



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HIGH COURT CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

GREVASIO MUJUMBE IKAMBA....1ST ACCUSED

JAMES MUTUGI MURITHI.....2ND ACCUSED

J U D G E M E N T

1. **Gerevasio Mujumbe Ikamba and James Mutugi Murithi**, the first (1st) and second (2nd) Accused persons respectively, jointly with others before court are charged with 4 counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the four counts are as follows: -

a. Count 1

The particulars are that, on 1st May, 2017 at Kankaga Village, in Tharaka South Sub-County, within Tharaka Nithi County, the first (1st) and Second (2nd) Accused jointly with others not before court, murdered one Francis Mutiiria Mukanda.

b. Count II

The particulars are that on 1st May, 2017, the first and second Accused herein, jointly with others not before court, at Kankaga Village, Tharaka South Sub-county, Tharaka Nithi County, murdered one **Mwathi Kithinji**.

c. Count III

The particulars are that, on the same day, in the same place, the first Accused and second Accused with others not before court, murdered one **Daniel Muthengi Mutegi**.

d. Count IV

The particulars are that, on the same day, in the same place, the 1st Accused and 2nd Accused jointly with others not before court, murdered one **Joseph Kibara Ikamba**.

2. The Accused persons both denied committing the offence and the prosecution presented a total of 9 (nine) witnesses to prove their case. The prosecution's case mainly hinged on direct evidence.

3. Theresa **Kabere Mutira** (Prosecution Witness 1), a wife to Francis Mutiria (deceased, in respect to the first count) testified and recalled the events of 1st May, 2017. She told this court that, they were invited for meeting at the local church grounds namely, **Mbacaca Catholic Church**. The invite was oral and it was made to the area residents on 30th April, 2017, by the first (1st) Accused who was sub-area manager. The witness told this court that she woke up early and attended to her morning chores as her late husband (deceased in the Count) went ahead of her for the meeting. She testified that she shortly thereafter, followed her husband towards the venue of the meeting. She added that, just before she reached the venue after crossing a river at Kathorombu, she heard noises and whistles emanating from the church grounds which kind of frightened her but nevertheless, she walked up to the venue and found people seated with women on one side, while men seated on another side. The witness testified that, she arrived at the venue as the noises were subsiding and she heard Mutungi (2nd Accused herein) asking if all the expected people had arrived and that one person pointed out that one Mwathi Kithinji (deceased in respect to Count 2) and

his wife had not arrived. The witness stated that, at that point Mujumbe (1st Accused) directed that he ought to be brought and asked for volunteers to accompany him as they went to fetch the said Mwathi Kithenji. She testified that the second Accused, one James Mutugi Muriithi and few others went with the 1st Accused and twenty minutes later, they arrived at the venue dragging the said Mwathi Kithenji to the meeting venue after beating him using canes in the process. She further stated that the deceased Mwathi Kithenji was pushed and told to sit down.

4. The witness further testified that the group led by the first Accused herein, one Mauke after ordering the deceased to sit down, went to a nearby shop and came back with an exercise book and a pen. She stated that the first (1st) Accused then went ahead to tear the exercise book into small pieces and gave all the people at the meeting one piece of a small paper and directed them to write down people they suspected practised witchcraft.

5. The crowd then were directed to write down the names of suspected sorcerers, fold the paper and put them in a carton which was taken round by the 1st Accused. The witness added that, the first Accused came with the carton box and that, after he collected the folded papers, he then removed the folded paper one by one and read over the names of suspects whose names had been written down. The witness testified that names of six people featured prominently and that two of the suspected "sorcerers" were not around while four of them were present. She gave the names as follows: -

- i. Francis Mutiria (1st deceased in respect to 1st count)
- ii. Muthengi Mutegi (3rd deceased in respect to 3rd count)
- iii. Mwathi Kithinji (2nd deceased in respect to 2nd count)
- iv. Kibaara Ikamba (deceased in respect to 4th count)
- v. Mwithi Rukirwa and
- vi. Kithome Kanampiu.

6. The witness told this court that after the four "suspected sorcerers" were called in front, the first Accused tied them using a sisal rope which he had brought to the meeting and that he tied up the "suspects" in pairs. She testified that the first Accused then stated that the four "suspects" would be escorted to Ciakariga Police Station. She added that, the second Accused ordered the women to go in front, ahead of the "suspects" as the men went behind them. The witness told this court that she went ahead and never suspected anything fishy at first but when they reached a river, she heard a loud bang from behind and when she looked back, she saw a huge fire and people running away to the nearby bushes. When she went back to check what was going on, she found the four "suspects" including her husband had been lynched.

7. Regina Kamene (Prosecution Witness 2) a wife to Muthengi Mutegi (deceased in respect to the 3rd count) testified and revealed that on 29th April, 2017, while she was in a women's meeting, she heard the first Accused call for a meeting slated for 1st of May, 2017 and that the first (1st) Accused notified a fellow Sub Area Manager, one Mr. Mbaka Muketha to attend the meeting. She further stated that, the 1st Accused clarified that the meeting was to be attended by every man and his wife. The witness further testified that, she attended the meeting with her husband Daniel Muthengi Mutegi at Mbacaca Catholic Church grounds, where they found many people having turned up for the meeting. She testified that, the first Accused then asked them (the crowd) to identify sorcerers or witches living in their midst.

8. The witness told this court that the 2nd Accused then distributed pieces of papers to each person at the meeting and they were directed to put down on the pieces of paper the names of any person, one suspected to be a witch. She added that, after they had written down the names, the two Accused persons brought a carton box and collected the pieces of paper before the 1st Accused proceeded to read out the names and that about ten names were called out. She recalled that the following names of suspects who were called out;

- i. Mutegi Muthengi (her husband-deceased in respect to 3rd Count).
- ii. Muthiria Nkuyu (deceased in respect to Count 1)
- iii. Kibaara (deceased in respect to 4th Count).
- iv. Mwathe Kithinji (deceased in respect to 2nd Count).
- v. Ciangara Mbiti and
- vi. Mugambi Mbiti

She could not recall the others but she recalled that, after the ten "suspects" were called in front, they protested that they were innocent. She testified that, when complaints were raised, the 1st Accused unilaterally picked out 4 of them Mutegi, Muthiria, Mwathe Kithinji and Kibaara Ikamba and tied them in two pairs using a sisal rope. She recalled that Kibaara and Mwathe Kithinji were tied together, while Muthiria and Mutegi were tied together with a "suspect" had being tied with his "co-suspect" on the side. She added that, the first and second Accused then directed that the suspected sorcerers were going to be escorted to a Chief's Office in Ciakariga.

9. The witness further testified that they embarked on the journey to Ciakariga and that the “suspects” walked in front and that she walked along closely keeping a keen eye on her husband. She told this court that along the way the “suspects” became anxious and kept asking;

“Kwani tunaenda wapi?”.

She testified that at that stage, one Mugendi Reuben proposed that there was no need to go any further and that the “suspects” should be exterminated. And that point she added, the Accused persons asked some boda boda riders who were going along with them if they had extra petrol and that one Kinoti Ngare was ordered to go to Matero Shopping Centre and buy some fuel and that the said Kinoti Ngare went fast because he was ordered to speed up.

10. She testified that, the boda boda person went and came back quickly with four big bottles with fuel which appeared like paraffin but the witness was not sure about the same. The witness stated that she walked up to her husband and informed him that the situation appeared bad and that her husband handed her his identity card and told her to safely keep it in case he was going to be killed. The witness added that the 2nd Accused then rushed to his house which was nearby along the road they were walking along and came back with old tyres assisted by the 1st Accused, Grevasio Mujumbe Ikamba and others who pushed the old tyres towards where the “suspects” were.

11. The witness further testified that, the two Accused persons herein, then told the people to collect stones as the 2nd Accused took a stick and started beating the four “suspects” as they continued walking towards Ciakariga. She testified that after crossing a river, both the Accused ordered the 4 “suspects” to kneel down and that as they knelt down, the first Accused hit them on their heads using a rungu as the other people descended on them stoning them before fuel was poured on them by Kirimi Reuben and quickly lit a fire which exploded making the “suspects” fall into each other because they had been tied together. She testified that, the “suspects” screamed as the fire engulfed them and burned them alive. The witness is shocked, ran back home to inform her children of what had transpired.

12. Anne Gatiria (Prosecution Witness 3), a mother to Kibaara Ikamba (deceased in respect to 4th Count herein,) testified and told this court that she was also present at Mbacaca Church grounds for a meeting, she stated was convened by both Accused persons. She told this court that, she was present and witnessed the 1st Accused reading out the names of suspected sorcerers who included Kibaara, his son. She further corroborated the evidence of Prosecution Witness 1 and Prosecution Witness 2 that the 1st Accused collected the names of suspects as were jotted down on some pieces of paper that were distributed to the attendees of the meeting.

13. She further testified that, she saw the four “suspected sorcerers” tied up in two pairs by the first accused, assisted by one Kirimi and that after they were tied, they were ordered to walk to Ciakariga escorted by the Accused persons and other people in the meeting. The witness (Prosecution witness 3) stated that she followed the “suspects” from behind.

14. She told this court that, the Accused had at first indicated that the four “suspects” were being escorted to the District Officer at Ciakariga for purposes of “Oathing” ceremony to confirm if they were truly sorcerers but that on the way, the 1st Accused shouted;

“Wachome!” “Wachomwe!”

The witness added that, the crowd agreed by shouting in unison and fuel was immediately brought and old tyres brought before the four “suspects” were told to sit down and tyres put around their necks and fuel poured on them before they were set ablaze. The witness stated that, before that the 2nd Accused hit her with a stone when she tried to receive some money from his son (deceased in respect to fourth count). She stated that she was not able to receive the money from her desperate son (Kibaara) because the second Accused gave her a huge blow on the head so severe that she fell down and almost lost consciousness. She testified that she almost died trying to rescue his son. He testified that Mutungi (2nd Accused) also hit Kibaara (deceased) on the head so hard that Kibaara (deceased) fell unconscious and that he was lynched when he was lying down unconscious together with the other 3 “suspected sorcerers.”

15. Josphat Mutungi Mwati (Prosecution Witness 4) the Area Chief Ciakariga location also testified and told this court that he was called on 1/5/2017 at around 10:30 am by his Assistant Chief, one Gilberto Mageo called him informing that some people had been seized on suspicion of witchcraft.

16. He told this court that, he was unaware of any meeting scheduled on that date. He added that his attempt to call the 1st Accused for more information was unsuccessful. The Area Chief further testified that at around 12:30 pm, a Chief of a neighbouring location, Kamande Location called him and informed him that some people suspected of witchcraft had been lynched. He rushed to the scene in the company of two AP officers and found 4 people tied in 2 pairs lynched and burnt beyond recognition.

17. He confirmed that, wherever there were official public meeting or public “barazas” they would normally use the Area Managers to reach people at the grassroots.

18. Joselyn Gatundu (Prosecution Witness 5), a wife to the slain “suspected sorcerer” Mwathi Kithinji (deceased in respect to the 2nd count) told this court that on 1st May, 2017, at around 8:00am both Accused persons herein accompanied Njeru Mbanda, and mine, others not before court went to their home and asked her husband (deceased) why he had not attended the meeting. She testified that their pleas that they were unaware of the meeting fell on deaf ears, adding her husband was beaten by both the first and second Accused. She further told this court that her husband was beaten and frog matched to the venue of the meeting and by the time they reached the venue, her husband (deceased) was bleeding from the mouth due to brutal beating inflicted upon him. She testified that they beat him while singing circumcision songs and that there was nothing she could do other than to follow them helplessly from behind. She stated that, they found many people at the meeting where her husband was forced to sit down as people attending the meeting were given pieces of paper by 2nd Accused to jot down names of suspected sorcerers. She stated that, her husband was one of the 15(fifteen) people read out by the 1st (first) Accused and told to step forward before those people whose names had appeared more than one were placed aside and those whose names once were told to

go back and sit down with the rest of the people. She also testified that, her husband (Mwathi Kithinji), Kibaara Ikamla, Mutiria and Muthengi Mutegi were then paired up and had them tied up by the 1st Accused exclaiming;

‘Tunaenda kuwachoma’ before proceeding on the journey to Ciakariga. She added that, the 1st and 2nd Accused, were the ones leading the way. She further corroborated the evidence by Prosecution Witness 1, Prosecution Witness 2 and Prosecution Witness 3 on what transpired on the way. She added that when she tried to intervene to save her husband both the Accused told her;

‘‘Tutawachoma.....yeye ni Mchawi!’’.

19. She testified that, she was then beaten by Kambuwa Kirema and one Helena Kirema. She added that the four ‘‘suspects’’ were stoned and old tyres placed on their necks before being set ablaze.

20. Dr. Justus Kitili, (Prosecution Witness 6), the doctor who performed post mortem examination on the bodies of the 4 lynched ‘‘suspects’’ at Chuka Hospital mortuary and noted the following from the following bodies:-

i. Mwathi Kithinji; On this body, the doctor testified that the body had 3rd degree burns or 100% burns with all internal systems burnt. He opined that, the cause of death were severe burns. He tendered post mortem report as Prosecution Exhibit 1(a).

ii. Francis Mutiria, the doctor also testified that the body had 3rd degree or 100% burns. He found sooth in the lungs and opined that the cause of death was severe burns. He tendered the post mortem report as Prosecution Exhibit 1 (b).

iii. Daniel Muthengi Mutegi, the doctor, testified that, when he examined the body of this deceased person he established that the body had 100% body burns. He noted that, he found sooth in the trachea and lungs. He tendered the post mortem report as Prosecution Exhibit 1 (c).

iv. Joseph Kibaara-The doctor testified that the body had 100% body burns and found sooth in trachea and lungs. The other parts had 3rd degree burns clarifying that a 3rd degree burn is the severest form of burn as it affects skin tissue up to the bones.

He also opined that, Joseph Kihaawa died due to severe burns and tendered his post mortem as prosecution exhibit 1 (d).

21. Joseph Kithome Kanapiu, (Prosecution Witness 7) on his part told this court that on 30th April, 2017, a day prior to the incident, he overheard the first Accused herein, tell one Elosy Wanja and Ikunga Rukwaro that Francis Mutiria (deceased), Daniel Muthengi, Mwathi Kithinji and himself Joseph Kithome would be lynched the following day and would not see their homes again. The witness told this court the first Accused had not seen him as he was approaching where the three were talking. He added that, he reached where they were standing and greeted them before leaving.

22. The witness further testified that, when he reached his home he started pondering at what he had heard and as first as he was pondering Mujumbe (1st Accused herein,) called him on his mobile phone and informed him that there was going to be a meeting the following day, where ‘‘oathing’’ was to take place and directed him to attend the meeting with his wife. The witness stated that when he got information about the meeting, he went to the Area Chief and Assistant Chief to inquire about the meeting but both of them denied knowledge of the same. Sensing danger, the witness told this court that he went all the way to Ciakariga Police Station on foot, to report on what he had heard and the police cautioned him not to go back home that night and that they would later investigate the matter.

23. The witness further, told this court that he sought for a place to sleep and the next day at 6 am he went back to the police station where he called the 1st Accused and informed him that he was at Ciakariga Police Station and not to bother his wife about his whereabouts. He added that, when he informed the 1st Accused, he replied as follows before switching off his phone;

‘‘Wacha tumalize huku. Tutakukujia’’.

24. The witness further testified that, his wife later called him and warned him never to go back as four (4) people had been lynched on suspicion of witchcraft. He testified that, when he got the news, he had to flee to Nairobi fearing for his life and only came back after three days when the police called him to write a statement which he did. He further said he took a traditional oath before the Area Chief to show people that he was not a sorcerer and that it was only after the oathing ceremony that he felt safe to go back home.

25. Samuel Mayira John (Prosecution Witness 8), also testified and majorly corroborated the evidence of Prosecution Witness 1, Prosecution Witness 2 and Prosecution Witness 3 on what took place at the meeting on 1st May, 2017 at Mbacaca Catholic Church grounds to the time the ‘‘suspected sorcerer’’ were called out and tied together in pairs. He knew the actors and victims well because all of them were his neighbours. He told this court that he thought the matter was a joke at first but when he heard that some ‘‘sorcerers’’ or ‘‘witches’’ had been left behind, he at once knew that the matter was not a joke. He added that the four ‘‘suspected sorcerers’’ were frog-matched towards ciakariga and he left for home adding that about 1 ½ hours later he heard that the four had been lynched to death.

26. PC John Bwami (Prosecution Witness 9), the Investigating Officers in the matter, gave this court an account of the investigation he carried out upon receiving the report of the murder of four people on suspicion of practicing witchcrafts. The Investigating Officer told this court how he later visited the scene and recorded the statements of witnesses who testified at the trial in this case. He told this court the scene was a footpath as there are no roads in the area but clarified that the footpath is used by both the people and boda bodas.

27. When placed on their defence, both the Accused denied committing the offence.

28. The first Accused **Grevasio Mujumbe (Defence Witness 1)**, gave a sworn statement stating that at the material time he was busy carrying on his business at a local butchery where he stated that he used to slaughter goats and sell mutton to customers including a local secondary school known as Materi Secondary School. He reiterated that on the material day, he was going on with his business when at around 2 pm he heard people talking about some people who had been burned alive at Balala. He further defended himself saying that Bacaca was 6 Km away from his place of business. He denied having been to Bacaca that morning and denied knowledge of the “suspected sorcerers” lynched but conceded that one of them **Joseph Kibaara Ikamba** was his step brother. He claimed that there was a land dispute between his mother, and step mother the mother to Joseph Kibaara (deceased in respect to the 4th Count).

According to him, his step mother Gatiria lost the case and was unhappy. When pressed under cross examination, he stated that the land in dispute was his, having bought it and was not part of the family land. He clarified that, he had no dispute with anyone over the said parcel.

29. **James Mutugi Mureithi (Defence Witness 2)**, on his part also defended himself by raising a defence of alibi. He stated on oath that on the 30th April, 2017, he proceeded to Matiri Market where he had hotel business where he began his work at around 6:20am and later proceeded to Meru Town to visit his brother one, Fredrick Kinoti Muriithi. He added that, he spent the whole day in Meru and only went back to Matiri Market where he arrived at about 9PM, slept until the following day when he woke up and proceeded with his hotel business until around 2 pm when he heard from people, that some people had been lynched. He denied any involvement stating that, he did not go to Bacaca that day.

30. He conceded on cross examination that all the witness were known to him and are his neighbours. He denied having any difference with any of them but added that, some may have just mentioned his name for no reason or because he owned a car which could be the reason why they associated him with supplying old tyres used to lynch the “4 sorcerers”.

31. In their written submissions, through Counsel, the accused persons denied involvement in the crime stating that, the sheer large number of the crowd at Bacaca Church grounds, made it almost impossible to identify the perpetrators of the crime and submitted that the four deceased persons were victims of mob justice. The defence contend that, the ring leader of the perpetrators of crime was one Mauki Mitugo who is still at large. They have urged this court to give them the benefit of doubt due to possibility of mistaken identity given that there were many people. They further contend that, the elements of murder under **Section 203 and 206** that is *mens rea* and *actus reus* have not been established in this case and connected to the Accused persons herein.

32. This court has considered the prosecution’s case against the Accused persons herein. I have also considered the defence offered. This is a case of murder as observed at the start of this judgement. The position in law is that for the prosecution’s case to be sustained against the Accused persons, three elements under Section 203 of the Penal Code has to be established and connected to the Accused persons beyond reasonable doubt. The three elements are:-

- i. Death of the decease person(s).
- ii. That their deaths were caused by acts or commissions by the Accused persons jointly or with a common purpose.
- iii. Malice aforethought.

33. (i) **Fact of death.**

The medical evidence tendered by **Dr. Justus Kitili (Prosecution Witness 6)** as Prosecution Exhibits 1 (a) (b) (c) and (d) which were post mortem reports of Francis Mutiiria Mukanda Mwathi Kithinji, Daniel Muthengi Mutegi and Joseph Kibaara Ikamba respectively, coupled with evidence of Prosecution Witness 1, prosecution Witness 2, and Prosecution Witness 3, prosecution Witness 4 and Prosecution Witness 6, proved beyond doubt that the four named deceased persons died after being lynched or burned alive on 1st May 2017. That fact is not contested in this case even by the defence.

34. It is also not contested that the act causing death was unlawful. In the case of **Gusambizi Wesanga versus Republic (1948) 15 EACA**, the court restated the fact clearly when he stated as follows: -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”

35. The evidence tendered during trial in this matter evidently was connected to suspicion of witchcrafts and/or conspiracy to make it appear as such and this brings this court to the next issue for determination which is, who is connected with the act of murder or put another way, who is connected with *actus reus*.

36. The element of actus Reus.

Going by the elaborate evidence put together by the prosecution, it is an undeniable fact that the names of the 1st and 2nd Accused persons appear prominently as part of the people who unlawfully carried out the murder of four deceased persons in a most gruesome and horrendous way. The four deceased persons were tied in pairs and set ablaze using old tyres and petrol.

37. The evidence of Prosecution witness 1, Prosecution Witness 2, Prosecution Witness 3, and Prosecution Witness 5 all of whom were close to the deceased persons narrated to this court how the plan was hatched and executed with perfection. The 1st Accused was a village Elder commonly referred to as “Sub-Area Manager” to denote their authority.

38. The people with such responsibility are used by the local administration to reach the grassroots as confirmed by Prosecution Witness 4. This court also takes Judicial Notice of the fact that Sub Areas Managers or village elders are respected people in the communities around this region and are believed to exercise the authority delegated to them by local Chiefs and Sub Chiefs. This court finds that, based on evidence tendered, the 1st Accused took advantage of that “authority” to convene a meeting on 1st May, 2017 at Mbacaca Catholic Church grounds.

39. I also find that, there is sufficient evidence laid before me clearly showing the active parts played by both the 1st and 2nd Accused in executing a carefully choreographed exercise where the four innocent people to wit Francis Mutiria Mukanda (deceased), Mwathi Kithinji (deceased), Daniel Muthengi Mutegi (deceased) and Joseph Kibaara Ikamba (deceased) were first called out before being tied in two pairs and frog-matched to the scene where they were stoned before being lynched. As this court finds direct evidence connecting the Accused persons with the *actus reus* from the evidence of Prosecution Witness 1 wife to Francis Mutiria (deceased Prosecution Witness 2, (wife to Daniel Muthengi (deceased), Prosecution Witness 3 (mother to Kibaara Ikamba (deceased), Prosecution Witness 5 (wife to Mwathi Kithinji and Prosecution Witness 3 (Samwel Mayira John) a neighbour to both the Accused and deceased persons.

40. All the above witnesses, gave a vivid account of how they were made to convene at Mbacaca Catholic Church grounds, where the attendees at the meeting were just given pieces of paper and told to jot down names of people who lived in their midst whom they suspected practiced witchcraft.

41. Bizarre as it may sound, but that is how the deceased persons in this case were picked and called to go to the front. The first and 2nd Accused got an exercise book from a kiosk and tore it to pieces before distributing the pieces of papers to the people in the meeting.

Prosecution Witness 1 clearly stated that 2nd Accused rushed to the kiosk and came back with an exercise book before tearing it up and distributing it to the people. The first Accused then came with a carton box and directed the people to fold the pieces of paper and drop it in the box. He then picked each paper and read out the names of people appearing on the pieces of paper and just like that the journey of doom began for the four “suspects”.

42. All the eye witnesses (Prosecution Witness 1, Prosecution Witness 2, Prosecution Witness 3 and Prosecution Witness 8) were certain that they saw the first Accused remove a rope and began to tie the four suspects in pairs with Murithi Kithinji and Kibaara being tied together and Francis Mutiria and Dominic Mutegi being paired for a journey that later turned out to be their last journey on earth. The gravity of what awaited them ahead must have played out in the agonizing journey as I find the description given by Prosecution Witness 2 quite telling. This is how she narrated the ordeal as they walked towards Ciakariga;

“..... after some distance, the “suspected” persons wondered aloud.....kwani tunaenda wapi?”

43. That question seemed to have bothered one of the assailants named Mugendi Reuben because along the long journey, he remarked on the way,

“he suggested that the four people be exterminated to end the problem.”

The Accused persons took the cue and sent a boda boda rider named Kinoti Ngare to buy petrol which he brought using plastic bottles.

44. The witnesses (Prosecution Witness 2, Prosecution Witness 3, Prosecution Witness 5) saw the 2nd Accused rush to his house (next to the scene) and fetched old tyres. Prosecution Witness 2 was apt in what she saw; “At that instance James Mutugi (2nd Accused) rushed to his house which was nearby and came back with old tyres..... Mujumbe (1st Accused), Kirimi, Reuben and others assisted him in pushing the old tyres towards where we were standing..... Mutugi (1st Accused and Mujumbe (2nd Accused) then asked people to collect stones.....”

45. The eye witnesses (Prosecution Witness 2, Prosecution Witness 3 and Prosecution Witness 5) saw the 1st Accused order the four suspects to sit down before the 2nd Accused embarked on beating them up before being joined by the others who then stoned them. The four “suspects” were then lynched alive. This court finds from the evidence, of Prosecution Witness 1, Prosecution Witness 2, Prosecution Witness 3 and Prosecution Witness 5 that the “suspected sorcerers” were burned alive. The same fact is well corroborated by the evidence of the doctor (Prosecution Witness 6) who found both in the lungs and trachea in the two bodies of deceased persons upon performing post mortem examination on the bodies of the deceased persons namely Francis Mutiria, Daniel Muthengi Mutegi and Joseph Kibaara. The body of Mwathi Kithinji had 3rd degree burns with all internal organs burnt. Prosecution Witness 5 was clear in his testimony that the two Accused herein are the ones who directed that the four suspects be lynched and as I have observed above, the 1st Accused person in particular was a person in some level of authority given that he was a Sub Area. His influence cannot be underrated. He together with the 2nd Accused really played significant and prominent roles right from Mbacaca Catholic Church grounds to the scene of murder. This court was told by Regina Kamene (Prosecution Witness 2) and Josephine Gatundu Prosecution Witness 5 that the scene was near the 2nd Accused house. It is also telling that Prosecution Witness 2 heard him (second Accused) mocking the victims;

“Tafuteni police kwa sababu wakifika hamtachomwa.” The two Accused then ordered the four suspects to kneel down as the 2nd Accused hit them on the heads with a club as the rest joined in by stoning them before lynching them alive.

46. It is true that the two Accused persons did not act alone in executing their mission but the particulars in the information or charge are clear. They acted with others not before court and that fact alone (others not before court) does not negate the overwhelming evidence that both the 1st and 2nd Accused played a prominent role. They all had a common purpose to execute an unlawful act and sections 21 and 22 of the Penal Code makes one of them accountable.

47. When they decided to kill the four “suspects”, Prosecution Witness 2 said that they acted swiftly. She stated;

“The exercise (killing was done very quickly and fire was started. The fire exploded and the “suspects” fell down in a cloud of fire in twos, in the way they had been tied.” That evidence explains the narrative given by Prosecution Witness one (1) who had walked slightly ahead believing what she had been told by 1st Accused that the “suspects” were being escorted to Ciakariga but as she was walking ahead along with others she said,

“..... when I reached a river, I heard a loud sound. I looked back and I saw fire. We were 300 metres ahead. I saw people running away to the bush.....”.

The loud sound probably was a burst of fire caused by petrol ignited to ensure suspects were burnt alive.

48. This court is satisfied that based on the overwhelming evidence tendered against both the Accused persons on their respective roles they played, the element of *actus reus* has been proved beyond reasonable doubt and connected to them by the prosecution.

49. (iii) **The element of Mens rea**

It is clear from the evidence tendered before this court that the Accused persons with others not before court harbored ill intentions to exterminate the four people named in the information on suspicion of witchcraft.

50. The evidence of Prosecution Witness 1(Teresia Kabera) and Prosecution Witness 7 (Joseph Kithome Kanampiu) clearly reveals that, the meeting at Mbacaca Catholic Church on the fateful day (1st May, 2017) was planned and convened by the first accused person again using his authority as a village elder (also known in the locality as Sub-Area Manager).

51. This court in particular finds that the evidence of Prosecution Witness 7 was crucial to the prosecution’s case in respect to the element of Mens rea or malice aforethought. He narrated to this court how he coincidentally met the 1st Accused with 2 other persons on 30th April, 2017, along the way talking among themselves that the “four suspects”, were to be lynched the following day and they would not see their home again”. Prosecution Witness 7 heard them mention Francis Mutiria, Daniel Muthengi, Mwathi Kithinji and himself Joseph Kithome. It is clear that the 1st Accused and the 2 other persons were freely talking oblivious that Prosecution Witness 7 was lurking nearby. The fact that Prosecution Witness 7 took off to Police Station that day, (30th April, 2017) and eventually avoided the dragnet that was to follow the next day shows that he was factual and truthful about the conspiracy by the 1st Accused and others to kill the “suspected sorcerers”. I say so for a number of reasons.

52. Firstly, it is telling that the 1st Accused never informed either the Assistant Chief or his Area Chief about the purported meeting. Prosecution Witness 4 (Joseph Mutugi Mwati), the Area Chief Ciakariga location, told this court that he had no information regarding the planned meeting of 1st May, 2017. He further stated that on the material day, he was unaware of any planned meeting as it was a public holiday. The Area Assistant Chief, one Gilbert Mageo called him on phone informing him that the 1st Accused had called to report that 4 suspected sorcerers had been seized. When the Area Chief tried calling the 1st Accused, his phone had been switched off which in my view, indicates that he was out to do some mischief because why else would he call the Assistant Chief and immediately switch off his phone.

53. Secondly, Prosecution Witness 5, the wife to Mwathi Kithinji (deceased), narrated how the 1st Accused in the company of the 2nd Accused and others went to their home that fateful morning and forcefully frog matched the deceased (Mwathi Kithinji) to Mbacaca Catholic Church grounds, beating him along the way. Before the said deceased agreed to attend the purported meeting, he was assured by the 1st Accused that both Chiefs were present at the meeting.

54. Thirdly, it is clear from the evidence laid before this court that the purported meeting convened at Mbacaca Church grounds on 1st May, 2017 was planned and convened for ulterior and malicious purpose of unlawfully killing “suspected sorcerers”. The 1st and 2nd Accused after calling out the victims and tying them in pairs, pretended that the four were to be escorted to Ciakariga presumably to the authorities but behind that facade belied their true intentions which was to unlawfully kill the four.

55. The evidence tendered also reveal that the 1st Accused (Grevasio Mujumbe Ikamba) is a step brother to Joseph Kibaara Ikamba (deceased in respect to 4th count). The 1st Accused in his defence, stated that there was a land dispute between her stepmother and his own mother and the question posed is did he use the occasion on 1st May, 2017 to eliminate his step brother on account of a land dispute? Though there was no sufficient evidence tendered toward that end, I find the evidence of Defence Witness 1 (1st Accused) that he never bothered to go and check what had happened to his brother to be either a lie/unreal or an afterthought. This is because, ordinarily, if one is informed that his own brother has been lynched, it is expected that the person would be bothered and would even go to the scene to find out or establish the truth. The first Accused never bothered or even appeared concerned that his brother had been lynched. I find that, his defence in regard to why he never bothered holds no water.

56. I also find the action by both the Accused persons of tying up the victims in pairs was ill intentioned. The 1st Accused person went to the purposely convened meeting with two sisal ropes. Prosecution Witness 1, Prosecution Witness 2, Prosecution Witness 3 and Prosecution Witness 5 were clear in their evidence, that all they saw the first Accused remove a rope which he used to tie the victims in pairs which in my view shows that he went to that meeting with a predetermined mind. He purposed to tie up some “suspects” which shows that, he also knew them beforehand, if the evidence of Prosecution Witness 7 is anything to go by. He tied the “suspects” with a view to subdue them, and eventually lynch them.

57. I also find from the evidence of Prosecution Witness 1 and Prosecution Witness 5 that “*circumcision songs*” were sang when Mwathi Kithinji was being beaten and frog matched from his house to the venue of the meeting. Those songs were sang at the meeting because when Prosecution Witness 1 approached the venue, she heard the songs and whistling which frightened her. The fact that those kind of songs were sang coupled with whistling clearly showed that the conveners of the meeting or were up to no good as there was no impending circumcision.

The songs obviously were meant to fire up the crowd and came trepidation to whoever was opposed to what was going to take place. The murder of “*suspected sorcerers*”. The fact that the 1st Accused person went in the meeting with a carton box and the Accused went for an exercise book which was later torn and pieces of paper given to the people to jot down suspected sorcerers, in my view, shows that the 2nd Accused persons herein, harbored a common purpose and an ill purpose for that matter. How could they just distribute small pieces of paper to people in an area (Tharaka) where witchcraft is believed to be real if they were not malicious? The Accused persons in my view were ill motivated or malicious in their actions. Their predetermined minds were unmistakable. The fact that the four victims were lynched near the home of 2nd Accused besides using old tyres he (2nd Accused) “donated” for the purpose, in my view proved beyond reasonable doubt the prosecution has established and proved the element of *Mens rea* against both the Accused persons herein.

58. This court has considered the defence put forward which I find similar in substance. Both of them have raised defence of alibi stating that on the material date, they were both busy doing their respective businesses.

59. The first Accused (Defence Witness 1) on his part stated that, he was busy with his butcher business but failed to tender any evidence for example he says he delivered some mutton to some school but he has not tendered any evidence to prove that he delivered any mutton at any given school at the material time.

60. The 1st Accused has also stated that Prosecution Witness 3 Anne Gatiria who is her step mother has a land dispute with his own mother but he has not shown the nexus between that dispute with this case because he says the dispute was between her mother and Prosecution Witness 3. He also did not call any witness to prove that fact or show anything that could show that Prosecution Witness 3 was motivated to fix him.

61. The 2nd Accused has also raised the defence of alibi, stating that he had gone to Meru the previous day and spent the entire day on 1st May, 2017 at his hotel doing business. He however, never called a single witness to establish this claim.

62. This court finds that the fact that both defences are almost similar is suggestive of an afterthought and a carefully rehearsed statement of defence. The 2nd Accused stated that he was a clan member of Joseph Kibara Ikamba (deceased in respect to 4th count), but when put to task as to why he did not bother to go and find out what had happened to his classmate as he claimed, he could not give a satisfactorily answer which means that his defence could not add up.

63. This court finds that, when considered with the prosecution’s case, the prosecution’s case is simply overwhelming. Both the Accused stated that they had no issues with the prosecution’s witnesses save for the 1st Accused who claimed without substantiating that Prosecution Witness 3 gave incriminating evidence in order to frame him. This court finds that even if I was to discount the evidence of Prosecution Witness 3 (and I find no basis to do that), I would still have found that the prosecution’s case had met the threshold. The witnesses who testified had no grudge against any of the Accused persons and their evidence in my view is weighty because they simply gave testimonies of the horror they witnessed.

64. In the end, this court finds that the prosecution’s case against both Accused persons herein has been proved to the required standard. I find their actions extremely callous. The victim of their heinous crime died a gruesome death. They were frog match, beaten, had old tyres placed on their necks, and petrol poured all over them before being set ablaze. What an excruciating pain and a painful death. One of the prosecuting witnesses (Prosecution Witness 5) in fact stated that, after fireball subsided, one of the victims, Mr. Mutegi appeared to be still alive and more petrol was sent and set ablaze the 2nd time to extinguish the little life left in him. That in my view, showed the sense in which the Accused and others not before court were really determined to accomplish their unlawful purpose which was to make sure that the 4 victims were dead and “*were not going to see their homes again*” as Prosecution Witness 7 aptly put it. The long and short of this is that, this court find that prosecution has proved beyond reasonable doubt that both Accused persons unlawfully caused the death of the four people named in the information presented to this court. This court finds them guilty in all the four counts and are hereby convicted accordingly.

Dated, Signed this 15th day of June, 2021.

HON. JUSTICE R. K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF JUNE, 2021

HON. LADY JUSTICE LUCY GITARI

JUDGE

SENTENCE:

I note that this offence is serious. It was a mob injustice, planned and executed. The action by the two accused is unthinkable in a civilized

society where there are laws to deal with a simple offence like witch craft. This is a classic case of how one abuses imagined authority as I do not believe the authority of 1st accused is extended to holding meetings like the one he called. I find no fit words to condemn the action by the accused other than to counter it with the requirement of the law in punishing such crimes. Though the accused are first offenders, they should nevertheless meet the full force of the law. I sentence the accused to death on each count. I however suspend the sentence on the 2nd, 3rd and 4th accounts.

Right of Appeal in 14 days.

L.W. GITARI

JUDGE

15/6/2021