



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 51 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIMEU MWONGELA.....1ST ACCUSED

BERNARD KYALO KIMEU.....2ND ACCUSED

JUDGEMENT

1. The 2 accused persons were charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 Laws of Kenya).
2. Particulars being that on the night of 26th and 27th December 2010 at Kisyani village, Ndiani Sub-Location, Kithembe Location in Kilungu District within Makueni County jointly with others not before court murdered Albert Muindi King'oo.
3. They both denied charge and matter went into full trial.
4. The prosecution called 6 witnesses. The accused testified on oath and called 3 witnesses.
5. **PW1 Fredrick Mulinge** testified that on 26/12/2010 at 10 pm he was at home when deceased Albert Muindi King'oo came home.
6. At 11pm, he heard dog barking. When he went outside he found many people coming to their home asking for Albert Muindi King'oo. They passed his home and went to his brother's Shadrack Wambua home. They asked him whether he had seen Albert. He said he was asleep and they asked him to wake him up and call him. They went with him towards Kisiani market and later he heard screams. Then he slept until morning when he was told Albert had been killed and burnt in the Kisiani market.
7. He later recognised the voice of the person who asked him to wake up Albert as Kyalo because where the act happened was at the shop of Kyalo – where Albert was burnt. He says he recognised the voice of Kyalo because he had known him for a long time since 2003. He is a family member. Their grandfathers are brothers. He stated, ***“They stated Albert is the one who had been stealing from the shops at Kisiani market.”***
8. He said Albert brother Simon is the one who told him Albert had been burnt and killed. Then he went to the scene at 11 am and found body covered by blankets.
9. On cross examination he stated that the people who came to their home were about 30 in number. He was not able to see any of them. He was only hearing voices of people. One of them asked him to get Albert. He did not see the person. There was no electricity. He had not put any light on. He said the one who talked to him was Kyalo because the place where the theft happened was in his plot. That is why he came out back for Albert.
10. **PW2 Shadrack Wambua Mulwa** testified that on 26/12/2010 at 1 am in the night he heard people calling him. He woke up together with his wife. He got out of his house and found people who told him they were looking for a thief. He said he could identify one Kyalo.
11. They said the thief was Albert and had stolen from Kyalo Kimeu. They went away with Albert. He said the person who called him from the house was Kyalo Kimeu. He talked to him while he was in the house. He knew Kimeu before.
12. He said in his statement to police we never recorded he saw Kyalo Kimeu and Mutua take King'oo by hands and that his mother woke up and asked Kimeu Mwangela where they were taking King'oo and that they said don't warm as King'oo had stolen. He also stated that he can't remember writing statement at police station saying Kimeu Mwangela called him from his house and Kimeu was his neighbour and

uncle. Kyalo is a distance relative.

13. On cross examination he stated that the people who came for Albert were about 15 in number. He says when he opened the door he identified Kyalo. He saw him at the door. It was 1 am in the night. His house had no electricity and there was no light. Neither did he have a torch. He was asked by police whether he knew Joseph Kimeu and said he knew that his shop is one which had been broken into. He then said, "I did not see Joseph Kimeu that night". Other than Kyalo no one else talked to him and there was no one else he knew.

14. At police station he said he only talked that night to Kyalo because he stood outside his door when he opened it.

15. **PW3 Dorcas Kiyua Mulwa** testified that on the night of 26/12/2010 she heard people outside her compound. It was dark. She got outside house. She had already slept. She saw people. The noises at her son's house woke her up. There were 2 boys Patrick Mulinge also called Red. She heard people's voices as it was dark.

16. She identified Joseph Kimeu and Kyalo Kimeu by their voices. She knew the 2. They were children of his uncle called Kimeu. Kyalo is son of Joseph Kimeu. They live a distance like – Town to Court (Machakos). She identified the 2 in court. She said Joseph is the one who told her to go back to sleep. Next day she learnt deceased was killed.

17. On cross examination she stated that she heard voices and found many people outside. It was dark. Other than Joseph Kimeu and Kyalo she did not recognize anyone else. She said she spoke to Joseph Kimeu only. They left with other people and Albert.

18. She only heard them talk and left. She did not hear accused 1 and 2 say anything as they left with Albert. She said, "only spoke with Joseph. I can't remember well what he said." It is not possible that voices she heard that noise were not of other people.

19. **PW4 Raymond King'oo Mutiso** testified that on 26/12/2010 he parted ways with his child at 10 pm and on 27/12/2010 at 7 am he was informed by a neighbour Johanna Ndula that his child had been killed and burnt at Kisiani village. He went to the scene and confirmed same. He found people; police came and took body to mortuary. He later identified it for postmortem exercise.

20. In cross examination he said he did not know what happened.

21. **PW5 Sgt. David Wanyonyi** testified that on 27/12/2010 he was instructed by OCS to proceed to the Kisiani market based on a report of killing a person by members of public. He proceeded there where he found people and police officers. He later recorded statement and conducted investigations and thereafter arrested and charged the accused person.

22. In cross examination, he stated that he relied on witness statements to charge accused.

23. **PW6 Dr. Loiposha** conducted the postmortem which concluded that deceased death was caused by respiratory failure due to fire. He had heard injury and was 60% burn.

24. The prosecution closed its case at this point.

25. The court ruled that accused had case to answer and they were put on their defence. They gave sworn statements and called 3 witnesses.

DEFENCE:

26. **DW1 Joseph Kimeu Mwongela** who is the 1st accused told the court that on the night of 26th and 27th December 2010 he was between 2 and 3 am in his house sleeping. They had celebrated Christmas the previous day. He heard noise and whistle. He woke up, went to the house of his son who is the 2nd accused and woke him up. He had also a visitor by the name Josephat Muendo Kyengo who had come to collect a balance of land purchase price he had sold to him.

27. The visitor was sleeping in his son's house, the 2nd accused. The noise was from Kisiani market. They all boarded his pickup KAK 001J and went to the said market. On arrival they found fire burning and later learned somebody was burning. He had a shop in the market and had a watchman by the name Julius Muthengi Sombi who used to guard the shop.

28. When he enquired from the watchman what happened he told him that a group of about 8 people attacked in an attempt to break into his shop. He whistled and the thieves ran away. People came. One of them while escaping fell into a ditch which had been dug by people who were making bricks.

29. People answered to the distress and managed to arrest the person. They took him across the road. People gathered. More people arrived with matatus headed to Nairobi. He was burnt by mob. It was his evidence that by the time he arrived, he found the fire already on.

30. He later left because he had an engagement at Wote the following day. When he later went to report the incidence at Kilome Police Station with his son, they were arrested and later charged. He stated that the reason why he was probably charged is because the alleged theft took place in his shop.

31. It was his evidence that he had nothing to do with the murder of the deceased because by the time he arrived at the scene, the deceased had already been burnt by mob. He refuted the prosecution claims that the deceased was taken from his home and killed. He did not even know the accused and prayed he be acquitted.

32. In cross examination he reiterated his evidence in chief. He added that the reason why he was implicated is maybe because the shop which was broken into belonged to him.
33. **DW2 Bernard Kyalo Kimeu** who is the 2nd accused repeated what DW1 said. He stated that on the material day and time he was in his house sleeping with a visitor by the name Josephat Muendo Kyengo who had come to collect a balance of purchase price for a price of land he had sold to his father. He was woken up by his father and noise from Kisiyani market. They boarded his father pickup and went to check what was happening.
34. On arrival they found burning fire and realised somebody was burning. His father enquired what had happened from his watchman and later went back home because his father was to travel to Wote town for an engagement. He stated that when his father came back, they later went to report at Kilome the incidence but were locked up and then charged.
35. It is his evidence that he knew nothing to do with the alleged murder and by the time they got to the scene, they found the person who was later identified as the deceased burning. He did not know the deceased. He prayed he be acquitted.
36. In cross examination he repeated his evidence in chief. He added that the reason why he was implicated is maybe because the shop which was broken into belonged to his father, the 1st accused.
37. **DW3 Julius Muthengi Sombi** told the court that he was a watchman employed by the 1st accused to guard his shop at Kisiyani market. On the night of 26th and 27th December 2010, he was at the market guarding. Suddenly about 8 people who were thieves attacked and they regrouped themselves. Some went to break the shop, other the bar and some stood guard at the road.
38. He whistled and people answered to the distress. They ran away. One of them hit a post and fell into a ditch which had been dug by people who were making bricks. The rest disappeared. He could hear the one who fell into the ditch calling the rest telling them not to leave him behind alone.
39. With help of a torch he saw him but did not know his name. People who answered the distress call retrieved him from the ditch and took him to the side of the road. Many people gathered and many other people arrived with vehicles who were headed to Nairobi. People started shouting thief and he was burned by the mob. They got tyre from the one of the vehicles and petrol and he was burned, he did not know who was burned.
40. Later, 1st accused came with two (2) other people using a pickup. He enquired from him what had happened. He then narrated to him what had happened. The 1st accused and his two people later left. He was later called to the station where he recorded statement. He produced the statement he recorded at the police as Dexhibit 2.
41. He told the court that he was never called to testify by the police. He was categorical that by the time the accused persons and the third person arrived, the deceased had already been set on fire and they did not participate. He stated that he witnessed all the events and refuted claims that the deceased was arrested somewhere and brought to the market and burned by the accused persons.
42. Despite the police recording his statement and having witnessed what happened, the police did not call him to testify in this case.
43. **DW4 Joseph Muendo Kyengo** told the court that he was from Kathonzweni in Makueni County. He had sold a portion of his land to raise school fees to the 1st accused. He told the court that on 26/12/2010, he had gone to the home of the 1st accused to collect the balance of the purchase price of Ksh.11,000/=. He produced the same agreement dated 12/6/2010 as Dexhibit 1.
44. He stated that between the night of 26th and 27th December 2010 at around 2 and 3 am, he was at the home of the 1st accused, he was sleeping at the house of his son who is the 2nd accused. He had been unable to travel back the same day due to long distance and unavailable means of transport.
45. He was woken up by the 1st accused who informed them of the noise from Kisiyani market. They boarded his pickup, the three of them and went there. On arrival they found fire burning. Upon close look there was somebody burning. Many people were gathered. He learned that some thieves had broken into a shop and one had been caught and burned by mob.
46. He refuted claims that the deceased had been taken from his home by the accused persons and burned. He was new in the area and did not know any other people. He stated that by the time the three of them arrived at the scene, the fire was burning and the accused persons had nothing to do with it.
47. They later went back to the house because he was to travel back home the following day in company of the 1st accused who had some business to do at Wote town.
48. He was later called to the police station at Kilome and recorded a statement. He was never called as a witness by the prosecution. He produced the statement recorded with the police as Dexhibit 3.
49. **DW5 Felix Julius** the final witness to testify in support of the defence case he stated that his home is near Kisiyani market. He knows the accused persons as they come from the same area though a distance apart.
50. He stated that between the night of 26th and 27th December 2010 at around 2 and 3 am. He was at the home sleeping. He heard whistling

and screams from Kisiyani market. He woke up his mother and his brother Benjamin Kivuva. He peeped through a window and saw torch light.

51. He decided to go to the market. On arrival he saw a group of about 200 people shouting thief burn him. By then the alleged thief had already been set on fire. He stayed there for about 10 minutes when the 1st accused arrived in his pickup accompanied by the 2nd accused and another person he did not know. It was his evidence that when the accused persons arrived at the scene, they found the deceased already having been set on fire by mob and they did not participate.

52. He was later called at Kilome Police Station to record a statement which he produced as D exhibit 3. He however informed the court that he was never called by the police to testify in this matter.

53. In cross examination he stood his ground that the accused persons had nothing to do with the death of the deceased.

54. Parties agreed to put arguments via written submissions. Only the defence filed the same.

ACCUSED'S FINAL SUBMISSIONS:

55. The accused submitted that, none of the witnesses identified the accused persons positively on the night when the offence was allegedly committed. The law with respect to identification at night is not in doubt. It must be proved beyond reasonable doubt.

56. They cited the case of **Caleb Muhatia Musiongo & 6 Others vs Republic [2016] eKLR** on the issue of identification at paragraph 77 – 84 which stated:-

*“However on visual identification of the appellants by PW1 this court is reminded of the guidelines. In the case of **Mwaura vs Republic [1987] KLR 645** in which the Court of Appeal held that:-*

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position of the accused and the quality of light.”

*They also cited the Court of Appeal in **Wamunga vs Republic [1989] KLR 424** as follows at page 426:-*

“...where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

*See also **Republic vs Turnbull [1976] 3 ALL ER 549, Maitanyi vs Republic [1986] KLR 198, Anjononi & Others vs Republic [1976-1980] KLR 1566, Morris Gikundi Kamande vs Republic [2015] eKLR at Nyeri***

57. They further submitted that, the prosecution did not call all important witnesses who witnessed the events of the night leading to the death of the deceased. The watchman, DW3 recorded a statement with the police but they did not call him as a witness. DW4 and 5 who are independent witnesses also recorded statements with the police but were not called as witnesses. The prosecution did not call any independent witness. Again failure to call these witnesses should be inferred that had these witnesses been called they would be adverse to the prosecution's case. They cited on this the case of **Nguku vs Republic [1985] KLR 412**.

58. They further submit that, the standard of proof in criminal cases is beyond reasonable doubt and rely on the case of **Philip Muiruri Ndaruga vs Republic [2016] eKLR**.

59. And further argue that it is also trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence as it was held in the case of **Sekitoleko vs Uganda**.

60. They conclude, that the prosecution case is disjointed, not corroborated and full of gaps which can only be interpreted in favour of the accused persons.

ISSUES ANALYSIS AND DETERMINATION:

61. After going through the evidence on record, I find the issues are; ***whether the prosecution has proved its case beyond reasonable doubt?***

62. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR** the elements of the offence of murder were listed as follows:-

a) *the death of the deceased occurred;*

b) *that the accused committed the unlawful act which caused the death of the deceased; and*

c) *that the accused had malice aforethought.*

(a) The death of the deceased:

63. The death of the deceased has been proved by the PW6 the Doctor, witnesses PW1 2, 3, 4, 5, DW1, 2, 3, 4, and who saw deceased's body being burnt and by the postmortem form produced as an exhibit. It confirmed that the death was caused by respiratory failure due to fire. He had heard injury and was 60% burnt.

(b) Proof that accused persons committed the unlawful act which caused the death of the deceased:

64. The prosecution anchors its case on the visual and voice identification of the people who picked deceased from home prior to the killing. The presumption is that the same people who picked him that material night are the same ones who killed him among others.

65. Accused persons have denied ever going to pick deceased from home on the material night as alleged. Thus the burden shifts to the prosecution to prove visual and voice identification meet the threshold of being safe and reliable to found a conviction.

66. What is the law on visual and voice identification?

Visual identification; In the case of Mwaura Vs Republic [1987] KLR 645, the Court of Appeal held that:-

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position of the accused and the quality of light.”

67. See also the Court of Appeal in Wamunga Vs Republic [1989] KLR 424 as follows at page 426:-

“...where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

68. The evidence of identification by night must also be tested with the greatest care as provided in the guidelines in Republic vs Turnbull [1976] 3 ALL ER 549 and must be absolutely water tight to justify conviction.

69. In the case of Maitanyi vs Republic [1986] KLR 198, the Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available what sort of light, its size and its position relative to the suspect.

70. The only eye witnesses of the picking of the deceased at the material night are PW1, 2 and PW3. All of them concede that there no any form of light and it was dark. Though initially they had alleged to have seen accused persons with other persons that night they on cross examination changed their version and said they recognized them by their voices.

71. PW1 said; on cross examination he stated, ***“that the people who came to their home were about 30 in number. He was not able to see any of them. He was only hearing voices of people. One of them asked him to get Albert. He did not see the person. There was no electricity. He had not put any light on. He said the one who talked to him was Kyalo because the place where the theft happened was in his plot. That is why he came out back for Albert.”***

72. PW2, on cross examination he stated that, ***“the people who came for Albert were about 15 in number. He says when he opened the door he identified Kyalo. He saw him at the door. It was 1 am in the night. His house had no electricity and there was no light. Neither did he have a torch. He was asked by police whether he knew Joseph Kimeu and said he knew that his shop is one which had been broken into. He then said, “I did not see Joseph Kimeu that night”. Other than Kyalo no one else talked to him and there was no one else he knew.”***

73. On the part of the PW3, on cross examination she stated that, ***“she heard voices and found many people outside. It was dark. Other than Joseph Kimeu and Kyalo she did not recognize anyone else. She said she spoke to Joseph Kimeu only. They left with other people and Albert. She only heard them talk and left. She did not hear accused 1 and 2 say anything as they left with Albert. She said, “only spoke with Joseph. I can't remember well what he said.” It is not possible that voices she heard that noise were not of other people.***

74. Thus in the words of the above 3 stars witnesses for the prosecution, none could see the people outside as it was dark.

75. The threshold of visual identification above set by cited authorities fail.

76. How about on voice identification?

With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the accused, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble. See Karani vs R [1985] KLR 290 and Chogo vs R [1985] KLR 1.

77. In the latter case, Court of Appeal delivered itself thus on the issue:

“.....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight”

78. In ***Rosemary Njeri vs Republic [1977] Criminal Appeal No. 27***, a “.....**We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.**”

79. More recently in ***Simon Mbelle vs Republic, (1 KAR 578 At 583)***: court held;

“In relation to the identification by voice, care would obviously be necessary to ensure;

(a) that it was the accused person’s voice

(b) that the witness was familiar with it and recognized it;
and

(c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.....”

80. As for PW1, there were about 30 people making noise and asking for Albert. Then he says; **“one who talked to him was Kyalo because the place where the theft happened was in his plot. That is why he came out back for Albert.”**

81. He said he had known him for long and their grand fathers were brothers. How often were they interacting to be familiar with his voice? He did not say. How did the noises of about 30 others demanding to get Albert affect the hearing and recognition of allegedly Kyalo’s voice? Hard to tell. Which actual words did Kyalo actually spoke? Same not clear.

82. PW2 says after hearing noises of about 15 people he opened, and saw Kyalo.Howver on cross-examination he said there was no light. He said only Kyalo talked to him.He does not say how long he was familiar with his voice and what actual words he uttered. Neither does he say whether other 15 plus people making noise had kept quiet for Kyalo to talk to him.

83. PW3 says that after hearing voices outside, she only recognized Joseph Kimeu and Kyalo. Then she says she **“I only spoke with Joseph. I can’t remember well what he said.”**

84. After going through the evidence of the PW1, 2 and 3, the court arrives at a conclusion that, it is not safe to say that the conditions obtaining at the time the voices were made/heard were such that there was no mistake in testifying to that which was said and who said it. In short the threshold warranting reliance on voice identification as set out by cited the authorities above was not established.

85. The identification aforesaid having failed, the other piece of evidence which could have connected the accused persons with the killing of deceased is their presence and participation in killing of the deceased. The accused persons have together with their witnesses DW3, 4 and 5 exonerated themselves and prosecution did not rebut their evidence. There was no effort to get the witnesses who witnessed the killing and burning of the deceased.DW1, 2 and 3 recorded statements with police but they were not called as prosecution witnesses but came as defence witnesses. They ought to have been called by police to give the evidence on what they witnessed. It did not matter they were to exonerate the accused persons. The prosecution noble duty was to seek justice but merely seeking conviction at the altar of justice.

86. The court agrees with defence that, it is also trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence as it was held in the case of ***Sekitoleko vs Uganda.***

87. The prosecution case is disjointed, not corroborated and full of gaps which can only be interpreted in favour of the accused persons.

88. Thus the court finds that the prosecution has not proved its case beyond reasonable doubt. Therefore;

(i) Accused are acquitted and released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

.....

C. KARIUKI

JUDGE