



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

**AT NAIROBI  
CRIMINAL DIVISION  
CRIMINAL CASE 259 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILSON GACHUI MURIUKI.....ACCUSED**

**JUDGMENT**

These five accused jointly with others not before the court are charged with murdering five young people at Githima Village, Munyu in Thika District. At the outset I can say that the prosecution has proved that the deaths of five young men did occur as per post mortem reports produced by Dr. Jane Wasike (PW.6).

The death of deceased Willis Midamba Okal was caused by fire exposure with no injuries, (deceased in count 1), that of Julius Nduati was caused by multiple injuries including amputated legs, multiple injuries and fire exposure (deceased in count 2), that of Samuel Maina Githua was due to multiple injuries due to blunt object and fire exposure (deceased in count 3), that of Abraham Mburu was due to multiple injuries (caused by heat fractures) with fire exposure (deceased in count 4) and lastly that of Musyimi Makokha Juma was caused due to multiple injuries with fire exposure. Although no witness has been called to state that he/she identified the body of Abraham Mburu, I shall rely on the post mortem report (Exhibit 2a) to find that his body was found charred along with other four bodies. I also get support from the photographs taken by the scene of crime officer and produced in evidence (Exhibit 6).

PW.1 Irene Njeri Wamuyu, PW.2 Patrick Joma, PW.3 Jane Okar and PW.10 Agnes Wanjeri Githua are parents of deceaseds in count No.1, count No.5, count No.2 and count No.3, respectively. They all asserted that the deceased persons were school going children and were out of the school at the material day, i.e. on 14th July, 2000. They all denied that the deceaseds were involved in criminal activities in the area. I do not think I need to go into their individual evidence as the same did not shed any light on what the deceased had gone to or for what purpose at the material time. The reasons given by all of them were found not to be true in view of the evidence of PW.5 James Nzioka who also was a student and accompanied the deceased persons in a rabbit hunting spree with eight dogs picked from phase IV Makongeni. It is also sufficiently on the record that the deceaseds were residents of Makongeni village but their bodies were found at Githima village in Munyu.

The distance between the two villages varied as per evidences of all the witnesses which ranged from 2 km to 12 km.

How and why those deceased persons reached to the scene is depicted by PW.5. According to him, he was given leave from the school upto 10.30 a.m. because his mother was sick and he was required to buy medicine for her. He was given permission in early morning and came back at home and went to buy medicine for his mother. On his way back he met the deceased persons who were his friends, and asked

him to join in the hunting of rabbits. They picked dogs from phase IV Makongeni.

The dogs were very fast for them and entered a home which did not have a fence but had a bush. The dogs were surrounding a rabbit trapped in a hole in that bush. They went there to pick the rabbit but at the time someone from that home came out and started shouting **'thieves, thieves!'** He was followed by a woman who joined him in shouting.

He warned his friends to run as there was danger but they did not heed his advice.

He however left the place and reached the school at 10.35 a.m. According to him they left Makongeni at about 8 a.m. He left the scene at 9.05 and reached the school at 10.35 a.m. He also stated that it took them 30 minutes to reach the scene from Makongeni. But it took him about one and a half hours to reach back to the school, thrice the time to come to the scene. Obviously, something is amiss and definitely this witness has not shed much light on the distance. He of course denied that they had broken into the home and had stolen radio and bicycle from the home. At this juncture it may be appropriate to state that PW.6 Anthony Njage has testified that at about 10.30 a.m. on his way from Thika to Munyu a passenger with a bicycle informed him that some thieves were arrested nearby.

This may be right time to consider the evidence of two material witnesses of the prosecution case who are PW.4 Martin Ngugi and W.6 Anthony Njage.

PW.4 was the conductor of a matatu driven by PW.6 on the material date. He stated that he was at Githima on 14th July 2000 and heard shouts coming from upper side (sic). He went there and found some people being beaten. They were between 16 to 20 years of age and there were about 100 people who had gathered around. They were saying that the persons beaten were thieves. Out of the members of this big crowd, he recognized Gachuhi, (1st Accused), Njeri Kariba (2nd Accused), Baba Boi (5th Accused), Waithaka (3rd Accused) and one Paul. In cross-examination he first stated he did not see Paul at the scene and then stated that he did and he was beating the deceaseds with a stick. In any event, this person Paul is not before the court. He specifically stated that he did not see 4th Accused at the scene.

He further stated that when he went near those persons being beaten he did not find anything on them but agreed that he heard that Gachuhi's home was broken into and that those people were stealing. He also stated that 1st Accused, 2nd and 3rd accused persons had sticks on them while 5th Accused had a stone. He placed those young persons in his vehicle but he stated that 1st Accused removed them. He left the scene as he sensed some danger. He however, agreed that he did not report to the Police thereafter. He also stated that the distance from the scene to Makongeni was 12 km.

As against this evidence PW.6 who was the driver and with PW.4 testified that on the material date at about 10.30 a.m. he left Thika to go to Munyu. The young man with a bicycle told him that some thieves were arrested nearby. He did not say that he heard shouts as did P.W. 4. Even contrary to what PW.4 had stated that he saw people beating some persons this witness stated that when he went to the place he saw five young men seated and that when he was told that they were thieves he asked the five and they told him the story which PW.5 had testified before the court. They also showed him six dogs nearby. PW.4 did not mention either of this story or about dogs. He tried to talk to people around who were about 10 at the time and denied that they were about 100 as PW.4 has informed the court. He said he knew only 1st Accused in the crowd by name but tried to identify other two from the dock. It was 2nd Accused being identified as a lady and 3rd Accused identified simply as mzee. He specifically stated that he did not see other two Accused persons before the court. Unlike PW.4 he also testified that 2nd Accused had a panga on her hand and not a stick.

He denied having relations with two deceased namely Mburu and Githua and also denied suggestions that he was the leader of that gang who were robbing people.

He also stated that when he placed those five in his matatu 1st Accused with others not before the court barricaded his vehicle with stones and started beating the five.

He then left because he was scared that they would burn his vehicle. PW.4 has stated that he did not see anyone with paraffin or matches.

I would also note that there were serious allegations made against this witness specifically by 1st Accused who alleged that he had grudge against him because he had been named as a conspirator of spate of robberies in Munyu, which he in any way agreed is same as Githima.

Once more contrary to PW.4 agreeing that there had been recent incidents of breaking of houses in the area, this witness denied of such incidences. Similarly PW.7, IP. Joseph Muli after denying that there had been reports of breaking in agreed that one Ann mentioned to him about a theft on 13th July, 2000.

Lastly PW.6 told the court that after leaving the scene, he went and reported the incident at Munyu Patrol base. PW.7 on the other hand who was attached to Thika Police Station told the court that he received information on 17th July, 2000. I may consider the date as an oversight, but the fact of the report to Munyu Police Station is not mentioned by any one even PW.4 who, on the contrary, denied having made a report although it is on record that he was with PW.6.

PW.7 on information went to the scene and found five bodies smouldering at around 4 p.m. and learnt that it started about 11.30 a.m. He stated further that as per witnesses he was told that the deceased persons were first beaten with sticks, cut with pangas and after they died they were put on fire. It is apparent from the evidence of the other witnesses that none of them has testified this version to the court. On the contrary there is evidence that there was no sign of any fire activities when PW.4 and PW.6 were at the place. However, I also notice that eventually the charred bodies of the deceased persons were found but no evidence as to when, how and by whom they were cut and burnt. The evidence of this witness, stating that PW.4 and PW.6 saw the Accused persons cutting the deceased persons, has not been corroborated by those very witnesses.

PW.8 Isaac Munga brother to the 1st Accused testified that on 13th July, 2000 he found items stolen from their home when he came at 4 p.m. Then he narrated what occurred on 14th July, 2000 when he was at home being chased away from the school for non-payment of school fees. He was in the kitchen when he saw five persons enter their home and he managed to escape and to shout for help. People responded and around 200 people gathered and chased thieves who were caught. He mentioned the enigmatic person on a bicycle who, also joined in shouts. Anyway, there is no evidence before the court that a bicycle was stolen or that there were more than five persons who entered the house. After the thieves were caught he left for Thika to see his father over the school fees. He came back at 6 p.m. He also agreed that he was living with the 1st Accused and that 1st Accused informed him on the night of 13th July, 2000 that he was going to Nairobi the next day. Thus an alibi which is raised by the 1st Accused is in a way corroborated by a prosecution witness.

PW.11, PC. Patrick Ndila stated that on 14th July, 2000 while he was on duty at Munyu Patrol Base a cyclist came and reported that some suspects were surrounded by members of public and were about to be lynched. This witness also does not corroborate or mention that PW.6 ever reported the matter. He with other officers visited the scene where he found five bodies burning with no one around.

This is the case of Prosecution and all the accused persons in their sworn testimonies raised defence of alibi.

**At the end of the prosecution case, I can safely find that there is no evidence led against the 4th Accused from any of the witnesses and without much to add, I enter a finding of not guilty against him and acquit him of the charge leveled against him. I further direct that he be set at liberty unless otherwise held as per law.**

The case against other Accused really rests on the evidence of PW.4 and PW.6. I have already detailed their respective testimonies as well as stark discrepancies in their evidence. Their evidence differed from the start on the fact of their reasons to visit the scene. PW.4 said it was due to shouts and PW.6 stated it was as a result of a report from a young cyclist passenger. He did not even state what made him turn his

matatu only because of that report. This becomes a bit important or relevant due to suggestions by Defence about his connections with some of the deceased persons as well as with criminal activities around the area. The reasons for their departure and point at which they saw the beatings of the deceased persons are also at variance.

Apart from 1st Accused, PW.6 identified 2nd and 3rd Accused from the dock and referred to 2nd Accused as a lady with a panga and 3rd Accused as mzee, which is an apparent fact. While PW.4 identified 2nd Accused, with a stick. He also identified the 3rd and 5th Accused amongst a crowd of 100 people, with one Paul, who is not before the court.

It is trite law that the identification from the dock is not the best way of basing the case of identification. PW.6 only knew the 1st accused amongst 10 people he saw and then identifies the other two from the dock without describing them or pointing out to the authorities at the earliest possible opportunity. He has also not given evidence that he told the police that he was able to identify others. Thus his evidence on identity becomes very limp and cannot be accepted to base the case without a proof of identification parade on the record.

Due to variances in material aspects of their respective testimonies, the identification on the scene amongst 100 persons by PW.4 also cannot be accepted without blemish. He is the sole identifying witness in respect of 2nd, 3rd and 5th Accused persons and I shall hesitate to accept his evidence as safe premises to place guilt on those Accused persons.

**I shall thus have no options but to find that the prosecution has failed to prove the charge against 2nd, 3rd and 5th Accused persons beyond reasonable doubt.**

**I also therefore enter findings of not guilty against 2nd, 3rd and 5th Accused and direct them to be released unless held otherwise as per law.**

That leaves me with the case against the 1st Accused. From the evidence as a whole there lurks a suspicion that the relation between 1st Accused and PW.6 was not at its best. The fact that house of 1st Accused was broken into previous day and report to that effect was made was tried to be concealed and denied by PW.6 as well as by I.P Muli (P.W.7).

Furthermore his defence of alibi has been mentioned and accepted by a prosecution witness (PW.8) although he happens to be his brother. I note that both PW.4 and PW.6 have placed him at the scene with a stick. He is a Civil Servant at Munyu and it would have been very easy for the Prosecution to investigate his whereabouts from his office. Mere denial by Inspector Muli that, he did not know that he was a Public Servant on the contrary goes against the case of the prosecution and speaks volumes as to the quality and efficiency of investigation in a serious case like this one.

Considering all the facets of the evidence led by the Prosecution and that led in defence of 1st Accused, I cannot sincerely find that no doubt of its probability has arisen in the mind of the court.

I am a very sad person to observe the aforesaid as the case involves deaths of five young people of our society. What I would have expected from the police was a thorough and intensive investigations in the matter so that evidence as required under law is brought before the court for it to dispense justice to both sides. It has become apparent that this case has been investigated and prosecuted half heartedly and without any diligence and I am not happy to comment on that deficiency, especially in the present case.

**However, I have to bow down to the law of the land and has to enter a finding, which I hereby do, that even against 1st Accused the Prosecution has failed to prove the charge as required under the law. Hence, I shall acquit him and direct that he be released unless otherwise held as per law.**

Unfortunately, I am unable to agree with the Assessors as per law and for the reasons given in the judgment.

**Dated and Signed at Nairobi, this 15th June, 2005.**

**K.H. RAWAL,**

**JUDGE**

**15.6.05**