



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 34 OF 2008

REPUBLIC.....PROSECUTION

VS

FRANCIS MBAE JUSTUS.....1ST ACCUSED

JAPHET MUTEMBEI FRANCIS.....2ND ACCUSED

GEORGE MWIRIGI KIAMBI.....3RD ACCUSED

ERNEST GACHOVI MAKEMBO.....4TH ACCUSED

LUCIANA NKUNU KIAMBI.....5TH ACCUSED

ELIZABETH NEKESA MWIRIGI.....6TH ACCUSED

FREDRICK GIKUNDA KIAMBI.....7TH ACCUSED

JUDGMENT

The accused persons Francis Mbae Justus, Japhet Mutembei, George Mwirigi Kiambi, Luciana Nkunu Kiambi, Elizabeth Nekesa Mwirigi and Fredrick Gikunda Mwirigi were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that the accused persons on the 23rd day of April 2008 at Rwarene village, Giathathu sublocation, Mweru Location in Imenti South District within Meru County (Formerly Eastern Province) jointly with others not before the court murdered Francis Gichari Miriti.

The proceedings herein were initially taken by Hon Justice Muga Apondi before the retired between 5th March 2012 to 26th November 2012 and he recorded the evidence of 4 witnesses including the evidence of doctor – PW2 who produced post mortem form and said the deceased died due to severe burns.

When Justice Makau took over the trial of accused person's direction was taken on 12th February 2013 that matter proceeds from where reached although PW4 was recalled for further cross examination. On 8th July 2014 and she said that she didn't mention A1, A4 and A6 when statement to the police. She also said that she didn't mention in her statement that her mother Luciana was thrown into the ditch. PW4 in her evidence said that on 23.4.2008 at 7.00 p.m she was on her way home when she found her father the deceased herein together with her mother and A1 the village headman together with accused persons and they were talking about money the deceased had lent to A5 herein – 5000/=. Then her mother offered to give assailants a cow or in the alternative they should take the deceased to the police station. She said A4 claimed that they were wasting time and she took a stick which she used to assault the deceased.

That A6 threw her mother into the ditch and A3 poured petrol onto the deceased and A2 lit a match stick and set the deceased on fire. That she raised alarm and the assailants escaped. She said all the 6 accused persons were at the scene.

PW3 Luciana Mukwa Njeru Miriti the wife of the deceased testified that on 23.4.2008 she was at home with her husband at 7.00 am preparing breakfast and thereafter her husband went to conduct tuition for some students. In the evening her husband came back at 4.00 pm from school and again left for Kiandegde market. That the deceased returned at 6.30 pm and told her he didn't get bones for the dogs and he left to go and buy rice. That after 5 minutes she heard noise next to the road and she rushed there and saw about 10 people chasing her husband. She followed the crowd to the main road and at the junction she found her husband's hands and legs had been tied and he was seated on the ground. That when she asked the deceased what had happened, the deceased said the money he had lent to Elizabeth had brought problems.

That the deceased said Elizabeth – A5 claimed he had given her money tainted with witchcraft. PW3 said the village headman was at the scene. She said Luciana Nkunu assaulted the deceased with a stick. She said A5 had the money and the loan agreement - EXP2. She said the agreement was witnessed by Agatha Njeri and Regina Kiragu.

PW3 said she offered a cow to Luciana A4 so that they could resolve the problem amicably but she never responded.

That A1 and A6 grabbed her and threw her in a ditch and when she stood from the ditch she saw A3 pouring petrol on her husband and A2 lit match stick and set the deceased on fire. That she raised alarm and called her daughter. PW4 to bring a vehicle to take her father to hospital. That all the assailants ran away. PW3 said that her daughter Nancy arrived at scene while she was talking to Elizabeth A5 herein. That PW4 – Nancy Kakomo went to look for water to put out fire burning her father. That when her daughter Caroline arrived with a vehicle the deceased had already died. Matter was reported and Police visited the scene and collected the body of the deceased told her to offer to the assailants anything they wanted. She said the deceased said he was robbed of cash and mobile phone make Motorolla. She said A1 – village headman was at the scene and he pushed her into the ditch instead of protecting her. PW3 said incident took place at 6.40 p.m and she could clearly see the assailants. She said she didn't talk to Caroline about the people who assaulted her father. She said Nancy – PW4 came to scene when she was negotiating with assailants not to harm the deceased. She said scene was 50 metres away from her home. She said she negotiated with Mwirigi – A3, Luciana A4 and Elizabeth A5. PW1 Caroline Mukiri arrived at scene with a vehicle and found her father was already dead. She didn't witness offence being committed. PW5 said she witnessed the deceased give a loan to A5. She said she also took a loan from the deceased on the same date 17.4.2008.

PW6 Stella Kathure also testified that she knew the deceased and his wife but she didn't know who burnt the deceased. She said she didn't know if the deceased was a money lender. PW7 P.C John Siluda investigated the murder and preferred charges against accused persons herein. He said when they visited the scene with OCS Nkubu and other officers they found the village was deserted and A1 the village elder could not be traced to assist. He said that it was suspected that deceased was having affairs with other people's wives and that money allegedly loaned to A5 by deceased brought some domestic problems between her and her husband A3. PW7 said the widow to the deceased identified the suspects they arrested on 20.4.2008 and they were taken to police station and charged.

Accused persons were placed on defence and A1 65 years old village elder gave sworn statement and said the deceased was from Nkugune village and not from his village.

He said that he was at home on 24.4.2008 when he heard screams at 9.00 pm and left his home to go and see what was happening. That when he got to the road he found the body of the deceased herein had been burnt and he thought that the village elder from his village Muriungi Mwanamia had information and had gone to make report. That he went back to sleep as incident didn't happen in his area.

That he learnt that some people had been arrested and he was also arrested on 25.4.2008 by PW7 – Investigating Officer. He said he had interacted with Investigating office in the course of duty in his village. He said Investigating Officer arrested him and asked why he had not reported the murder and he said no one reported to him the death of deceased. He said he accompanied PW7 to Kiandegge police post from where a vehicle came and he was taken to Nkubu police station and he was charged.

He said he had never committed an offence since his childhood. He said Miriti's death was said as he was a teacher who had just bought land in the area and was an orphan. He said he didn't commit offence and he didn't see Miriti on the material day. He said he went to scene when he heard screams and not during murder. He said he had no relationship with the deceased and he owed him nothing. He said in cross examination that his home is 1.5 KM from scene of murder. He said he heard screams from about 7.30 pm. He said the murder was committed outside his jurisdiction. He denied having pushed PW3 into a ditch. He said PW3 and Nancy didn't see him at scene. He said he could not do much because murder was caused by a multitude of people. He said he didn't find the people who committed murder at the scene. He admitted that what PW7 said is true that he didn't report murder because he thought headman of village where murder was committed reported. He said A2 and A3 don't come from his village. He said the people who were screaming and blowing trumpet were many. He said it was dark and while going to scene he walked in fear to scene as he didn't know if he could be attacked. He also said A4, A5 and A6 also don't come from his village but are known to him.

A2 sworn stamen said that his village and that of the deceased bordered each other and his home is 4 KM a part from that of the deceased. He said A3 is his neighbour. As2 said that on 23.4.2008 in the evening he went to Mukuru Market at 7.30 p.m using route through Makutano. That they passed by Nancy Kathomi the deceased persons daughters home. That ahead of them a group of people came saying that someone had been burnt. When they heard this they didn't proceed with the journey. He said he was in company of Jackson Samburungi who was in prison by the time of testimony. He said it was dark and he didn't identify the people he heard say someone had been burnt. He said it had also rained during the day. He said it was not true that he lit the match stick that was used to set the deceased on fire. He said his co-accused were not his relatives and he didn't know anything about the borrowed money. He said he didn't see A1 on the material day and he doesn't know what he does but he used to see him. He said he didn't see A1, A3, A4, A5 and A6 on the material day. He said his wife was not at home. He said Mutuma and Mutai were with him. He said it was only his 4 year old child who was at home. He said they left home at 7.30 p.m and when 20 metres from Kathomes home that they heard screams and met people who claimed Francis had been murdered.

A3 also gave sworn statement and said he was against the wife taking a loan from the deceased. He said on the material day he was at home baking cakes. At 5.00 on 23.4.2008 after he send salesman to go and do supplies. He said he finished baking at 8.00 pm and because he was concentrating he didn't hear anything. He said he didn't send his brother to buy petrol as had no business to do with petrol. He said the boy PW4 claimed she saw with petrol was very young by then and was not made a witness. He said he didn't pour petrol on deceased body. He said he learnt of murder on 24.4.2008 and on same day he was arrested. He said he didn't leave his house on the night of 23.4.2008. He said he didn't see the deceased on 23.4.2008. She said his mother A4 was in her house and that A5 his wife came back home at 4.30 pm and she didn't leave the house.

He said A6 used to work in Tharaka Nithi and could come over the weekend. He said he had no problem with his wife being given a loan to boost their business as it was to be returned. He said his home is 1 km from deceased home and he didn't hear any noise. He said A1's home is further than his home. He denied that he send for petrol. He said he was at home baking cakes. He said it was not true that his wife

had reported they had differed and there was no association between his wife and the deceased. He said his home to the shops is less than 5 minutes walk but 20 minutes walk to the junction. He said the Investigating Officer didn't produce any report by his wife at the post. A4 also gave sworn statement and said she didn't know what caused the death of the deceased as she didn't hear anything. She said A3, A6 are his sons whereas A5 is her daughter in law. She said on 24.4.2008 A3 and A5 were at home after A5 came from work. She said A6 was not at home as he was at his place of work. She said what the deceased person's wife and daughter said was a lie. She said she was not involved in the death and she didn't know about the loan that A5 took from the deceased. She said she would have no problem even if she knew about the loan.

She said she learnt about death the following day and evidence of PW1 and PW3 is fabricated. She said she didn't see the deceased on 24.4.2008. She said A1 was village headman but she didn't see him on the material day. She said they didn't make any report against the deceased. She said she heard the deceased wife say that murder was committed by a group of about 30 people but they were the only ones arrested. She said that her house and that of A3 is 30 metres and was obstructed by maize plantation. She said she had not differed with the deceased or his wife. She said she didn't see deceased person's wife and she didn't offer to give her a cow so her husband is not injured. She said her home to scene is one house walk. A3 said it is 1 KM. She said she didn't hear any alarm being raised on 23.4.2008 and she went to sleep at 8.30 pm. She said she was not at scene of murder and she didn't use a stick to beat the deceased.

A5 in her sworn statement testified that on 23.4.2008 she returned home at 4.30 pm and started washing, cooking and fetching water. She said other business women at the market introduced her to the deceased who gave her a loan of 5000/= at 2% interest. She said the loan was not yet due for repayment by the time of deceased person's death.

She said she didn't leave the house on 23.4.2008 in the evening. She said she was arrested on 24.4.2008 in the evening. She said she didn't go to police post to complain about her husband. She said she had hardly known the deceased and she could not have planned his death. she admitted owing the deceased 5,000/=.

She said she came to know A1 when she found he had also been arrested at the police post. She said she didn't see A1 on 23.4.2008. she said the deceased persons sister and Njeri introduced her to the deceased who gave her a loan of 5000/- on 17.4.2008. She said her husband didn't have a problem with loan she got from the deceased. She said she could not tell if A4 left after she had returned home. She denied having an affair with the deceased. She said she didn't know why she was fabricated.

A6 testified that on 23.4.2008 between 5.00 and 6.00 pm he was at his place of work in Chogoria. He said his home from Chogoria is 20 KM. He said he was arrested 5 days after his brother and his mother's arrest. He said he learnt of deceased death when his sister called and informed him everyone at home had been arrested and that he should go back home and take care of the children who were left alone. He said evidence by PW1, PW2, PW3 and PW4 is fabricated. He said it was not possible for him to leave his place of work and go home to commit offence. He said the deceased was a member of his church and knew his daughters PW1 and PW3 as well as his wife PW2. He said he didn't see A1 on 23.4.2008 and he didn't know what he was doing on the evening of 23.4.2008 as he was in Chogoria. He said he was arrested 5 days after A1 had been arrested. He said he was doing construction work at Kiera Academy where he was staying. She said she had never been to Machakos to work. He said that if he decided to go home from Chogoria at 5.00 pm the earliest he could get home is 8.00 pm. He said the school where he was doing construction was closed. He said the 2 people he was working with also died and could not come to testify. He said PW1, PW2 and PW3 fabricated members of his family. He said the money given to Nekesa A5 was cause of the death and since he was a member of the family of Nekesa he was also fixed.

Written submissions were filed by Mrs Mwathi for state in support of the charge against accused persons whereas defence counsels filed submissions urging the court to acquit accused persons because the prosecution had not proved the charge beyond all reasonable doubt.

The evidence of Kuilana Mukwanyeru –PW3 the wife of the deceased and PW4 Nancy Kathome the daughter of the deceased that the deceased died as a result of burn injuries and in the hand of a mob is confirmed by PW2 the doctor who produced post mortem report showing cause of death as severe burns. PW3 and PW4 said that a mob attacked and tied the deceased on the hands and legs and that PW3 pleaded with them in vain. That A3 poured petrol on the deceased and A2 struck the match stick that set the deceased on fire. A1 and A2 confirmed that there were screams. Whereas A2 gave time that was similar to that of PW3 the village elder claimed that he heard noises later at 9.00 pm and when he went to scene he found the deceased had died of burn injuries and because he was not village elder of the village where offence was committed he just went back home and left the body of the deceased whom he knew as a teacher lying outside. I find that inhuman and sadistic for a village elder who was trusted to keep law and order. When PW2 and PW4 say that A1 was at scene of murder and did nothing as a village elder to restrain the mob I do believe them save that the omission to restrain mob from lynching the deceased may not be considered a felony.

A3 claimed he didn't hear the screams and yet he said his home/house to scene of murder was nearer than the home of A1 who heard screams and went to scene. That is not possible. PW2 and PW4 saw him at scene. The subject matter of mob attack was allegedly a loan the deceased gave A5 and PW2 said she pleaded with A4 to allow her settle the matter amicably but she didn't respond and she said she didn't want her family to be messed up.

PW2 and PW4 evidence was corroborated that A3 poured petrol on the deceased whose hands and legs were tied and he was on the ground and A2 set him on fire.

A6 confirmed that deceased was killed because of the money he gave to A5 and that is why he was being fabricated as his from A5 family. PW7 the Investigating Officer said A3 had suspected the deceased had an affair with his wife A5 and that is why he and other mob lynched the deceased. I do believe the evidence of the prosecution witnesses and particularly PW2, PW4 and PW7./ although a mob attacked the deceased and were present during the murder, it is clearly pointed out in evidence of PW2 and PW4 that the stroke that broke the camel's back was the pouring of petrol on deceased by A3 and striking of a match stick by A2. I do find that their alibi cannot stand. There is no way A2 could have failed to know the people he heard saying the deceased had been murdered considering they are from same village if indeed he met them and that he was not at the scene.

It is also not true that A1 could have heard screams 1.5 km away and yet A3 claims he didn't hear any screams 1 km away from scene and yet the deceased was being killed as a result of money he allegedly gave A5 and suspicion that deceased had an affair with his wife. The lynching was done by him as the aggrieved man. I do find A2 and A3 guilty of the offence of murder and they are convicted under S. 215 C.P.C. for A1, A4, A5 and A6 I would find that they didn't directly cause the death of the deceased although they were said to have been at the scene and seemed to support A3 cause that deceased had an affair with his wife and that is why he gave her money.

A6 confirms deceased was killed because of the money he gave to A5 and that is why being a member of family where A5 came from he was fabricate. I do acquit them. All they would have done is to restrain A2 and A3 from executing the murder but they didn't. They were passive participants who by their omission made it possible for A2 and A3 to murder the deceased.

They are acquitted.

HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 5TH DAY OF JULY 2018.

IN THE PRESENCE OF:

C/A:-Penina

Prosecution:- Mr Kiarie for state

Accused:- A1 –present person

A2 – present in person

A3 – Present in person

A4 – Present in person

A5 – Present in person

A6 – Present in person

Mr Mbaabu for A1.

Mr Kaimenyi Advocate for 4th, 5th and 6th Accused.

Mrs Ntarangwi Advocate for A2 and A3 – Mr Kaimenyi holding brief

Mr Kaimenyi

The file can be placed aside for Mrs Ntarangwi to mitigate on behalf of A2 and A3.

Mr mbaabu

We request for copies of judgment.

Order

A2 and A3 remanded for mitigation.

Later

Copies of judgment to be supplied to defence counsels upon payment of copying charges. A2 and A3 to be supplied for free.

HON. A.ONG'INJO

JUDGE

Later at 11.40 am

Before Adwera –Ong'injo J

Penina – Ct Ast.

Mr Kiarie for state

Mrs Ntarangwi for A2 and A3

A2 – Present

A3 – Present

Mr Kiarie

Accused persons may be treated as 1st offenders. I don't have past records. I submit that the 2 accused persons took the law into their own hands and intentionally in most heinous manner murdered deceased by burning. They had no mercy on him. They don't deserve any mercy from court and maximum sentence should be meted out.

Mrs Ntarangwi Advocate for A2 and A3 in Mitigation.

On behalf of A2. He is an orphan when the others were granted bail he was unable to raise it and he remained in remand for ten good years. He has 2 children. He is 48 years old. It is not an eye for eye. This is account of justice and should be tampered with mercy irrespective of the offence. The court should see how best to reform the offender.

On behalf of A3 – Mwirigi. He is aged about 36 years. He was in custody for 3 years until 2013 when he was released on bond. He has a wife – A5. Because of this case which has taken too long they have been disorganised economically. He is the one who is bread winner for his family. The wife is unemployed. May justice be tampered with mercy.

Court

This court has considered accused persons mitigation but having taken it upon themselves to take deceased person's life which is sacred and created by God, I think they deserve commensurate punishment.

They tied the deceased hands and legs and immobilised him before dousing him with petrol and setting him on fire. They didn't heed to deceased persons wife pleas to pardon the deceased for whatever sins/crime he had committed.

Order

A2 and A3 to suffer death as provided under S.204 penal code.

Right of Appeal 14 days explained.

HON. A.ONG'INJO

JUDGE