



**Republic v Njulu & 4 others (Criminal Case 5 of 2018)
[2024] KEHC 6902 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 5 OF 2018
GMA DULU, J
APRIL 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

NJULU MWAKIO NJULU 1ST ACCUSED

ANOLD MWANGACHE 2ND ACCUSED

GIDEON MENZA 3RD ACCUSED

DELIUS MCHARO 4TH ACCUSED

BERNARD ROVAL MWABILI MAIGHACHO 5TH ACCUSED

JUDGMENT

1. The five accused persons herein stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of offence are that on 11th July 2018 at Kese Shopping Centre of Werugha Sub Location within Wundanyi Sub County of Taita Taveta County jointly with others not before the court murdered Delilah Wawuda Jumwa.
3. Each of the five (5) accused persons has denied the charge.
4. In proving their case, the prosecution called seven (7) witnesses.
5. PW1 was Mwandawiro Mghanga a former Member of Parliament for Wundanyi whose evidence was that on 11th July 2018 between 5p.m and 6p.m, while at his house he heard screams outside. On proceeding there he found Delilah near a neighbour's house being assaulted on allegations of witchcraft.



6. He tried to intervene but in vain and was even threatened.
7. According to him Delilah was surrounded by many people and assaulted on allegations of bewitching and making Njulu Mwakio (1st accused) to be dumb the said Njulu was also present and surrounded by people.
8. At the scene, he also saw Mwangache (2nd accused), and Menza (3rd accused), and Mcharo (4th accused) and Bernard (5th accused). According to him the crowd was telling Delilah to cure Njulu Mwakio whom she had bewitched.
9. At that time, Delilah was half naked and shaking and his attempt to intervene did not succeed and was chased away thus, he phoned the OCS Wundanyi Police Station and went back into his house which was nearby.
10. After a while Delilah ran to his house and they allowed her in and noted that she had cuts and burnt wounds. When the police arrived, they took Delilah to hospital at Wundanyi, but was referred to Moi Referral Hospital Voi and then referred to Coast Province General Hospital and admitted in ICU.
11. He described the 1st accused as standing near Delilah. The 2nd accused beat Delilah with a stick. 3rd accused beat Delilah with a stick. 4th accused beat Delilah with a stick and told the witness that he was not an effective former MP. The 5th accused beat the deceased with a stick and ordered her to treat or cure the 1st accused from the alleged dumbness.
12. In cross-examination, he stated that the deceased was his aunt, and that the incident occurred at 5p.m. He said that he initially sent his driver Jackson to intervene, but later came out in person. He admitted that he did not mention 1st and 2nd accused persons in his statement. He also agreed that Bernard was not mentioned in the statement, but maintained that 5th accused was at the scene.
13. PW2 was Hilton Mnyambo Mbela whose evidence was that he was a businessman and brother in law of Delilah the deceased. That on 11th July 2018 at 6p.m. he heard screams and on going to the scene saw the five (5) accused persons throwing stones at the deceased accusing her of being a witch.
14. It was his evidence that they poured petrol on her and set her on fire using a gas lighter and that through he attempted to stop them, they told him to go away.
15. It was his evidence that one of the people around then poured water on the deceased and removed her burning clothes and deceased then ran to PW1's house. He stated that he was a nephew of 2nd and 3rd accused and an Uncle of 4th and 5th accused. According to him some of those who threw stones were not arrested.
16. In cross-examination he said that the time was during broad daylight, and that he had heard long before that the deceased was alleged to practice witchcraft. He also stated that one Tupa Tupa who threw stones was not arrested. He stated that the person who poured water on deceased was a Luo and that 5th accused came to the scene later and threw bricks at the deceased. He agreed that he sold petrol, but maintained that the man who poured petrol was not arrested, but said the 5th accused lit the fire using a lighter.
17. PW3 was Loice Mchele Mwandoe whose evidence was that on 11th July 2018 at 6p.m, she was in house of her brother in law Mwandawiro Mghanga (PW1) when she heard noise and a knock at the door and when she opened saw an injured naked woman.



18. She then covered her with a bed sheet. According to her the injured woman said that she had been beaten by Gideon, Arnold, Delius and Mcharo. Police later arrived and took away the woman Delilah who later died.
19. In cross-examination, she insisted that incident occurred about 6p.m and that it was only slightly dark. She stated that PW1 initially went out of the house but came back, and that it appeared that someone had removed the clothes of the naked woman. She insisted that deceased said that Gideon, Arnold, Delius Mcharo and Igacho attacked her. She maintained that 5th accused was a boda boda rider.
20. PW4 was PC Ombati Anyega Douglas of DCI Nairobi who in 2018 was at DCI Wundanyi. It was his evidence that on 19th July 2018 with CI Said Hiribae met Mwandawiro Mghanga (PW1) at their office and recorded a witness statement and commenced investigations of a case of murder.
21. He testified that with information received from the area Chief and other informers, they interrogated the accused person among others and then charged the accused persons in court for murder.
22. It was his evidence that six (6) people were involved in the killing who are Bernard, Gideon, Titus, Delius, Kalama Mwawasi and Arnold.
23. He testified that the deceased person had made an earlier report to the police station that Titus (1st accused), accused her of witchcraft and that Titus was taken to court but the complaint was later withdrawn. He testified that Delilah was assaulted 3 weeks after that report, and that she died one (1) week after the assault.
24. He testified also that he visited the scene one (1) week after the incident but it was already disturbed. He maintained that PW1 and PW3 informed him that the deceased mentioned Arnold and Gideon as having been involved in the assault.
25. In cross-examination, he stated that he took no photographs and that he was given names of suspects by informers. He stated that PW1 pretended at the scene to be dumb. He admitted that he did not mention 1st accused in his statement. He stated that he arrested 5th accused later at a shop because he removed petrol from a motor bike and poured the same on the deceased. He stated that the person who lit the fire was not arrested.
26. PW5 was Cpl. Gladys Kombo of Wundanyi Police Station whose evidence was that she knew the deceased before as a person who on 27th June 2018 reported to the police station that Titus Mwakio Njulu had called her a witch.
27. The report was recorded in the Occurrence Book and a charge sheet drawn and Titus arrested, but on reaching the court Titus asked to talk to Delilah and on admission of his mistake, the case was withdrawn by the OCS. She learnt later after three (3) months that the deceased had died.
28. In cross-examination, she maintained that Delilah withdrew the criminal complaint.
29. PW2 was recalled and asked questions by the court and maintained that the 4th accused informed him that Delilah was a witch.
30. PW6 was Lawrence Odhiambo a driver and mechanic of Kесе Star School whose evidence was that on 11th July 2018 at 6p.m, he dropped school children home and on his way to the market, saw a crowd of more than 50 people gathered and witnessed a woman being pelted with stones or bricks.
31. He noticed the woman sitting on the ground trying to use her mobile phone to call someone, and a person from the crowd poured petrol on her and another lit her clothes with a cigarette lighter.



32. Then the woman went to a nearby tap, took a bucket and poured water on herself but someone snatched the bucket and this witness then intervened and tore the woman's burning clothes, and the woman then ran into a nearby house of PW1, before the police arrived. It was his evidence that some of those in the crowd complained that he was from another tribe yet he was helping the woman. He could not identify any of the people who assaulted, poured petrol, and set the woman on fire.
33. In cross-examination, he admitted that 4th accused was his workmate at Kесе Star School. He stated that he initially saw PW1 talking to the crowd, and also stated that he did not see 4th accused in that crowd of between 50 – 100 people as it was getting dark. He was also not assaulted when he assisted the woman.
34. PW7 was Dr. Gabriel Mngola who testified to the post mortem report which was filled by Dr. Faiza whom he knew. It was his evidence that the body was of a female African aged 59 years.
35. There were bilateral burns on both lower limbs, sharp wound frontal lobe (forehead), burns on chest, face and upper limbs. Internal organs were normal. The cause of death was inhalation burns with electrolyte imbalance secondary to assault. He produced the signed post mortem report as an exhibit.
36. In cross-examination, he stated that the body was identified by Eveline Wawuda and Leonard Zoka Titus. That was the prosecution evidence.
37. When put on their defences, each of the five (5) accused person tendered sworn defence testimony.
38. DW1 Njulu Mwakio Njulu (1st accused) denied killing the deceased. He stated that he did not know the deceased Delilah and was sick at home on the date of alleged incident. He stated that what PW1 Mwandawiro Mghanga stated about him being at the scene was a lie. Also what PW5 Cpl. Gladys Kombo stated about a report to the police on his calling the deceased a witch, was not true. He was cross-examined at length.
39. DW2 Arnold Mwangache (2nd accused) on his part stated that he knew the deceased for long as a business woman.
40. He stated that on the material day he did casual work at Kituri Secondary School then went home. On the way he met a crowd of about 100 or more people. He went to enquire and saw PW1 telling people not to harm the deceased, as she was not a witch. He then left for home only to hear next day that the woman was assaulted and rescued by the police.
41. He testified that if some witnesses said that he assaulted the woman with sticks, that was a lie.
42. He said that after two weeks, he was summoned by the Chief, on arrival at the office arrested by Administration Police, and taken to the cells where he met 3rd and 4th accused. He complained that he was kept in cells for long before being taken to court. He was cross-examined at length.
43. DW3 Gideon Menza Mighulo (3rd accused) on his part stated that on 11th July 2018 he was at his work place where he washed motor cycles and cars upto 6p.m. He denied knowing Delilah or assaulting her. He stated that he was not at the scene when the incident is said to have occurred, and that he was later phoned by the Chief from Werugha.
44. He stated that, if witnesses said that he assaulted Delilah that is not correct, and that PW1 and PW2 misled the court. He stated that he had a disagreement with PW2 and did not know PW3. He was cross-examined at length.
45. DW4 Davis Mcharo Maghanga (4th accused) also denied the offence. He stated that he did not know Delilah and that on 11th July 2018 he did not have a lorry to drive so went to work at his farm. He stated



- that if some witnesses like PW1 said that he was at the scene, it is not true. Also evidence of PW2 was not true. He emphasized that PW6 Lawrence Odhiambo said he did not hear his voice at the scene.
46. He stated also that he has an issue with PW1 who was his Uncle because of title to land. On PW2, he did not know why he implicated him. He was also cross-examined at length.
 47. DW5 Bernard Roval Mwabili Maighacho (5th accused) also denied the charge. He testified that he was a mechanic at Ngulu about 3km from Kese. He stated that on the material day, he left job at 7:30p.m and went home. He only came to know his co-accused persons in custody. He stated that he did not know PW1. He was also cross-examined at length.
 48. At the close of the prosecution and the defence evidence, both the Director of Public Prosecutions and defence counsel Mr. Mosioma and Mrs. Isika filed written submissions, which I have perused and considered.
 49. This is a murder case. All the five (5) accused persons stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. They have each denied the offence.
 50. The burden is on the prosecution to prove the allegations against each of the accused person. This burden is codified under Section 107, 108 and 109 of the Evidence Act (Cap.80).
 51. This being a criminal case, the standard of proof is beyond any reasonable doubt – see Woolmington =Versus= DPP (1935) AC 462 and Sawe =Versus= Republic (2003) eKLR.
 52. The elements of murder are the death of the deceased, whether the death was unlawful, whether there was malice aforethought, and lastly whether the accused persons killed the deceased.
 53. Did the deceased die? The evidence of the prosecution witnesses is clear. The deceased person was assaulted on 11th July 2018 around 5p.m. She was beaten with stones and burnt with her clothes and ran into the house of PW1 Mwandawiro Mghanga naked with only underwear. She was taken by the police to hospital and died a week later at Coast General Hospital and the post mortem doctor PW7 Dr. Gabriel Mngola confirmed that she died of severe burns.
 54. In my view, the prosecution proved beyond reasonable doubt that the deceased died of severe burns and assault.
 55. Was the death unlawful? No lawful reason has been suggested for the way the deceased died. A belief in witchcraft cannot be a lawful reason. In any case there is no evidence on record, of any act that the deceased did or said which could raise any suspicion of practising sorcery. I find that the death of the deceased was unlawful.
 56. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the Penal Code. It is an intention to cause death or do grievous bodily harm. With the injuries that the deceased sustained, and the evidence on how those injuries were inflicted by stoning and burning, in my view the prosecution proved beyond any reasonable doubt that the death was caused with malice aforethought.
 57. I now turn to proof of the involvement of each of the five accused persons in the killing.
 58. The first accused Njulu Mwakio Njulu denied knowing the deceased person. He denied being at the scene. However, the evidence of PW1, PW2 and PW4 put him at the scene pretending to be dumb. In court, he made a long verbal defence statement which shows he is not dumb.
 59. The time was in broad daylight. There was evidence from PW5 Cpl. Gladys Kombo also that the same 1st accused person had on an earlier date alleged that the deceased was a witch and the deceased reported



same to the police and he was almost charged in court, but for forgiveness from the same deceased on his own pleading for forgiveness.

60. In my view, the defence of the 1st accused was an afterthought. He had all reason to pretend to be dumb to incite others to assault the alleged witch. I find that the 1st accused participated in the killing of the deceased person.
61. As for the 2nd, 3rd, 4th and 5th accused persons, they were all mentioned by PW1 and PW2 as participating in the stoning and burning of the deceased. There is no evidence that visibility was poor at that time of the day 5p.m. The incident took a reasonable amount of time before the police arrived. Though 4th accused claims that PW6 Lawrence Odhiambo did not see him at the scene, it is clear from the evidence of that witness that he arrived later, and appeared to be more concerned with helping the assaulted woman (deceased) rather than identifying people in the crowd.
62. All the 2nd, 3rd, 4th and 5th accused were placed by eye witnesses PW1 and PW2 at the scene and were described as active participants with different roles in the stoning and burning of the deceased. The deceased also mentioned their names to PW1 and PW3 as persons who had assaulted her.
63. I appreciate that none of the accused persons were arrested immediately, but with the evidence on record herein, of an incident of mob justice, it is always difficult to arrest someone immediately, especially where the allegation is related to witchcraft or some beliefs of supernatural forces. It took a person of much courage like PW1 Mghanga who could take up the responsibility to make a formal report to the police and mention names, even after being threatened.
64. I find that the prosecution proved beyond any reasonable doubt that each of the five (5) accused persons participated and acted in concert in the assault and burning of the deceased, which resulted in her death. Having participated in the killing, they were the culprits.
65. I thus find each of the five (5) accused persons guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code as charged, and convict the five (5) accused persons herein of murder accordingly.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Sirima for State

Mrs. Isika for 5th accused

Mr. Mosioma for 1st, 2nd, 3rd and 4th accused

All five (5) accused

