



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 38 OF 2010

REPUBLIC

-VERSUS-

OTO & 13 OTHERS

JUDGMENT

On the night of 17 October 2010, tragedy hit [Particulars Withheld] Boys Secondary School when two of its form one students perished in a dormitory fire; the accused, eleven of whom were the deceased's fellow students were suspected to have set the dormitory on fire and therefore they were charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. In the first count the particulars were that on the night of 17 October 2010 at [Particulars Withheld] Boys' Secondary School in Nyeri Central District within Central Province, jointly with others not before court, they murdered KKN. The particulars in the second count were in the same terms save for the name of the deceased who in this case was JMK.

After a psychiatrist examination by Dr. Owino whose report was eventually produced in this trial by **Dr Wambui Njoroge (PW10)**, the accused were certified to be fit to take plea and stand trial. They entered a plea of not guilty and so the state called seventeen witnesses in prosecution of its case against them.

The first of these witnesses was **Laban Mugwanja (PW1)** who was the principal of [Particulars Withheld] Boys Secondary School at the material time. It was his evidence that on 16 October 2010, at about 6:30 P.M., while he was in Nyeri town, he received a call from a Mr Mwai who told him that he had received some information about an impending students' strike at his school that evening. The strike was to start at 9:30 P.M. after the evening studies. He called the District Education Officer who in turn told him to inform the police so that they could provide additional security. He also informed the deputy principal to mobilise the other teachers for the same purpose.

The security officers from Mweiga police station proceeded to the school and took their positions. The principal himself went to school at 8:00 P.M. and together with the teachers who were there, he undertook the necessary surveillance. Nothing unusual happened that night and therefore he released the security officers at 1: 00 A.M. On 17 October 2010, he established that the organisers of the strike backed off when they saw the police.

On the evening of 17 October 2010, he again mobilised the teachers and watchmen at the school to undertake surveillance; this time round, he did not involve the police. He released the teachers at 11:00 P.M. At 11:30 PM, he heard the watchman shout that there was fire. He went out and met a watchman who told him that the dormitory occupied by form one students was on fire. He rushed towards the dormitory and found that it had been engulfed by a huge fire. Some students were outside the dormitory. Some teachers arrived and led the students away. He contacted the officer in charge of Mweiga police station to provide security. The police officers from Endarasha police post arrived almost immediately. Efforts to put out the fire proved fruitless because the fire was overwhelming. After a roll call, it was established that 16 students were missing. Later, it was established that, in fact, five were missing; three of them had escaped to their homes while two had perished in the fire. Those who died were KKN and JMK. Upon interrogation of students, names of certain students in form one were given as suspects based on their strange conduct that particular night; it was alleged that they were moving in and out of the dormitory. The names given were those of the 1st, 2nd, 8th and 9th accused.

Upon cross-examination, the principal testified that he lived within the school compound and that the compound was properly fenced; it had two gates which were manned by five night watchmen and one-day watchman. In the month of October 2010 there was another students' strike as a result of which some students were expelled. The complaint then was poor leadership. He interrogated about 20 students but admitted that he never gave their names to the police. The police had been in the school and patrolled the compound before the incident in question.

In the previous strikes in July and September 2010, the students destroyed classrooms, dormitories, the kitchen and utensils. Students in the entire school were sent home and asked to pay for the damages.

It was also his evidence that the gate accessing the staff quarters was not manned. At the main gate to the school there were two registers, one for the students and the other for the school workers and visitors.

As much as the school was fenced the principal admitted that one could climb over the fence. He admitted that cases of student indiscipline were regular; for instance, they could sneak out of the school; in one instance one was even found with alcohol in the school. This particular student was suspended.

The initial report about the strike was that it was to be staged by form three students. While interrogating students, the names of 4th 13th and 15th accused persons were not mentioned as suspects.

Josphat Ndungu Gathiari (PW2) testified that he was a teacher at [Particulars Withheld] Boys Secondary School and that on 17 October 2010 he received a call from the school's principal (PW1) to the effect that the dormitory of which he was in charge was on fire. He went to the school where he met the principal, his deputy and other teachers. They went around the school and recovered a ten-litre jerrican smelling petrol fumes. It was about 20 meters from the burnt dormitory. He handed over the jerrican to the police.

Five students were found to be missing when a roll call was taken; however, two of them later resurfaced the following morning. The names of the 1st to 8th accused and the 10th accused were given as suspects. These names were given by their colleagues but anonymously. The names were forwarded to the police.

Martin Kingori Muraya (PW3) testified that he too was a teacher at [Particulars Withheld] Boys' Secondary School at the material time. On 16 October 2010, he and other teachers were summoned by the principal (PW1) to the school at about 9:00 P.M. There was information of an impending strike. Nothing happened on that night. On the following day at about 1:00 P.M. the principal requested him to be in school. There was no indication whatsoever that there was going to be a students' strike. The principal asked him to be in school at night to carry out a night surveillance. He remained at school till 11:30 P.M. when he left. Shortly thereafter, he was summoned back to the school by the principal who told him that there was an outbreak of fire at the school. He went back and found the form one student's dormitory on fire. A roll call was taken and 15 students were found missing; 11 of these students were brought back by the villagers, apparently, on the same night.

It was his evidence that the school was fenced well. The burnt dormitory was locked from inside and the dormitory captain whom he named as TM was in charge of locking the doors. There was also a watchman in charge of each dormitory. On the material night there were four watchmen on duty. To be precise, there was a specific watchman guarding the burnt dormitory. He testified that there were two other strikes before, in November 2009 and in July 2010; school property was destroyed in those two strikes.

On cross-examination, he stated that not every dormitory was guarded by a particular watchman. The student population was 738 at the time. He could not tell the students who were unofficially out at that time. The school gate, according to him, was not manned during the day.

Corporal Benjamin Muturi (PW4) testified that he was a scenes of crime officer. He visited the crime scene and took ten photographs of the burnt dormitory which was christened "Father Wambugu". Amongst the pictures taken were a closer view of the dormitory showing burnt metal boxes; burnt beddings and burnt bodies of the two students who perished in the fire and were burnt beyond recognition.

JWK (PW5) testified that one of the deceased students, JMK, was her first-born son. The last time she saw him alive was when he came back home for half term holidays. When she heard of a fire at the school she asked her sister-in-law to collect her son on her behalf. She could not travel herself because she was apparently taking care of a small child. She later learnt that her son had been burnt beyond recognition. She identified his body at the mortuary.

One other teacher who testified was **William Mbogo Githu (PW6)** who testified that the bodies of the deceased students were only discovered after the students went to salvage their property on 18 October 2010 at about 9:00 A.M. Previously, more particularly on 22 September 2010, form two and three students had staged another strike. They were sent home and only came back to school on 12 October 2010. The students had complained of school food and the school headmaster. They were also concerned that money had been raised to construct one more dormitory but the dormitory had not been built. It was his evidence that there had been previous attempts to burn down the school.

PNK (PW7) testified that KKN the other student who perished in the dormitory inferno was his son. He got information on 18 October 2010 that a school dormitory had been burnt. He went to the school but he did not find him. He was referred to the deputy headmaster who in turn referred him to school counselors. He identified his son's charred remains at the mortuary.

The investigation officer in the case was corporal **Kipkorir Kirui (PW8)**. He went to the scene of crime on 18 October 2010 accompanied by the Nyeri central Officer in charge of Police Division and inspector of Police Wesonga who was the Deputy District Criminal Investigation Officer of the same region. At the school, he was informed that the officer in charge of Endarasha police station had arrested nine people and pupils. They visited the burnt dormitory. The fire was still smoldering. He established that the dormitory accommodated 184 students but only 176 were present at the time of the incident. Two of them had perished in the fire. They discovered the charred remains of the burnt bodies on the right side of the door and next to a bed. They were covered in soot. He retrieved the bodies and took them to Nyeri Provincial General Hospital Mortuary using the school van. The officer in charge of Endarasha police station handed him a black jerrican. He was also shown two 20 litre jerricans both of which were partly filled with some liquid.

He forwarded the jerricans together with their contents and the debris collected from the scene to the government chemist for analysis.

He also took body parts of the deceased and their respective parents blood for DNA testing. However, at the time he testified no report on the DNA analysis had been received. In cross examination, he testified that the accused made statements under inquiry or recorded plain statements. He denied receiving any notes on the suspects from any teacher and neither was he told of the existence of such notes. None of the jerricans recovered were dusted for any fingerprints. In any event he did not know the source of the jerricans and neither could he tell how the fire started.

The ninth prosecution witness was police constable **Raphael Hamisi (PW9)** of the District Criminal Investigations Office at Nyeri. His testimony was that his station received a report of arson on 18 October 2010. He proceeded to the scene with his colleague corporal Kipkorir where he found a dormitory razed to the ground. Also burnt were two human bodies. He accompanied the deceased's parents to the mortuary on 21 October 2010 to identify the bodies. Some body parts were removed for DNA testing.

Ann Wangeci Ndiritu, (PW11), a government analyst, based at the Government laboratory at Nairobi, testified that on 25 October 2016, she received several items for paternity DNA analysis from corporal Reuben Kipkorir Kirui of the Criminal Investigation Department at Nyeri Police Station. These items were described as follows:

1. Item "A" was indicated to be a body part of the deceased KKN.
2. Item "B" was indicated as the blood sample of PNK the father of KKN.
3. Item "C" was indicated to be the blood sample of VWN, the mother of KKN.
4. Item "D" was described as a piece of body part of JMK.
5. Item "E" was indicated as the blood sample of DMM father to the deceased JMK.
6. Item "F" was described as the blood sample of JWK, the mother of the deceased, JMK.

The findings according to the Government analyst were as follows:

1. The substance indicated as a piece of body part (Item "A") of deceased KKN did not have blood.
2. The piece of body part (Item "D") indicated as of deceased JMK was partly stained with blood.
3. Several attempts to generate DNA profiles from the piece of body part Item D indicated as of the deceased JMK, were not successful.

Upon cross-examination the government analyst testified that she did not obtain any profiles from the body parts and therefore she could not conclude whether the body parts were human; the samples did not generate any DNA profile.

Robert Onchiri (PW12), a senior superintendent of Police testified that he took a confession from the 10th accused, Ayub Kungu Waweru, to the effect that he had been given Kshs. 400/= to handover to one Kitu who, in turn was to hand it over to Githinji, the 11th accused who sold petrol at Endarasha town. It was suspected that it was the petrol that was used to burn down the school.

The objection to admit the statement as evidence was sustained because the statement was not signed by either the 10th accused or even this officer who is alleged to have recorded it. Initially, the hand written version of the statement was not produced and the learned counsel for the state only made a reference to that statement in response to the objection raised by the learned counsel for the accused. Later, the same witness produced a handwritten statement; in its opening words, the statement read as follows:

"I Robert Onchiri, a Chief Inspector of Police attached to Provincial CID Headquarters Nyeri, am inquiring into an alleged offence of murder contrary to section 203 as read with section 204 of the Penal Code"

The statement continued:

I have information to believe that you Ayub Kungu Mwangi is connected with the offence as you may have some information that may assist in my investigation."

It is apparent that first the statement was not a confession but a statement under inquiry. Secondly, the witness expressly identified himself in the statement as an investigator rather than a recording officer. **Section 25A (1)** of the **Evidence Act, cap. 80** and **Rule 2 of the Evidence (Out of Court Confessions) 2009** is clear that whenever a confession has to be recorded, the recording officer should be independent of an investigation; in other words, the investigation officer should not be the same person recording the confession.

Nowhere in the statement was it indicated that the accused wished to make a confession. Again no certificate was made in the prescribed form as is required under Rule 9 of the Rules. It was not indicated whether he confirmed in his own words that the purported statement was his and that he had been asked either to correct, alter or add anything that he wished to add.

The objection to production of the statement as a confession was sustained on these grounds.

Stephen Mutua (PW13), a senior superintendent of police, who was the District Criminal Investigations Officer in charge of Othaya sub-district at the material time, testified that he too took a confession from one Stephen Ndirangu Thuita, the 6th accused. However, his attempts to have the statement admitted in evidence were thwarted when it turned out that the purported confession was vitiated for the same reasons that the statement of Onchiri (PW12) was rejected; this time round, the learned counsel for the state withdrew the statement and so this particular witness was not even cross-examined.

Inspector of Police, Peter Kimani (PW14) testified that he was in charge of Endarasha police post at the time the offence was committed and that on 16 October 2010 he was called by, Mr. Wanjau, the principal of [Particulars Withheld] Secondary School informing him that the students at the school were planning to stage a strike. He in turn informed the officer in charge (OCS) of Mweiga police station with whom they proceeded to the school together with the area District Officer. The latter, the principal and the OCS talked to the students and calmed them down.

However, on 17 October 2010, he was called by the OCS and informed that [Particulars Withheld] Secondary School was on fire; he asked him to go to the scene to find out what the problem was. He proceeded to the scene and found the principal and the watchman at the administration block. They had five fire extinguishers; he took one of them and together they attempted to put out the fire. But the blaze was too overwhelming to be extinguished by fire extinguishers. The principal asked the teachers who had now joined them to take a roll call of the students.

Of the 184 students who were accommodated in the dormitory that was apparently on fire, only 178 students were found to be present. Five students were missing. As the officer moved around with one of the teachers, he found a 10 litre empty plastic container that smelled petrol fumes; it was about 15 to 20 meters from the burning dormitory. The dormitory was completely burned. Two bodies were recovered from the dormitory the following day; they had been burnt beyond recognition.

The officer together with what he described as 'the disciplinary team' which included Mr. Muraya, the deputy principal set out to establish who may have caused the fire. He was given names of nine suspects and these were the 1st, 2nd, 3rd and 5th accused persons; others were the 7th, 8th, 9th, 12th and 13th accused persons.

He established in the course of his investigations that each of these accused contributed Kshs. 100/= to buy petrol with which they doused the dormitory before it was set on fire. They bought the petrol from one Mburu who was described as a 'boda boda' rider. He arrested all of them together with one Macharia who was alleged to be the owner of the petrol. The officer also visited the house from which the petrol was purchased and recovered two jerricans both of which were half-full with petrol; it was his evidence that the jerricans were either from Mburu's or Macharia's house. He clarified that the house actually belonged to the 6th accused but that it was rented out to Mburu and Macharia.

During cross-examination, he testified that prior to the students' strike there had been tension in the school. The school, according to him, was not properly fenced; its fence was porous but the gate was manned. It was about 100 metres from Mweiga police station. The deputy principal, teachers and the disciplinary panel came up with the suspects' names most of whom were in the first form.

In his testimony, **Isaac Maina Wanjau (PW15)**, a teacher at [Particulars Withheld] Secondary School, narrated the events of 17 October 2010. He reported to work at 6:30 A.M. and took over the duties of the day from the school principal. Most of these duties included supervision of the students as they went through the chores of that particular day. He was at school until after 10:00 P.M. when he handed over to the principal. When he reported to school the following day, the principal informed him that there was tension at school and there was a possibility of a student's strike. On the morning of 18 October 2010 he found a message on his phone to the effect that the form one dormitory had been burnt down. He rushed to the school and found the students gathered at the administration block. Apart from the students, there were teachers and other people from outside the school who were gathered in the school. It was his evidence that the school was properly fenced and there is no way one would enter the school other than through one of the two gates to it.

William Kailu Munywoki (PW16), a government analyst testified that on 21 October 2010 he received an exhibit memo from the Criminal Investigations Department and with it were the following items:

1. "A"- 10 litre jerricans containing some liquid
2. "B"- Debris collected where the first body was found
3. "C"- Debris collected where the second body was found
4. "D"- Plastic container containing some liquid
5. "E"-Plastic container containing some liquid.

He was required to ascertain which liquid was in items "A", "D" and "E". He was also to ascertain the cause of burning in items "B" and "C"; the similarity of the exhibits marked "A" as compared to "D" and "E". Finally, he was to ascertain whether the liquids in "A", "D" and "E" were inflammable.

His findings were as follows:

1. Liquid "A", "D" and "E" were found to contain petrol which is an inflammable petroleum product.
2. There were no fire accelerants in items "B" and "C"

In cross-examination, he testified further that he did not trace any petrol in the debris and that he could not establish the cause of the burning of items "C" and "D".

Dr. James Waweru (PW17) produced post-mortem reports in respect of the post-mortem on the bodies of JMK and KKN. As far as the

body of JMK is concerned, he observed that it was of a male African; his apparent age was 15 years old. Nutrition and physique could not be assessed; his height could also not be measured because the limbs had contracted. He was subjected to 4th degree burns; the muscles and the bones were covered in soot and his body was only identified because of a crack in the incisor tooth. The skull was fractured; the brain matter was exposed; the facial bones were covered in soot and the chest muscles were completely burned. The abdominal wall was completely burnt with exposed internal organs; the perennial areas were burnt with soot; the upper limb muscles were completely burnt with exposed bones. The lower limbs were completely burnt. There were flexion contractures at the hip, knee joint with missing feet on both sides.

On the respiratory system the nasal bones were completely burnt and covered in soot; the digestive system had the intestines exposed and the liver covered in soot. On the head, the brain matter was exposed and covered in soot. He opined that the cause of death was asphyxia secondary to closed flame burns.

The deceased's sex was established because of the remaining part of the genitalia while age was estimated from the size of the skull.

The body of KKN was also identified as that of an African male approximately aged 15. Nutrition and physique could not be established; his height could also not be established because of the limb contracture.

The body had suffered a 4th degree burns and the bones were exposed and covered in soot. The body was identified by exclusion after the other accompanying body was positively ascertained.

The skull was ruptured; the brain matter was exposed and covered with soot. The facial bones were exposed and covered in soot. The abdominal wall was completely burnt and the intestines and the liver exposed and covered with soot.

The perennial areas were covered in soot; upper limbs were completely burnt with exposed bones and flexion contractures at the wrist, elbow and the shoulder joints. The lower limbs were completely burnt; the bones were exposed with missing feet on both sides. The respiratory system was completely burnt; the nose and the nose bones were covered with soot. The digestive system had the intestines exposed and the liver was covered with soot. On the head the brain matter was exposed and covered with soot. The doctor opined that the cause of death was asphyxia secondary to closed flame burns.

He established the sex of the deceased from the external genitalia area and the apparent age was established from the size of the skull.

The two bodies could be identified as those of human beings because of the remaining structures except for the bodily changes.

In answer to questions put to him during cross-examination, the doctor testified further that the deceased's airways were completely blocked and there was no other possibility of any other cause of the deaths except lack of oxygen or asphyxia. In any event, there was no evidence that the deceased died before they were burnt. He explained that 4th degree burns is the severest degree of burns one can possibly be exposed to; in terms of percentages, it is 110% burns.

When put on their defence, the 1st accused testified that he was a form one student at [Particulars Withheld] Secondary School at the material time; he had joined the school in third term and was a little over a month in the school when the incident out of which the charges against them arose happened. On 17 October 2010, he was sleeping in his dormitory when he was awakened by noise; the dormitory was burning and therefore he rushed towards the door. He found other students outside the dormitory. A roll call was made the following day. The principal summoned him and other students. They were all taken to Endarasha police station for interrogation. There he was beaten by the police. He denied having taken part in the burning of the school. He was transferred to a different school where he finished his education. He denied being aware of any planned strike by the students. He could not recall what transpired on at 11:30 P.M. on 17 October 2010. He slept at Father Wambugu dormitory which was then being occupied by form one students. It was his evidence that he slept in the middle row and that he could not recall collecting any money from students. He remembered a roll call being taken. He also did not know most of the rest of the accused. He testified further that he was aware that there were two other strikes in the school before 17 October 2010.

The 2nd accused also testified that he was a form one student at [Particulars Withheld] High School as at 17 October 2010. He was asleep on 17 October 2010 when he heard people screaming because of a fire. His dormitory was on fire and like everybody else, he ran for his life. He denied having anything to do with the fire.

The third accused also testified that he was in form one as at 17 October 2010 and used to sleep in father Wambugu's dormitory. On the material date he was sleeping when he heard screams. He ran out of the dormitory. He too denied being involved in the burning of the dormitory.

Like the first three accused, the fourth accused testified that he was also awakened by the noise on the night of 17 October 2010. His dormitory was burning and everyone was running out; he ran out as well. He denied being involved in the burning of the dormitory and that he only came to learn of the cause of fire in court. He recalled that besides the students' strike in which the deceased perished, there had been another strike in the second term.

The 5th accused testified that he too was awakened by screams on the night of 17 October 2010 and that he had nothing to do with the fire that burnt down their dormitory.

The 6th accused and 8th accused simply denied the charges against them. Likewise, the 9th accused testified that he was awakened by some commotion on the night of 17.10.2010 and that he had nothing to do with the fire.

The 10th accused testified that he operated a motor-bike transport business and that on 17 October 2010 he was at Endarasha shopping center

and was in his house the entire night. He denied having been at [Particulars Withheld] High School at any time. It was also his evidence that he could not recall Kitu giving him Kshs. 400/=, he was aware that Kitu was not operating a petrol station. He denied knowing one Githinji and also denied having bought any fuel.

The 11th accused also stated in his testimony that he was in his house on the night of 17 October 2010 and that he never went to [Particulars Withheld] secondary school. In cross-examination, he testified that he knew both the 10th accused and one Kitu. His business was a motorcycle transport business. He admitted that he received the sum of Kshs. 400/= from Kitu and that the money was given to him by the 10th accused. He denied having carried petrol at any time. In re-examination, it was his evidence that the Kshs. 400/= was given to him by the 12th accused and that it was in payment of the transport services he had offered him.

The 12th accused testified that he sold firewood at the material time. He denied that he had anything to do with the burning of the school. Upon cross-examination he admitted knowing the 11th accused whom he described as a 'boda boda' rider. He owed the 11th accused Kshs. 500/= and that he gave the 10th accused the money to take it to him.

The 13th accused testified that he was a student at [Particulars Withheld] Boys Secondary School but, unlike the rest of his colleagues in this case, he was in form two and also slept in a different dormitory from them. He denied the charges against him.

The 14th accused testified that he was also a student at the same school and like the 13th accused he was in form two in the year 2010 and never shared a dormitory with the form one students. He even denied knowing these students.

Sections 203 and 204 under which the accused were charged read as follows:

Section 203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

This latter section has since been declared to be unconstitutional because, first, its application renders mitigation upon conviction futile; secondly, it purports to deprive the trial court of its discretion to mete out what would be an appropriate sentence in the circumstances; and, finally it is discriminatory in nature. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Turning back to section 203 which, in the wake of the Muruatetu decision, it is the only relevant section in the present case, the offence of murder is established when, first, death of a person is proved; secondly, it must also be proved that the death was as a result of an act or omission of another person; thirdly, there has to be proof that the act or omission was unlawful; and, finally, it must be proved that the person who did the unlawful act or omitted to act had malice aforethought.

The death of KKN and JMK was proved beyond peradventure; the school principal and four of his teachers were all consistent in their evidence that the two boys perished in the dormitory inferno. Inspector of Police Peter Kimani (PW14) and police constable Raphael Hamisi (PW9) testified that the charred remains of the deceased students were traced in the burnt dormitory. The scenes of crime officer (PW4) produced photographs of the charred remains at the scene. The Investigation officer corporal Kirui (PW8) testified that he retrieved the bodies and took them to the mortuary. Their parents PNK (PW7) and JWK (PW5) confirmed in their evidence that not only were the deceased their children and students at [Particulars Withheld] Secondary School but also that they identified their charred remains at the mortuary.

To cap it all Dr. James Waweru (PW17) certified the death of the two students; post-mortem reports confirming the deaths and their cause were produced in evidence.

It follows that the first element of the offence of murder was proved to the required standard.

The circumstantial evidence presented would also lead to the conclusion that the fire from which the two students perished was an act of another person or persons. The evidence that there was simmering tension immediately before the fire at the school and an empty jerrican recovered at the burnt dormitory soon after it was set ablaze and whose contents were established to be inflammable point to the fact that the fire was an act of arson. By extension, the death of the deceased students was not only as a result of an act of another person or persons but also that the act itself was unlawful.

The next question of concern is whether the accused were the perpetrators of this crime.

As has been noted, there is no doubt that the deceased died in the inferno in Father Wambugu's dormitory; however, none of the witnesses testified as having seen any of the accused set this particular dormitory, in which the deceased perished, on fire. The evidence against them is, by and large, circumstantial. The question is whether the circumstantial evidence presented here is sufficient to sustain the prosecution case that the accused are culpable for the murder of the deceased.

The school principal's (PW1's) evidence in this respect was as follows:

“I together with the teachers carried out investigations. We asked students to write about what happened. I interrogated several students that night. I told them to record the events of that night plus the names of students. Some names were given by the students: - i.e.

(i) A

(ii) D

(iii) O

(iv) PN

The students stated that those named would be seen going in and out of the dormitory. The other students were settled. Those students mentioned belonged to Form 1 class. I had not received any complaint more(sic) against those students before. On 16 October 2010, the information I received was that form III would cause a strike. They had previously been suspended.”

When he was cross-examined on his interrogation of the students, this is what the principal said:

“I interrogated about 20 students. I did not pass the names of those students to the police. All the students in Form 1 wrote the names of the suspects involved. I collected all the papers written by the form 1 students. I have not presented any of those statements to this court.”

He continued:

“In my statement I did not give any names. I did not state the specific statements made by the students.”

The closest the rest of the witnesses came to linking the accused with the arson was with respect to the anonymous notes allegedly written by other students and in which the accused were implicated. Most, if not all of these witnesses were teachers at the school; take Gathiari (PW2) for instance. He stated as follows with regard to these notes:

“I later learnt that the Form 1 students were told to write anonymous notes. Nine names of students were mentioned”.

He then proceeded to list the nine names; as to the fate of these names, he stated that the names were forwarded to the police; however, when he was cross-examined, he stated that he was not sure whether those names were given to the police. But when he was cross-examined by counsel for the 4th accused, he stated as follows:

“I and the deputy principal compiled a list of suspects on 18 October 2010. I kept a copy of the list of students. I saw the list a week ago. I could not remember the last name. The list is under the custody of the school principal...I and the deputy principal gave the list of suspects to the police. The deputy principal handed over the list of suspects in my presence. The police officer in charge of Endarasha patrol base received the list of names. Our list had nine names. We compiled the list from the secret notes and from our interrogation. The secret notes were burnt to protect the witnesses.”

Martin Kingori Muraya (PW3) the other teacher at school, spoke of the notes and these names as follows:

“We gave students plain papers to write about what they knew about the cause of the fire. They were not required to record their names. We received about 1450 notes. The notes were handed over to the police in (sic) night of 17 October 2010. Both of us i.e. myself and PW2 handed over the list to the police. The police went through the notes and then gave them back to us. We then burnt those papers...we only gave the police the notes prepared by the students.”

On his part corporal Reuben Kipkorir Kirui (PW7) the investigation officer testified that the officer in charge of Endarasha police post had arrested ‘nine people and pupils’; it was his further evidence that “we took the nine students and two members of the public”. The nine students referred to are the 1st to the 9th accused.

As far as the anonymous notes are concerned the investigation officer had this to say:

“No notes of any suspects were handed over to me by the teachers. No teacher told me of existence of such notes.”

It is obvious from the investigation officer’s testimony that the first nine accused were charged on the strength of the anonymous notes the basis of which was shrouded in doubt and plagued by contradictory evidence. Going by the evidence of the school principal, the students were picked out only because they had been seen ‘going in and out of the dormitory’ while the rest of the students were ‘settled’ on the fateful night.

Even then, the principal himself confirmed that despite what appeared to be suspicious conduct on the part of the students, no previous complaints had been made against them. If anything, the information he received was to the effect that if there was going to be any trouble at school it would emanate from Form three students who had just returned from suspension.

Besides the anonymous notes, the principal stated that in coming up with the suspects names, he had interrogated twenty students. Curiously, the investigation officer never interviewed any of those students to verify their narrative on the charges that were subsequently preferred against the accused. Neither did he have any opportunity to scrutinize the alleged anonymous notes from which the suspects names were apparently derived.

As a matter of fact, it is not certain whether those anonymous notes were made at all because none was presented as evidence in court. According to Gathiari (PW2), the notes were burnt. **Muraya (PW3)** also testified that the notes were burnt but not before they were given to the police.

If the notes were anonymous, no satisfactory reason was given why they were burnt. Going by Muraya's (PW3's) testimony it is further puzzling that the police handed over the notes back to the teachers yet this was a crucial piece of evidence that should not only have given them a basis for their investigations but also because it was the basis upon which the accused were picked out, arrested and charged with the present charges.

It is apparent that the investigation officer never undertook any investigations on the involvement of the accused students in the murder of their fellow students; rather he chose to rely entirely on the investigations by the school principal and his teachers.

And in doing so, he denied having seen the anonymous notes or even knowledge of their existence despite the fact that Muraya (PW3) testified that the notes were handed over to the police who returned them after reading them.

The 10th, 11th, and 12th accused were non-students; the 10th and 11th accused testified that they operated a motorcycle transport business popularly referred to as 'boda boda' while the 12th accused sold firewood. The connection between them was some Kshs 400/= or Kshs. 500/= which the 12th accused paid the 11th accused as transport charges. The 10th accused is alleged to have conveyed the money. Their evidence was somewhat confusing but that, in itself, cannot be taken to seal the loopholes in the prosecution case; it is up to the prosecution to prove its case beyond reasonable doubt.

Nowhere in his evidence-in-chief or in answers to questions put to him during cross-examination did the investigation officer link any of these accused to the murder of the deceased. It was his evidence that jerricans some of which contained inflammable substance were handed to him by police from Endarasha patrol base but that he did not know their source. He also confirmed that they were not dusted for finger prints because they had been handled by so many people. He also could not establish how the fire started. In short there was no evidence connecting the non-student accused to the murder of the deceased.

What all these boil down to is that while it is trite that a court can convict on circumstantial evidence, the evidence presented as such evidence here fell short of the threshold of proof beyond reasonable doubt.

In **Tumuheire versus Uganda (1967) E.A** at pages 328 and 331 circumstantial evidence was held to be the best evidence; the court that:

"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case."

As much as it may be a basis for a conviction the court cautioned that:

"As was said by Lord Normand in Teper versus R (1952) A.C. at page 489:

'Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Thus a trial court must be cautious that the evidence is inconsistent with the accused's innocence or, put differently, it is consistent with the accused's guilt.

But the rule always is, in order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. By way of analysis, the evidence has to satisfy the following criteria:

- (a) the circumstances from which the conclusion is drawn should be fully established;
- (b) all the facts should be consistent with the hypothesis;
- (c) the circumstances should be of a conclusive nature and tendency;
- (d) the circumstances should exclude every hypothesis but one proposed to be proved. (See **Sarkar on Evidence, 12th Edition, Page 34**).

The basis upon which this sort evidence is accepted as proof of the fact sought to be proved has been explained in **Republic versus**

Kipkering Arap Koske & Another (1949) XVI EACA 135 and Simon Musoke versus Republic (1958) EA 715. In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence (6th Edition, page 311)**, held as follows:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

In **Simon Musoke versus Republic**, the same court cited with approval the passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** quoted in **Tumuheire versus Uganda (supra)**.

My appreciation of the evidence presented as circumstantial is that apart from being insufficient it is replete with other co-existing circumstances that weaken or destroy the inference of guilt on the part of the accused. It cannot be said with any certainty that the inculpatory facts have been established and that such facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

The prosecution case fails not necessarily because some of the accused may be innocent but because the investigations were poorly conducted and therefore it is not possible for this court to pick out the perpetrators of this heinous crime. I come to this conclusion because apart from the missteps in the investigations that I have highlighted in this judgment, it also turned out at the hearing that at least two confessions could have been recorded in the course of investigations but either out of negligence or sheer ignorance, the would be confessions were taken in breach of sections 25A and 26 of the Evidence Act, cap. 80 and the Evidence (out of Court Confessions) Rules, 2009 rendering them of no evidential value.

Having come to this conclusion, it is unnecessary to consider the question whether malice aforethought was proved.

In the ultimate I have to come to the conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt; accordingly, the accused are acquitted of both counts of murder.

Signed dated and delivered on 2nd October 2020

Ngaah Jairus

JUDGE