



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.56 OF 2013

REPUBLIC.....PROSECUTOR

V E R S U S

BENSON MURITHI KATHIA

STEPHEN KABIRA M'IKIAO.....ACCUSED

J U D G M E N T

Benson Murithi Kathia and **Stephen Kabira M'ikiao** (the accused 1 & 2) are jointly charged with the offence of *murder contrary to Section 203 as read with Section 204 of the Penal Code*. The two accused are alleged to have, on 10/5/2013, at Kiorone Village of Ntuluba Sub-Location, Mukululu Location, Meru County with others not before the court, murdered **Isack Meme M'ikilima (the deceased)**.

A total of 8 witnesses were called in support of the prosecution case. **Mr. Mulochi**, learned counsel, led the prosecution while the defence was led by learned counsel **Mr. Gitonga**. Both the accused testified on oath and each called one witness.

Kuleta Meme Issack (PW1) is the wife of the deceased. She was asleep with the deceased on the night of 19/5/2013. She was in one house with the deceased while their children were in another. She suddenly woke up to find their wooden house was engulfed in a fire. On trying to open the door, she found it was locked from outside. They managed to open the door, found somebody on the veranda who started to cut them; that she was able to see Kabira (accused 2) because of the fire; that he cut her on the head; that the fire was behind Kabira; that Murithi (accused 1) also cut her on the hand; that she became unconscious after being cut and did not know what happened after that. Later, she found she had also been cut on the legs and other parts of the body. PW1 said that she left the house with the deceased and that the two people at the door also cut the deceased and stabbed him; that she saw the 2nd accused stab the deceased on the stomach. After 2 – 3 days when PW1 came back to, she learnt that her husband had died.

PW1 said that they were attacked because she had lent some money to one Muthoni wife of Kirimi to pay a hospital bill but she started calling PW1 a witch; that the matter was reported to Njuri Ncheke where both were summoned attended and were supposed to take an oath, but they were attacked the night before the oathing took place.

PW2 Judy Kawira a daughter to the deceased and PW1 was asleep in a separate house on 19/5/2013 when about 2.00 a.m. she heard people talking outside. On peeping through the keyhole, saw her parent's house was on fire; that she screamed and saw accused 2 come to knock on her door; that she noticed many people had surrounded her parent's house; she only managed to recognize accused 1 and accused 2. PW2 saw her parents struggle with the people at the door; that the deceased came out followed by PW1 and that the 2 accused started to cut them as other people beat her mother all over the body; that the deceased ran off and the people chased him; that her house was directly opposite her parents' house and she could see what was happening well; that the mother fell near the door and after the people chased the deceased, she came out of the house and with the help of her brother, moved PW1 into a trench behind her house; that the brothers had been asleep in a shop near the gate. They took PW1 to hospital at Kangeta and were referred to Maua and later to Meru General Hospital. She did not know what happened to her father because she never went back to their home. PW2 knew the two accused as neighbours and that their relationship had been good with her parents until PW1 started demanding to be paid back her money that she had lent Muthoni to pay for a hospital bill from Kirimi but Kirimi started calling PW1 a biblical witch; that the matter was reported to the elders; that Karimi fell ill and died on the day they were attacked before the issue was resolved.

PW3 Moses Murungi, a son to PW1 and the deceased was not at home when the attack took place. He received a report of the attack at midnight on 20/5/2013, went back home, found four houses burnt, the mother was in the garden with cut injuries on the right hand and the head; they arranged for PW1 to be taken to hospital; that when police came they went to find out from neighbours why they did not come to their aid and on going to Murithi's house (accused 1), he was called and it was noted that his clothes were burnt (coat sleeves) and his shoes and trouser had blood stains. Accused 1 was arrested and taken to police station. PW3 was later called and informed that the father had been found dead near their home. He went to the scene found that the deceased had injuries to the head, back and the body had been burnt and a stick had been thrust through his body from the back through the chest. He was aware that there had been a disagreement over money that

PW1 had lent Kirimi who failed to pay and accused and others started calling PW1 a witch; that Kirimi was related to the accused. PW3 further stated that accused 2 was arrested when accused 1 named him as his accomplice.

PW4 Lydia Karambu is a daughter to PW1 and the deceased. She learnt of the attack on the parents on 20/5/2013 at 5.00 a.m. went to the home, found the houses had been burnt down the father had been killed, some distance from the home, with a metal rod thrust through his body, had multiple cuts to the body and the body had been burnt. She was aware of the case that was before the elders between PW1 and Kirimi who was represented by the two accused. She had attended the hearing of the case the day before the attack where accused and villagers threatened to attack her parents but the elders urged them to wait till they took an oath; that the attack was carried out before the oath was taken. She said when Moses called her, he told her that Kabira and Murithi had burnt the houses but she never recorded it in her statement to police.

PW6 Dr. Irene Gichunuku of Meru Level 5 Hospital produced the postmortem which had been filled by Dr. Njuguna who performed the postmortem on the deceased. Dr. Njuguna found that the deceased had sustained 50% burns on the lower limbs and trunk, multiple deep cuts on the scalp with fracture of right temporal occipital region. He formed the opinion that the cause of death was severe burns and severe head injuries.

PW7 Sgt. Athanasio Muriuki, the investigating officer in this case, from 20/5/2013 went to the scene and found the main house and kiosk were burnt. He was shown where the deceased's body was, where he found ash and blood clots; he took some ash, the blood clots, drew a sketch map of the home; found the two accused at the Administration Police Camp. He took the two accused to Maua Police Station. He also attended the postmortem. PW7 said that the arresting officers found accused 1 with a match box and a blood stained jacket which was forwarded to the Government Analyst. The match box was kept as an exhibit. He prepared an exhibit memo form and forwarded the exhibits to the Government Analyst. He said that though the report of the Government Analyst on the ashes had been received, the jacket was not returned.

PW8 Titus Kungutia is an elder of Antubalinki clan to which the accused and deceased belonged recalled that PW1 had in 2011, reported to the elders that Kirimi was calling her a witch because he was not willing to repay her Kshs.7,000/=. She had paid for Kirimi's wife's treatment; that Kirimi was summoned and agreed to repay but he failed to do so. PW1 went back to them after 2 months and they sent some elders to Kirimi who was asked to pay a lamb and Kshs.3000/= but he only paid Kshs.3,000/=. In 2013, PW1 went back to the elders alleging that Kirimi and accused 1 were calling her a witch; that on 18/5/2013 both parties were before the elders and many other people attended; that accused 2 insisted that PW1 had to be given an oath for bewitching many people. They were scheduled to meet again on 25/5/2013 but on 20/5/2013 he received a report of the deceased's death.

PW9 Catherine Murambi is a Government Analyst based at Nairobi. She recalled that on 5/8/2013, they received an exhibit memo form with some exhibits i.e. fire debris – F1, 2 & 3 and they were to ascertain whether there were any fire accelerants in the debris but on examination, they did not find any fire accelerations which include petroleum products. She advised that the exhibits should have been parked in polythene bags but not khaki.

When called upon to defend himself, accused 1 denied killing the deceased. He said that he was asleep in his house which is next to accused's house but separated by a fence. When he heard screams, he got out only to find people passing going towards PW1's home; that the fire from deceased's house was spreading to his fence, so he starting putting it off and never went to the deceased's home. Next day, the deceased's son and policemen called him and asked him to go with them to Kangeta Police Station where they took his jacket and he was detained. He denied knowing the accused 2 or the dispute between Kirimi and PW1; that he was framed because his father had married Kirimi's sister. He also denied that he ever called PW1 a witch.

Accused 2 in his sworn testimony denied knowing the deceased; that he only heard of the charges in court; that after his arrest, he investigated and found out where the deceased came from, 3 km from his home. He said that on 20/5/2013, he left home at 6.00 a.m. to go and harvest his *miraa* and returned back home at 4.00 p.m. He denied knowing Kirimi and that he belonged to an adjacent clan. He admitted knowing PW7 Julius as a member of the Land Committee; that Julius had sold land to one Jacob Murungi and he refused to transfer it and accused 2 told the funeral gathering about it and that since then, Julius never used to greet him. He denied having been present at a meeting of elders called to resolve the dispute between Kulleta and Kirimi. He denied knowing PW1 and her children; that it is Julius Kungutia (PW7) who framed him. **DW3 Mercy Karambu** is the wife to accused 1; she knew the deceased as a neighbour as their home is separated by a footpath; they heard screams when asleep on 20/5/2013, went out, found a fire had reached their side and started to put it out; she found many people outside and was not able to identify any of them; that accused had arrived home on 20/5/2013 and never left. She denied having heard of any dispute between Kulleta and Kirimi. She did not go to the deceased's home that night because they were busy putting off the fire that was advancing to their home.

DW4 Angeline Mukai Kabira is the wife of accused 2; she said that accused 2 went to harvest *miraa* at Kitherine, returned home at 4.00 p.m. and never left home till the next day when he left to go to his business of buying and selling cattle. She denied knowing the deceased.

The offence of murder is defined under Section 203 of the Penal Code. It is the duty of the prosecution to prove beyond any reasonable doubt the following ingredients under Section 203 of the Penal Code:

- (1) ***Proof of death and cause of death;***
- (2) ***Proof that the death was caused by the unlawful act or omission of the accused;***
- (3) ***Proof that accused possessed malice aforethought.***

There is overwhelming evidence on record that the deceased was murdered. Dr. Njuguna found that the deceased sustained multiple deep cut wounds on the scalp, fracture of the right temporal occipital bone and 75% burns on the lower limbs and trunk. The doctor formed the opinion that the cause of death was severe head injury and severe burns.

There is also overwhelming evidence that the people who attacked the deceased's home on the night of 20/5/2013 chased and killed him a few metres from his home as evidenced by the sketch map that was drawn by the investigating officer, PW6.

The next question therefore is whether the two accused murdered the deceased.

From the evidence of PW1 and 2 they were attacked by very many people. In fact PW2 put the number at about 100. From the sketch map, some of the deceased's neighbours are his own brothers but it seems during the attack, nobody came to their aid. PW6 said that during investigations, nobody from the village was willing to come up to give evidence.

The genesis of what befell the deceased and his family is the allegation that PW1 and the deceased were practicing witchcraft. PW1 narrated how she had lent money to Kirimi's wife to assist in taking her to hospital; that Kirimi and the wife refused to pay and that is when they started calling PW1 a witch. PW7, one of the village elders and the secretary to the elders committee of the clan confirmed that PW1 had first reported to them in 2011 and returned to them in 2013 just before the attack; that Kirimi fell ill and that is when the people started alleging that it is PW1 who had bewitched him. In fact the attack took place on the night that Kirimi died. PW7 corroborated PW1's evidence that accused 1 & 2 were at the forefront in the case between PW1 and Kirimi at the Njuri Ncheke. In their defences, the accused denied knowledge of the case. Accused 2 even denied knowing the deceased and the family. I however do not believe their belated defences that they were not involved in the said dispute between PW1 and Kirimi.

The accused were represented by counsel throughout this case and at no stage was the evidence of PW1, 2, 3 and 7 challenged that the accused were strangers to the dispute or that accused 2 did not even know PW1 and her family. Accused 2's defence is that he was framed by PW7. If that were the case, there would have been no reason for PW1, 2, 3, 4 and even the investigating officer to draw him into this case. Besides, the allegation of being framed was never put to PW7 when he testified. By making such allegations in his defence, the prosecution would not have been able to respond to them and their defences are afterthoughts and unbelievable.

Having established that the accused were actively involved in the dispute between PW1 and Kirimi and were party to calling PW1 a 'biblical witch', the question is whether they were part of the group that attacked PW1's home and caused the death of the deceased. PW1 and 2 are the key witnesses as they were present at the scene. The attack on PW1 and the deceased was about 2.00 a.m. deep in the night. The witnesses were suddenly woken up from sleep by the raging fire. Given the above circumstances, the identification of the perpetrators would not be under favourable conditions. This court must therefore carefully examine the evidence of both PW1 and 2 with great caution to determine whether indeed they were able to identify the accused persons from the group of people that attacked them and killed the deceased.

The law on identification of an accused under unfavourable conditions is well settled in many decisions. In Roria Roria v Republic (1967) EA 583 (P584).

"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.'"

See also Republic v Turnbull (1976) ALL 349 and Abdalla Bin Wendoh v Republic (1953) EA CA.

I found a very glaring contradiction in the evidence of PW1 and 2. PW1 told the court that when they woke up, the fire had already reached their door and they had to pass through the said fire, PW1 said **"the fire was from the direction of the door. It is the same door we ran to try and get out. The door had caught fire and ceiling had also caught fire and started to fall. On opening the door, we ran through the fire."** However PW2 had a totally different narration of the scene. This is what she said **"when I peeped outside I saw a fire at the back of the house.....I did not see fire at the door of my parents' house but saw smoke from the fire"**.

PW2 said her parents' house was only 3 metres from hers. If indeed there was a fire which had reached their door and engulfed the ceiling, it would have been as good as being at her own door. Both PW1 and 2 claim to have seen accused 1 and 2 there but the scenes are quite different. If there was only smoke at the parents' door, then PW1 and deceased could not have been able to pass through a fire. This contradictory description of the scene makes the court wonder who is telling the truth.

Further to the above, PW1 stated that when they managed to get out of the house, the person who attacked them was one metre from the door and the fire was behind him. She said **"when I reached the veranda, the fire was about a metre away. The one who cut me was next to the fire. The person was facing me and the fire was behind him."** However, later, PW1 completely changed what she saw and said:

"I passed by the fire then I met people 3 metres away." The latter statement means that PW1 passed through the fire first before meeting the assailants but in the first statements, she was attacked before passing through the fire. It is not clear what happened at the scene where PW1 met the attackers.

During cross examination of PW1, her testimony as to what happened was so confusing as to how the events unfolded, that it is not clear what actually took place when she came out of the house. I need to reproduce part of her testimony:

Pg.34 line 5 - pg.35 line 1

"I was cut on the hand when bending to pick a stone. When I was cut on the hand, I had been cut on the head and had fallen. I was cut on the head and hand is when I fell. After I was cut on the head is when I felt dizzy and fell. When I was cut I did not

see my husband again. When the person was telling me that my God should help me, I did not see my husband. I saw him being cut and being stabbed. I saw him being cut I saw him being cut. The 2 accused first cut me. I do not know who attacked my husband.”

In one breadth PW1 knew who attacked her husband and in the next, she did not know. Then PW1 talks of having been cut on the head, fell and then cut on the hand but at the same time says that she was cut on the hand when bending to pick a stone. If that is the case could she tell who cut her.

PW2's testimony is that she was able to see all that unfolded through a keyhole. I find that to be very unlikely that she could have been able to see all that went on outside the house through a keyhole.

PW3 who came to the scene later told the court that when police were trying to find out from neighbours why they never responded to PW1 and deceased's distress calls they went to accused 1's house, found that his jacket was burnt on the sleeves, the trouser and shoes were blood stained. He said that accused 1 then mentioned accused 2 as his accomplice. I must observe at this stage that PW3 did not allude to having been told by PW1 and 2 who the assailants were on that night. This is because, PW1 said she was unconscious and came to after three days. I find that accused 1 was arrested because of the suspicious state of his clothing.

Further to the above, though PW3 saw accused 1's burnt and blood stained jacket and shoes, the police only took possession of the jacket as an exhibit and it was forwarded to Government Chemist for analysis. There was no explanation given to the court as to what happened to the blood stained trouser or shoes that were found with accused 1. But even the jacket that was taken to Government Analyst was never received back and there was no report on it. Only some ashes taken from the scene were received back. In fact the investigation that was to be done on the ashes found at the scene, in my view was not helpful to the just conclusion of this case. If indeed there were such exhibits as a Jacket, trouser and shoes, they should have been produced and may have placed accused 1 at the scene. The police seem to have conducted shoddy investigations or it was pure police negligence or a clear intention to defeat the ends of justice by ensuring that the evidence was destroyed or disappeared.

In the end, I find that there is evidence that the 2 accused had been calling PW1 a witch and the relationship between them was not good and that makes accused 1 and 2 prime suspects in the murder of the deceased. However, I find that the identification of the two accused as having taken part in the murder is not full proof following the contradictions in the prosecution evidence. I have noted in my analysis of the evidence of PW1 and 2, that it is likely that the accused became suspects because of the role they played in the case between PW1 and Kirimi which was pending before the elders. The evidence of identification of accused 1 and 2 by PW1 and 2 leaves a lot of doubts in my mind as to whether the witnesses actually saw the two accused persons at the scene of crime. For the above reasons, I will give both accused the benefit of doubt and acquit them of the charge of murder under section 322 of Criminal Procedure Code.

Dated and Signed at NYAHURURU this 7th day of FEBRUARY, 2018.

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R.P.V. Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 21st day of March, 2018.