



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 11 OF 2000**

REPUBLIC ..... PROSECUTOR

- VERSUS -

MUTSONGA KATSUNGU ..... ACCUSED

**RULING**

The accused has been charged with murder contrary to Section 203 as read with 204 of the Penal Code. The Prosecution called a total of 6 witnesses. The evidence of PW1 was that he was woken up on the night of 19.1.97 by his wife who told him there were screams of someone calling his name. He and his son PW2, went where the screams were coming from, only to find group of people beating up the deceased who was naked. On enquiring why they were beating her, they answered it was because she was a witch. He recognized three people, Mutsonga Katzungu (the accused), Emmanuel Patrick and Harrison Changawa.

PW2, EMMANUEL MBAGAH testified that while sleeping on the material night he too was woken up by his wife who said there were people making noise outside. He went to check and found a group of about 20 people gathered about 20ft. away from his house. As he walked towards them, he was obstructed by one HARRISON CHANGAWA who asked him why he was interfering as they were killing a witch. He then asked Harrison why they were carrying out the act in his compound and slapped him. He moved forward and heard people shouting kill, kill but he didn't recognize any of the voices but he saw and recognized Emmanuel Patrick who was hitting the deceased with a stick. He asked him to stop hitting the deceased, but Emmanuel Patrick told him let him finish her. It was at this point that PW2, starting calling his father's name who is PW1, and together they rescued and carried the deceased to the roadside to await help. PW2 says the accused at this point ran towards them in a rage wanting to hit the deceased but was restrained. At the roadside PW2, and Joseph left PW1 and Emmanuel Patrick guarding the deceased while they went to report to the sub-chief and the police. On returning they only found the still burning body of the deceased. Later they were informed by PW1, that a crowd of people gathered and threatened him for protecting a witch and he had to run for his dear life. He could not tell who had set the deceased on fire and did not give any names of the people who were in the crowd.

In cross examination, the PW1, admitted it was dark and he was drunk. PW2, too admitted PW1 was drunk. However non of the witnesses described the scene in terms of the light if any that was available. PW1, says it was dark but neither he nor PW2, say how they were able to identify the persons they named as having been at the scene.

PW3, JOSEPH KAINGU MUKAMA confirmed he had been woken up by PW2 on the night of 19.1.97 at around 11.00 p.m. with a message from PW1, that the deceased had been assaulted. After visiting the scene, he and PW2, left PW1 and Emmanuel Patrick and others not named guarding the deceased while they reported to the sub-chief. On returning they found a still smoldering body of the

deceased and no one around.

PW4, NZINGO JEFWA heard noises outside on the night of 19.1.97 and that people were shouting “kill! Kill!” He went outside and found a group of people beating a lady lying on ground with her hands tied with a rope. He recognized her as one Kadzo. He then went back to his house and later heard the noise intensify and on going out the second time, he saw a fire burning but he didn’t go nearby.

PW5, BAYA MWANYALE NDUNYA is the deceased son and he was on his way home on the morning of the incidence, only to find the deceased’s body burning by the road side.

The last prosecution witness was the investigating officer, PW6 Inspector AINEAH GEORGE AMBUNDO. He was instructed to proceed to the scene of the crime by the O.C.S. Kijipwa police station on the morning of the crime and in the company of two other police officers they arrived at the scene only to find the deceased body still smoldering. He said the body had been murdered and burnt and yet none of the witnesses who saw and even carried the deceased before she was burnt testified that she was dead before the burning. Infact none testified as to the degree and nature of injuries and/or the deceased condition before she was set on fire.

The witness also produced a post mortem report by Dr. Njiiri in which he described the body as completely burnt beyond recognition leaving only bottom part of skull ribs, pelvis and lower part of body. He was not able to access the internal state of the body.

In his submission, defence Counsel was emphatic that the evidence adduced by the prosecution failed to meet the standard to warrant the accused to be put on his defence.

The accused has only been mentioned by PW1, who says he was among the three people who were assaulting the deceased while PW2 says he had followed them as they carried the deceased to the road side for help and wanted to beat her but was restrained. However it is to be noted that he was not the only person said to have been beating her and when she was carried to the roadside she was alive. There is no evidence to say she died as a result of the injuries inflicted and at the time she was set ablaze she was dead. The charge facing the accused is clear and the particulars read as follows:-

*“MUTSONGA KATSUNGU WA KATSONGA:*

*On the 19 th day o f January, 1997 at Junju Location Bomani area in Kilifi District of the Coast Province jointly with others not before the court murdered Kadzo Ndurya Mwanyale”*

From the evidence on record, I am inclined to find that it falls short of pointing to the accused as the culprit who directly who indirectly caused the death of the deceased. He may however have participated in the initial stages of the assault but the evidence falls short of drawing a dividing line as to whether the deceased would have survived had she not been set on fire. In the circumstances the prosecution has failed to put up a case to warrant his being on his defence and the case against him is hereby dismissed and accused acquitted.

Dated and Delivered at Mombasa this 19th day of March, 2003.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**