Accused 3 was obviously not telling the truth that he went away immediately he handed over deceased to accused 1. I believe he was not truthful in what he told the court. However, it is not upon him to prove his innocence. It was upto the prosecution to prove that accused 3 actually took part in setting the deceased ablaze which they have failed to do. As earlier alluded to, I think there was a lot of interference with this case coupled with poor investigations so that not sufficient evidence was adduced to enable the court to reach a fair decision in this matter. The offence of murder is not proved.

Under the circumstances, this court has no option but acquit the three accused of the offence of murder.

R.V. WENDOH

JUDGE

Dated at Machakos this 23rd day of June, 2006.

Read and delivered in the presence of

R.V. WENDOH

JUDGE