



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Case 90 of 2004

REPUBLIC PROSECUTOR

VERSUS

1. FREDRICK MUTISYA WAMBUA

2. AUGUSTUS MUNYALO KALELU ACCUSED

JUDGMENT

Fredrick Mutisya Wambua and Augustus Munyalo Kalelu were 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 4/6/00, at Mutune Trading Centre, Kyangwithya East Location in Kitui District, murdered Muinde Maundu.

Both the accused persons denied the offence and made unsworn statements in their defences. They did not call any witness. The prosecution called a total of 10 witnesses in support of the charge.

Briefly, the prosecution evidence is as follows:

Sammy Muthoka (PW1), worked with the deceased, Muinde Maundu, as mechanics at Kalundu Market. PW1 recalled that on 4/6/00, he was at Muti ni Dawa Bar taking alcohol at about 8.00 p.m. when the deceased called him and asked him to accompany him to Mutune where they were to repair a vehicle which had broken down and that the owner had come from Mombasa. PW1 was reluctant to go but the deceased managed to convince him to go to Mutune. PW1 found two people waiting for them outside and they conversed in Kiswahili. The four of them boarded a public service vehicle whose Registration Number he only recalled as KAC. There was a lady passenger in the vehicle and they all alighted at Mutune where the lady went her way. The two men who had wanted their vehicle repaired told PW1 and the deceased that they were going to get the keys to the vehicle to be repaired but they returned about 2 minutes later armed with spades and started to beat PW1 and the deceased. They ran different directions. PW1 ran into the bush and later got assistance from the District Commissioner's lorry which gave him a lift. Next day, he learnt that Muinde had been beaten and burnt at Mutune. PW1 said that he was not able to see the faces of the two people who hired them to go and repair a vehicle as there was no light in the vehicle or where they alighted. He could not positively identify the accused persons who were the people who hired and attacked them.

As of 4/6/00, Flavian Mue Makio (PW2,) worked as a conductor in motor vehicle whose Registration

Number he recalled as KAC. He said that they set off for Mutune with the vehicle at about 7.00 p.m, with passengers. He was not able to recognize any of the passengers but on arrival at Mutune, he recognized two of the passengers. Accused 2 whom he knew by name of Kuthamba and Mutisya (accused 1). Earlier that day he had carried them from Mutune to a place called Jua Kali. He said one of the four paid 80/= as they were charging 20/= each. At Mutune, he was able to see the passengers because there was an electric light near where they stopped the vehicle. Next day he was arrested and detained for 2 weeks. He was later questioned about the passengers who had travelled in the vehicle. PW2 knew accused 2 who used to work in a club whereas accused 1 worked as a welder. He did not know who committed the murder. He noticed that one of the four passengers carried spanners.

Judy Peterson (PW3), is a resident of Mutune village. She recalled that she was at her home at about 8.00 p.m. when she heard a bang on the door. She asked her driver, one Osango to check. She went to the bar to check when she heard Mutisya's voice. Mutisya is accused 1 whom she has known from childhood and is a neighbour. Accused 1 seemed to be quarrelling. One of her tenants by name Muvea told her that thieves had escaped. When still out at the door accused 2 called her and told her that they had caught a thief and it is then she went and saw a person lying down. PW3 knew accused 2 well as he had been employed by her husband. She knew accused 2 as Kuthamba. PW3 told accused 1 to wake the person up so that they could interrogate him but accused 2 said the thief should be burnt. PW3 saw the person who lay on the ground lift his head but accused 2 got hold of it and she heard a sound as if he had broken the hand. She was able to see well because of the electric light from the bar which was about 10 metres away. Upon enquiry she was informed that the person tried to break into PW3's shop but she checked and saw no evidence of attempted breaking. PW3 went back to her house and sent her brother in law to call police. On going back to the scene, she found a big fire and by then there was a big crowd. At that juncture, accused 1's mother came and asked accused 1 if that was the boy who had beaten him and accused 1 agreed. On hearing that, PW3 suspected that the body being burnt may not have been of a thief. PW3 denied seeing who set the deceased ablaze. Police came later and she recorded her statement with them.

John Mutisya (PW4), recalled that he was at his home on 4/6/00, at about 9.00 p.m when he heard noises at Mutune market and went to find out what was happening. He learnt that a thief had been arrested and went to call police but on returning, found the person had been burnt. He said that though there was allegation that his brother's shop was burnt, he did not see evidence of the breakage and that the said thief lay 40-50 metres from the shop where there were security lights. He saw accused 1 at the scene amongst other people.

PW5 David Kiema, told the court that on 4/6/00, at about 4.00 p.m. one Susan asked him to and help load sugarcane on her vehicle at Wanzua area. They left Kitui Town and reached Wanzua at 7.00 p.m. PW2 was the conductor of the vehicle. On the way to Kitui, Mutisya, (accused 1) and accused 2 whom he called to as Kuthamba stopped the vehicle and were taken to Mutune where accused 2 said they were going to look for somebody who had beaten accused 1. Accused 1 and 2 helped offload the sugarcane and left. On their way back at Ngaini accused 2, again stopped the vehicle and accused 1 and 2 and others boarded the vehicle and they headed for Mutune. Accused 1 and 2 and others alighted at Mutune where they claimed to be going to repair a vehicle that had broken down. He said that when they stopped the vehicle before accused 1 boarded the vehicle, the lights from the vehicle were on and he was able to see the two accused. He said accused 1, 2, two strangers and Musyoki boarded the vehicle and that accused 2 said the father's vehicle was broken down but he knew that accused 2's father had never owned a car. PW5 said that accused 2 said they were going to look for 'Kamusu' but he did not know who Kamusu was. He was picked up as a suspect in the murder of the deceased but was later released after he recorded a statement. He said accused 2 had told police in his hearing that he had a spade. He had known both accused 1 and 2 for a long time.

Bakari Omar Bakari (PW6), testified that he was in the house at about 9.00 p.m. on that day when he heard a knock on the door. He then heard accused 2, whom he knew as Kuthamba, call out that Judy Peterson should be told that they had arrested one of the people who disturb them but that others had ran away. Judy (PW3) told him to press the security alarm. On coming out of the house, he found a person lying about 100 metres from that house. He did not know what the person had done but accused 1 and 2

who were there said he was a thief. PW6 had known Kuthemba (accused 2) for about 4-5 months as both worked for PW3, whereby accused 2 worked in the bar and PW6 dug a well. He found the two accused near the deceased's body but did not see them touch it.

PW7, Munyithya Kitonga, testified that he was at Kalundu Market on 1/6/2000 at 9.00 a.m. when he saw Kuthemba, Mutisya and the deceased pushing each other at a bar. He knew the deceased as 'Kamusu' for over 5 years and that he worked as a mechanic. He later learnt on 5/6/00 that Kamusu had been burnt. He was arrested and only released after recording his statement.

Acting Inspector Dedan Kamotho (PW8,) was instructed to visit a scene and on 6/6/2000, he visited Mutune Market where he found burnt out tyre debris and recorded statements from people he found at the scene. On 7/6/00 in company of Sergeant Kaaria, and others he went to the houses of accused 1 and 2 and arrested them and on the same day both accused led him to a kiosk near the scene where they recovered a broken spade. The spade said to have been used in the murder was not produced in evidence as it was allegedly produced in earlier proceedings.

Benedict Ithuli Wambua (PW9), recalled that he was repairing his motorcycle at Kalundu market when two people came to quarrel accused 1 that he had burnt their kiosks and PW9 intervened.

PW 10, Mulonzya Kyano, is the uncle of the deceased. He heard of Muinde's death and went to Mutune to confirm. He was able to recognize the body from the hands and feet. Deceased had rickets on the legs. He identified the body of Muinde to the Doctor who performed the postmortem.

Accused 1 in his unsworn defence said that he is a welder. On 4/6/00 he went to church at 8.00 a.m., left at 12.30 p.m., went to Mutune to open his shop and charged batteries till 6.45 p.m when he closed down and was in his bed at 8.00 p.m when he heard shouts from the shopping centre. He went to find out what it was all about. He found many people surrounding one person who had been lit. He was there for about 20 minutes and went back home. He went to work on 5th and the District Commissioner, Kitui held a 'Baraza' (public meeting) over the person who had been burnt and people dispersed. On 7th at 4.30 a.m., he was woken up by police and the Assistant Chief and was taken to the police station. He was tortured along with other people who had been arrested to accept having killed the deceased but he denied.

Accused 2 also made an unsworn statement in his defence. On 4/6/00 he worked in the garden the whole day. He went back home at 5.30 a.m then went to visit his girlfriend where he stayed till 9.00 p.m. He arrived home at 10.30 p.m, slept and on 5th; he woke up, tied up cows and on his way home, met elders who were going to attend a District Commissioner's meeting at Mutune. He went to Mutune at 11.00 a.m and they were addressed on how suspects should be taken to police station. On 6th he worked in the garden the whole day. He never left home. At 9.00 p.m, the Assistant Chief woke him up and told him that he was required at the police station where he went and found some of the witnesses who testified in this case had been arrested. He was informed that he murdered but he denied. He said that he was framed because he worked for PW3 whose club got burnt and she suspected accused 1 and 2 to have done it.

No doubt this case turns purely on circumstantial evidence. There is no direct evidence linking accused 1 and 2 with the deceased's murder. The question is whether what is on record is sufficient evidence to base a conviction upon?

The evidence on record is clear. The offence was committed at Mutune at night. The question of identification of those involved is therefore very crucial.

The two accused persons are not strangers to the prosecution witnesses PW2, PW3, PW4 and PW6. PW2 knew accused 1 Mutisya very well, even his home. PW2 also knew accused 2 as Kuthamba a name which all the 5 witnesses said they knew accused 2 by. Both accused had been transported in the vehicle in which PW2 worked as a conductor earlier in the day on 4/6/00. PW3 also knew the accused persons very well. She knew accused 1 as a neighbour since childhood and knew accused 2 whom she knew as

Kuthamba. He had even worked for her in her bar. PW5 also knew the accused persons very well. He had been with them earlier in the day when they boarded the vehicle in which he was with PW2. He knew accused 2 as Kuthamba. He even knew the accused 2's father. PW 6 also knew both accused. He knew accused 2 as Kuthamba and had worked with him for PW3. PW2 and PW5 had dropped off the two accused at Mutune at about 8.00 p.m whereas PW3, PW4 and PW6 were present at one time when the deceased had been 'arrested' or confined at Mutune outside PW3's business premises for allegedly being a thief. PW3 and PW6 did not only see the two accused but they also conversed with them over what was happening and the two accused alleging that the deceased was a thief who had been arrested after attempting to break into PW3's shop. PW2, PW3, PW4, PW5, PW6 and PW7 all testified to there having been electric lights at the scene of the murder which emanated from PW3's business premises. Though this was night, the court is satisfied that the two accused were ably identified and recognized as having been at the scene at Mutune where the deceased was burnt. They have been identified by people who knew them very well and the testimony of the witnesses puts them at the scene of crime. The evidence by the prosecution witnesses totally displace the alibis of the accused 2 that they were not at the scene on that day at all or accused 1's alibi that he was at his place of work the whole day and went to Mutune for only a few minutes to witness what was going on. Apart from identification, by use of the electric lights, both accused actually conversed with some of the witnesses. I do find and hold that the two accused were present at Mutune at the scene where the deceased met his death.

Were the two accused involved in the murder of the deceased? As earlier pointed out, nobody saw either of the two accused set the deceased ablaze. By the time PW3 came to the scene, the deceased had been beaten and was set ablaze when she went back to the house. In the case of **DAVID MERITA GICHUHI** versus **REPUBLIC** Court of Appeal 138/03 at page 6, the Court of Appeal held as follows:

“Before a court can base a conviction exclusively on circumstantial evidence, it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

PW1 was hired along with deceased to go and repair a vehicle allegedly broken down at Mutune. PW2 and PW5 have confirmed that it is accused 1 and accused 2 who alighted at Mutune with two strangers who were allegedly going to repair accused 2 father's vehicle though PW5 denied knowing that accused 2's father owned any vehicle. PW5 saw one of the strangers with spanners. Later that night PW3, PW4 and PW6, saw accused 1 and accused 2 claim to have arrested thieves. PW3 said accused 2 insisted that thieves must be burnt. PW3 also saw accused 2 get hold of the deceased's hand and break it. PW3 also testified to accused 1's mother coming and asking accused 1 if the deceased was the person they had disagreed with earlier which made PW3 get suspicious that the deceased was not a thief and in any event, PW3's evidence that accused 1's mother asked about the person accused 1 quarreled with is corroborated by the evidence of PW7 and PW9 who saw accused 1 and accused 2 on one hand and one 'Kamusu' quarrel on 1/6/00. Infact PW2 and PW5 said that accused 1 and accused 2 told them they were going to look for one 'Kamusu' who had beaten accused 1 on another day. 'Kamusu' turned out to be the other name of the deceased. PW7 knew the deceased by name of 'Kamusu'. The accused persons acted maliciously in hiring the deceased to go to Mutune to repair a vehicle where there was no vehicle to repair. They then attacked PW1 and the deceased on reaching there and alleged they were thieves. Even if both accused never lit the fire that burnt the deceased they had a common intention of doing grievous harm to the deceased and they set it in motion when they hired him from Kalundu to Mutune and invited the masses to treat him as a thief when they knew he was not one. Malice flows from the accused persons actions and it does not matter who lit the first match. They hatched a plan to eliminate the deceased after an alleged disagreement some days earlier and it was executed in a most crude and cruel manner. PW3 also saw accused 2 cause grievous harm to the deceased by breaking his hand. All these things taken cumulatively form a chain that points at none else but the two accused as the offenders. Accused 2 tried to raise the defence that he has been framed by PW3 for allegedly being involved in the burning of her club but that came as an afterthought. The accused persons' defences are bare denials and no such grudge had been raised earlier. The evidence of the prosecution witnesses put both accused squarely at the scene of the murder and it was upon them to only give a reasonable explanation which they have not done. No

postmortem report was produced in evidence because the Doctor who performed postmortem was never traced. However, there is ample evidence before the court that the deceased was burnt to death at Mutune. Accused 1 claims to have found when the deceased was already lit. Even accused 2 claims to have heard of the death on the next day. The death of deceased is not in issue and the lack of postmortem report does not in anyway weaken the prosecution case. The prosecution evidence is cogent and uncontroverted and this court is satisfied beyond any doubt that the two accused committed the murder. They are found guilty of the offence under Section 203 as read with Section 204 of the Penal Code and convicted accordingly.

R.V. WENDOH

JUDGE

Read and delivered at Machakos this 8th day of December, 2006

In presence of

R.V. WENDOH

JUDGE