



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 15 of 2001**

REPUBLICPROSECUTOR

VERSUS

ALEXANDER MUTWIRI RUTERE ALIAS SANDA.....1ST ACCUSED

MISHECK KIREMA KAUNJO.....2ND ACCUSED

DINUS KIOGORA GACHUMEL..... 3RD ACCUSED

JOSEPH KAIRISHI M'ITWAMWARI..... 4TH ACCUSED

ENOCK KOOME M'IKIAO ALIAS KOOME WA KIUGU...5TH ACCUSED

PAUL KABERIA NYAGA.....6TH ACCUSED

DOUGLAS NTOITI MAKAU.....7TH ACCUSED

WILSON MURATHI M'ITWAMWARI.....8TH ACCUSED

AYUB KITHIA NGOLWA.....9TH ACCUSED

JUDGMENT

The nine accused were jointly charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The charge was that they on 29th day of August, 1999 at Muithuni village in Nkomo Location, North Meru District, in Eastern Province, jointly murdered Martin Muchui. Those facts that are not in dispute establish that on the night of 29th August, 1999 at about 8.00p.m a group of people entered the home of the deceased Martin Muchui, attacked his mother and other members of the family injuring several of them and in particular, set upon Martin Muchui whom they cut with axes and other weapons. He died soon thereafter from the effect of the injuries inflicted on him.

Dr. John Gachanja Mundia who testified as PW10 and who had performed the post-mortem on the body of Martin Muchui on 2.9.1999 established the cause of death as cardio pulmonary arrest due to head injuries which also had caused haemorrhagic anaemia. His findings were not disputed.

The evidence of the other witnesses who testified is summarised as follows:-

PW1- Stanley Kaibunga Maitai was on 29.8.99 sitting inside his own house at Mwitone village when there was a knock at the door. Six other people who later had to give evidence sat with him at the table- room. A hurricane lamp was burning on the main table on the centre of

the table-room. There was some moonlight outside and an electric light from solar system was showing but it was too dim to be of any use. That is when two people entered the room. The one leading went straight for the hurricane lamp which he hit with a fork jembe stick and damaged it, putting its light out instantly. But PW1 had by then seen and recognised the two intruders as the 1st accused, Alexander Mutwiri Rutere alias Sanda, and Mishack Kirema Kaunjo, the 2nd accused, both of who PW1 testified, he knew well before the date of the incident. According to PW1, the attack took about a minute during which the attackers said nothing. He however claimed that the 1st accused was wearing a black coat while the 2nd accused wore a round cap on his head. He testified that the 1st accused, Sanda, entered led into the house first.

PW1 further testified that when the light was knocked out, he ran to his bedroom and soon was followed by one Mercy who was being led in by one of the attackers. They left the bedroom with PW1's car key. He did not leave the bedroom until about 30 minutes later when the police had arrived.

PW1 also testified that he much later gave to the police the names of the 1st accused Sanda and the 2nd accused Kirema. He was however sure that neither him nor other members of the family, gave the names of the attackers to the police the same night. He also testified that he did not know the two accused's other names. He admitted in cross-examination that it was Kirema and not Sanda who entered the room first contrary to his first testimony. He was sure that the police visited his home three times before he went to record his statement during their investigation, but he did not give them any names of the attackers, because the police did not ask for such names.

Sipora Muthao the mother of the deceased and of PW1 Stanley, gave her evidence as PW2. She had gone out to fetch water from the outside tap on the material night of 29.8.99, when she saw several people walking towards her. The people immediately attacked her, felling to the slippery ground. They shown torches on her as they attacked her using a sword and an axe. She recognised the 1st accused Sanda and 3rd accused Dinus Gachumei as the attackers. She knew them well before the incident. It was as they attacked her that her son Martin Muchui came to rescue her. But as Martin just walked out of his own house, the two and others numbering to about ten, turned on Martin and cut and beat him bringing him to the ground. The attackers, she testified, flashed their torches as they attacked Martin. She identified among the attackers, 2nd accused – Kirema; 4th accused-Kairishi; 5th accused –Kaume; 6th accused, Kabeeria; and 9th accused – Ayub as well as 7th accused Douglas. PW2 testified that she was meanwhile screaming as she lay on the ground and as she saw and recognised the attackers from a distance of about 15-20metres. Finally the attackers ran away as she screamed and she stood up and went to report at the Police Station and later came back home with the police.

PW2 admitted that she did not state in her police statement that she had used a torch to identify the attackers. She asserted that she, gave the names of eight attackers she had recognised to the police when reporting of the incident that night. She testified also that the 1st and 3rd accused carried axes while 1st accused also carried a sword while 5th accused had a sword. PW2 also testified that as Martin Muchui was being attacked, he called out the names of 1st and 3rd accused. PW2 was assertive that she reported the incident to the police the same night and gave out 8 names of accused persons except 8th accused Wilson Murathi. If the names were not being found in the police records including her police statement, as she claimed, a problem created by the police.

PW3, Elizabeth Kanja testified that she was in her house that night when she heard screams from PW1's house which was 20 metres away. But as she went out, she came face to face with 5th and 8th accused as she opened her door. She dashed back into her house, closed the door and opened a window from where she held some conversation with them. There was moonlight outside and a hurricane lamp light inside the house. She used the said lights to identify the two. It was then that she heard the deceased Martin say, "Koombe are you killing me?"

PW3 asserted that if she had mentioned only the 5th accused in her police statement then she has corrected it by including the name of 8th accused from the dock.

PW5 Ruth Kageni testified that on the material night she sat in the sitting room with others including PW1. When she answered a knock at the door by opening it and sitting down. A person entered and knocked down and off the hurricane lamp placed on the table, causing darkness to overwhelm the whole room. More people entered and beat those in the room. She could not recognise the attackers, she asserted as there was no other light, the solar light being too weak to help.

PW6, Mary Mwendwa was on the material night called out by PW2, Sipora to help her fetch water. When she went out she saw people beating Sipora near the water tap. She hid under a cart and heard Martin, the deceased, speak about the attackers to his brother Mutua. She then saw the strangers attack Martin and recognised 1st, 2nd, 3rd, 5th, 6th and 7th accused persons, among them. She testified that she used the attackers torches to see their faces and thus recognised them as they used axes and swords to cut him. However, she admitted failing to mention to the police about using the attacker's torches to recognise them.

PW7 was Josphine Kaguri, who was in her house in the same home that night. She testified that she heard Martin scream from outside saying "Koombe, are you killing me"? She dashed out and saw 1st and 5th accused carrying axes and swords. She said that she flashed a torch at them and saw several other people whom she did not recognise. She then saw 2nd accused cut Martin with an axe on his head. But she then made a statling claim – hers was the only torch at the scene as no one else, including the attackers flashed any other torch. She also claimed that she saw PW2 standing at the water tap collecting water and that no other member of the family was seen at the scene.

PW8 Peter Mutua Maitai was brother to deceased-Martin. When he and Martin heard their mother, PW2 scream, they rushed outside from inside his house. It was then that he saw Martin flash a torch as they moved towards Martin's house. Then someone shouted-

“piga mutu huyo risasi”. He then saw the 2nd and 5th accused ahead of them. He did not wait. He ran away to his uncle’s home. But he asserted that the two strangers were alone.

PW11 was No.53408 PC Kennedy Odhiambo. He said that on the material night at 8.00pm he was at Njiru Police Station when he and other officers heard screams at the home of the deceased and PW1 Stanley Maitai.

That Several officers under the direction of Inspector Nganatha then booked an Occurrence Book report and proceeded to the scene of the screams. They found the Maitai home had been robbed and several people injured. At the scene they recovered a hat, beer bottle and a knife and took the injured to hospital. They started investigations. They were given names of the attackers who included Kairishi, (4th accused) and Mutwiri – 1st accused. 1st accused was arrested on 31.8.99 and 2nd accused on 2.9.99. PW11 also testified that police were given the names of the attackers the same night of attack but even when they returned to the station and recorded a return trip report in the O.B., no such names of suspects were recorded. He also said that on 30.8.99 the police visited the scene of crime but again they recorded no names of suspects even after arresting some suspects. He said he forgot to record the suspects’ names, although the mother and wife of deceased had given the names of the suspects to him personally

PW4, was Chief Inspector Charles Mwainzinga. He recalled that on 30.8.99 he reported on duty at Njiru Police Station where he noticed the robbery entry concerning this case in the O.B. He also visited the scene of crime home where he also collected relevant information and particularly that concerning the names of suspects. He said he was given the names of 1st, 4th, 3rd, 8th and 5th accused. He testified that he got a black hat, a beer bottle and a sword. These he testified, were given to him by PW1.

He then started tracing and arresting the suspects. PW4 however denied that PW2 had gone to police station to report the incident. He admitted that although the police team visited ground three times and each time made O.B. entries, none of the suspect names were recorded despite having been allegedly received by Police Officers including himself and despite the fact that he himself made some of the entries. Only the name of 7th accused appeared in the O.B. as having been in cells.

Turning to the defence case, all the accused persons gave their defences on oath. They each denied being at the scene of crime or participating in the charged crime in the material night of 29.8.1999. They were cross examined, sometimes strongly, but they each firmly stood to their defences.

Mr. Isaboke for the 1st to 8th accused submitted that this case depended on visual identification. Several prosecution witnesses claimed to know several of the accused persons before the robbery incident. They testified seeing and recognising the accused persons taking part in robbing them. He submitted that the conditions for positive identification, whether through recognition or otherwise, were lacking. He accordingly sought for the dismissal of the murder charge against his clients.

Mrs Ntarangwi for the 9th accused submitted that the 9th accused was identified only by PW2 but that the conditions under which the identification took place were so uncertain that the 9th accused cannot safely be convicted.

On the other hand the State Counsel Mr. Muteti submitted that there was sufficient evidence upon which to convict all the nine accused persons.

Counsel produced several legal authorities, mainly on identifications.

The two assessors who sat with me throughout the trial after a third one was discharged, returned a verdict of guilty to murder. The first assessor said that the identification of the nine accused was positive and reliable because the witnesses who identified them were neighbours who knew them well.

The 2nd assessor also believed that the 1st, 2nd and 5th accused were guilty of murder and the 3rd, 4th, 6th, 7th, 8th and 9th accused were guilty of manslaughter. He was convinced that there was adequate light in the room to identify 1st and 2nd accused.

I have carefully perused the evidence and submissions made on behalf of both sides. I have also carefully considered the legal authorities submitted. I have as well taken into account the opinion of the two assessors.

In my view, the findings of this case will entirely depend on issue of identification which I will now delve into.

Several witnesses who include PW1, PW2, PW3, PW5, PW6, PW7, PW8, and PW9, are close relatives of the deceased and relate to one another. Each one testified that he or she, was present in the home of Maitai’s family that was attacked by robbers on the material night of 29.8.1999. The majority of the above mentioned witnesses testified that they saw and identified one or several members of the attacking gang whom they claimed to have known before. Their claimed identification therefore amounted to recognition.

In my understanding of the evidence the identification was made by several groups. The first one was that of PW1 Stanley Kaibunga together with those who sat with him in his house that fateful evening. They testified that there was a knock at the door at about 8pm to 8.30p.m. When the door was opened by one of those sitting at the table, someone entered and went straight for the hurricane lamp which sat on the table in the room. He hit it with a fork jembe stick and destroyed it, blowing off the light in the process. The room became dark as the solar-light which was claimed to be on, was too dim to enable anyone to see. PW1 testified that the person who entered first was the 1st accused Alexander Mutwiri Rutere otherwise called Sande. PW1 also claimed that the 2nd accused, Kirema Kaunjo, entered at the same time

with the 1st accused and it was the 2nd accused carrying a fork jembe stick who hit and blew off the hurricane lamp. But in cross-examination, PW1 said that it took one minute to blow off the lamp but that he during that minute, recognised the 1st and 2nd accused. He also slightly changed his version by stating that it was not the 1st accused who had entered first but the 2nd accused. It will be noted at this point however, that PW5, Ruth Kageni who was in the same room testified that it was the 1st accused Sande who entered the room first, and that it was Sande who blew off the hurricane lamp, not the 2nd accused, Kirema.

The second version about the attack, came from PW2 Spora Muthao. She had gone out to draw water from the water tap when she saw the attackers who carried torches. The attackers went straight at her cutting her with axes and swords. She testified that she flashed a torch at them and identified the 1st and 2nd accused and also the 3rd accused Dinus Gachumei. She asserted that she identified the three using her torch as well as their torch lights. She said that although she fell to the ground on being attacked, she nevertheless saw and recognised the attackers as she lay on the slippery ground. She asserted also that she identified others including the 4th, 6th, 7th and 9th accused.

The 3rd version on identification came from PW3, Elizabeth Kanja. When she heard screams from PW1's house and as attempted to go there, she saw the 5th accused Koome and 8th accused William immediately outside her door. She rushed back inside and, locked the door behind her. She claimed to have opened the window and communicated with the two accused. She claimed that she saw and identified the strangers using a hurricane lamp light from inside the house. At one stage she claimed using moonlight outside the house. It is on record however that the 8th accused is not William as PW3 called him but Wilson.

A fourth version came from PW6 Mary Mwendwa who went out to help PW2 to fetch water but was confronted by the intruders. She hid under a cart throughout the incident and asserted that she saw several people, some of whom she knew, attack Martin Muchui the deceased with axes and swords. She identified the 1st, 2nd, 3rd and 6th accused, the last one being Kaberia Nyaga. In her testimony she confused the 6th and 7th accused for each other. She said she used the light coming from the attackers torches to identify them, despite the fact that PW7 claimed that it was only her who carried a torch during the incident. She said the attackers surrounded the deceased as they cut him but that he saw their faces from a distance of 15 metres away.

I have considered the above evidence concerning identification. As touches those who were sitting in PW1's house at the material time, it is my opinion and conclusion from the evidence that there was too little a time to properly see the two attackers who entered the room before the hurricane lamp was put off. There is evidence that whoever entered first, went straight for the light which he put off by hitting the lamp with a stick. Even if I were to accept that it took about a minute or so to put off the light, I would still find it unsafe to conclude that such a short period gave the witnesses enough time to recognise the two intruders. More so when one of them, according to PW9, was wearing a hat covering his face and where the evidence from PW5 was confused as to who entered the room first between Sanda and Kirema. This raises the issue as whether the two accused really entered the room as claimed.

As to the evidence of PW2 Spora Muthao, this court comes to the conclusion that the events took place so fast that her evidence cannot safely be relied on. She saw people who attacked her approach fast, with swords and axes. She fell down. She claims to have seen their faces and recognised the attackers even when they had torches which they directed at her. I have considered her version of facts that she saw and recognised the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th accused. I find that it would not during the circumstances described, have been probable for her to manage to identify eight different faces and maintain the memory to later inform the police. If however she did, I would still feel doubtful that her recognition would be reliable enough to form the basis of a conviction.

Identification by the PW3, Elizabeth Kanja of 5th accused, Koome and 8th accused William is equally unsatisfactory. She saw two people standing outside immediately opposite her door. She had no light except moonlight. Evidence on the moonlight during the fateful night was little explained and was poor and unreliable. Infact when the witness was confronted on the issue, she turned for help, the light from a hurricane lamp inside the house. No explanation came as to how light inside the house could help PW5 see and identify two people standing quite outside the door. I have formed these strong doubts that PW5 really saw the two accused she claimed to have identified. If she did, her evidence is not sufficiently reliable to form the basis of a conviction.

I finally look at the evidence of PW6 Mary Mwendwa who said that she sat under a cart outside and watched from 15 metres away, as the attackers beat and cut the deceased with axes and swords. Her source of light was the attackers flashlights. I find this recognition far fetched. Fifteen metres is a long distance at night. Flashes from torches held by the attackers themselves are unreliable light upon which PW6 could see their faces and identify them. This, coupled by the evidence of PW7 who said that she was the only one who carried a torch at the scene, contradicts her evidence about the light that was used to identify the accused persons.

In conclusion, the light that was used by various witnesses to identify the attackers, was crucial in this, case. I find that there was no adequate or reliable source of light upon which various witnesses could identify various accused persons. I also find that the time within which identification was done was too short to give them ample opportunity to form steady and reliable conclusions. I finally also on this point find that the attack was too sudden to allow witnesses ample opportunity to observe clearly.

The second important issue which arose in this case that affects the credibility of all the witnesses is the evidence of first or early reports. PW1, PW2 and several other witnesses who were material, claimed that they gave the names of the attackers whom they claimed to know before the incident, to the police. PW2 claimed to have reported to Njiru Police Station within a few hours of the incident and claimed to have led the police to her home for first investigations. PW4 and PW12, both police officers, testified that they visited the scene of crime the same night and the next day on three occasions. While they both asserted that PW1, PW2 and PW5 gave them the names of the several accused from the first visit, and while these two officers made entries of their visits in the Police Occurrence Book none of the said entries contained any such names. This stood contrary to police practice of good investigation. It meant that the police witnesses are either telling lies or that their investigative capacity was terribly poor. Whichever it is, the result is that it does little to advance the prosecution case. I have however carefully considered the omission. The conclusion I arrive at is that no such names were given to the police that material night

nor the next day. This conclusion is confirmed by the evidence of PW1 who was categorical that neither him nor other members of Kaibunga family who were present that night, gave the police any names during the material night nor during the next day. The reasonable conclusion to be drawn from these facts by these court, is that the names of the accused persons were not so given during the material time, because they were not known by the witnesses who in this court therefore lied.

This is a sad case since the precious life of a citizen was unnecessarily lost. But this is a court of law and despite the sympathy that may have arisen during the trial, the court can only rely on acceptable and reliable evidence to convict the accused. There is no such kind of evidence in this case. The case was poorly investigated while most witnesses, even police witnesses, were prepared to tell lies, to secure a conviction, even when their performance in investigations, was totally unimpressive. Sadly, the prosecution continues to lose cases which could be won if the police carried out adequate and reasonable investigation. How, for example, can a police officer investigating a scene of murder or robbery, fail to ask for the names of the suspects at the earliest possible moments? Or how and for what sensible reason, can a police officer who is given such names of suspects at the earliest time of investigations, fail to enter such names in the Occurrence Book when such O.B. entries are made.

For the reasons given above this court comes to the conclusion that the charge of murder, of which the nine accused persons in this case are charged, has not been proved beyond a reasonable doubt to compel the court to convict them. The many doubts left standing will be treated in the accused's benefit. The accused are accordingly found not guilty of the charge of murder and are acquitted accordingly. They are each set at liberty forthwith unless otherwise lawfully held in prison. It is so ordered.

Dated and delivered at Machakos this 27th day of **October, 2006**.

D.A. ONYANCHA

JUDGE