



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 53 OF 2011

REPUBLIC.....PROSECUTION

- V E R S U S -

1. JAMLICK KARIUKI KIMOTHO

2. NICHOLAS GILFORD MUNYI

3. ZACHARY MURANGIRI

4. JAMLICK MUSYOKA MWIKAMBA.....ACCUSED

J U D G M E N T

The four accused persons: **JAMLICK KARIUKI KIMOTHO** (accused 1), **NICHOLAS GILFORD MUNYI** (accused 2), **ZACHARY MURANGIRI** (accused 3) and **JAMLICK MUSYOKA MWIKAMBA** (accused 4) were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 10/9/2011 at Magenga Village, Karamani Sub-Location, Mukuuni Location in Tharaka Nithi, jointly murdered **Esidio Kiura Kimotho (the deceased)**.

The case proceeded to trial with the prosecution led by learned counsel **Mr. Mungali, Mr. Musyoka** and later **Mr. Mulochi**. The prosecution called a total of 7 witnesses. The accused persons all testified on oath and called three other witnesses and the defence was led by learned counsel **Mr. Gitonga**.

PW1 Mary Kathure is a granddaughter to the deceased. She told the court that on 10/9/2011 at 10.00 p.m. she was having supper with her grandmother Ciamati, PW2, the deceased and Sharon Mwende (PW4) when they heard noises from outside with somebody saying, 'Wee mchawi lazima wewe tukuuwe' – 'you witch, we must kill you'; that people hit the room roof of the house with sticks and then their door to the house was hit with a stone, and it opened; that Jamlick (accused 1), entered and got hold of the deceased and said they had been looking for him; that – accused 1 is a brother to the deceased; that accused 1 was followed by Mwambia, accused 2 who is her uncle, Zachary Murangiri, her uncle and Jamlick Musyoka a neighbour; that they left with the deceased and went towards the farm; that they feared to sleep in the house and all of them went out to spend the night in the farm; that next day at 6.00 a.m., PW1 was sent to get Sharon's phone and on the way, found the deceased body on the road and he was dead. Besides the body was a jerican which she took back to the grandmother. They went home and found administration police had arrived. PW1 said that she was able to see those who entered the house and took away the deceased because there was a lantern camp on the table and she knew them before and heard them converse; that they related well with the accused persons there before but on that night, they alleged that the deceased was a witch; that she heard each of the accused speak.

PW2 Jennifer Ciamati Kiura testified that on 10/9/2011 about 10.00 p.m., she was in her house with her husband, the deceased, her daughter Sharon (PW4) and her grandchild MK (PW1), when she heard people conversing as if coming to visit the deceased because Murangiri accused 3 is a nephew to the deceased, Jamlick (accused 1) a brother to the deceased. She knew the accused's voices; that the people started to hit the iron sheets and they hit the door open; that accused 1 entered and told the deceased that they were looking for him because he is a witch and had bewitched his 2 children; that accused 2 grabbed the deceased and others helped pull him outside and went away with him. PW2 started to scream but nobody came to their aid. After the accused left, they decided to go and hide in the bush till morning. At 6.00 a.m. she sent PW1 to charge a phone and she came back and informed them that she had found the deceased dead.

PW3 Collins Micheni Mwenda is the Senior Chief, Mukuuni Location. On 11/9/2011, he received a call from unknown person informing him of somebody having been burnt. In company of Administration Police, he went to the scene where he found a crowd who informed him that a suspect, Kariuki Kimotho had been seen at Kiracha at a bus stage going towards Embu. He went to the stage with the Administration Police and arrested accused 1 and took him back to the scene. Suspects were named by the deceased's wife and on the night of the 12/9/2011, together with the OCS Chuka, arrested the other suspects from their houses. PW3 said the deceased was found besides the road and was partially burnt but recognizable.

PW3 further told the court that accused 1 had about a month earlier, reported to him that the deceased was a witch and had killed his children but he referred the matter for resolution by the family. He knew accused 1 to be a brother to deceased and deceased an uncle to accused 2 & 3. He suspected that accused 1 was escaping when he found him at the bus stage. He visited deceased's home

Sharon Mwende (PW4) is the daughter of the deceased. She recalled being in the house on 10/9/2011 about 10.00 p.m. eating supper with the deceased, PW1 and 2 when they heard people talking outside; that the door with a stone, and opened; that there was a lantern lamp on the table. PW4 saw accused 1 enter, take the deceased; that the other accused, Nicholas, Murangiri and Musyoka (accused 2 – 4) helped take deceased outside. PW4 said that after the accused left with the deceased, they went to hide in the farm for fear they may be attacked. PW4 further said that each of the accused spoke saying that they had come to pick up a witch. She further said that next morning, they sent PW1 to charge her phone and it is PW1 who found the deceased's body on the road.

PW5 AP Cpl David Mutegi, then of Mukuuni Administration Police Post received a call from Collins Micheni (PW3) the area Chief who informed him that a person's body which was burnt was lying on the roadside. He proceeded to the scene with another officer, found the body, injuries all over the body, a nearby fire and one leg was missing, intestines exposed; that neighbours who were present showed them the deceased's home where they proceeded and found the wife, PW2, who confirmed that the deceased was the husband; that she mentioned 3 people, Jamlick Musyoka, Nicholas Gilford and Zachary Murangiri and then Jamlick Kariuki had by then, been arrested by the chief; that police from Chuka Police Station came for the body. Later, they arrested accused 2, 3 & 4 in their homes. He also noticed some smoke outside the deceased's house as if somebody tried to burn it but the door was not broken.

PW6 CPL John Mwai Mbili then of Chuka Police Station was the investigating officer in this case. He was at the Police Station on 11/9/2011 when he was asked to proceed to the murder scene where they found Administration Police and a burnt body. The public identified the body as that of Kiura. He proceeded to deceased's home where they interrogated the deceased's wife and daughter who narrated the attack of 10th about 10 p.m.; that the wife (PW2) named the four accused persons as the perpetrators. During investigations, he found that accused 1 had been alleging that the deceased was a witch and had bewitched his children.

PW7 Dr. Nicholas Nkonge, performed the post mortem on the deceased's body on 16/9/2011. He found that the body was burnt beyond recognition with 3rd degree burns covering 99% of the body; that the gut was exposed, left leg was amputated at the knee and burnt to the bone. Internally, the trachea was swollen an indicator that the deceased inhaled burns. The Doctor formed the opinion that the cause of death was cardio pulmonary arrest due to severe burns.

After the close of the prosecution case, all the accused persons were called upon to defend themselves. **Accused 1 Jamlick Kariuki Kimotho**, a younger brother to the deceased denied committing the offence. He stated that they lived on same piece of land with deceased and on 10/9/2011, at 10.00 p.m. he was at Mukuuni at the home of Timothy Kinyua which was about 3kms from his home; that he had gone to Kinyua's home on 25/8/2011 with his wife and children after his two children died of malaria; that his elder brother and elders advised him to shift from the family home; that Kinyua is married to his niece and he had given accused 1 a house to live in till the malaria subsided. He was there till September, 2011 when he decided to visit Joy Gacheri at Runyenjes but was arrested at Keracha while on his way; that Timothy Kinyua who was with him was also arrested. Accused 1 denied having had any dispute with the deceased nor did he ever allege that the deceased had bewitched his children. He however stated that the deceased's wife had wanted to snatch his land which had been given to him by his elder brother, Rugendo. He identified accused 2 as his nephew, his sister's son but they had not met for long as he lived and worked as a driver at Maua. Accused 1 also identified accused 3 as his nephew, the sister's son and that he lived 3 kms away and he only met him at Chuka Police Station. He denied being related to accused 4 but his home was 3 kms from his and he did not know him well. He said that PW1 and 3 framed him and he heard PW2 tell them how to frame him when the case was already in court.

DW2 Nicholas Mwambia Munyi (accused 2) also testified on oath confirming that the accused 1 and deceased are his uncles, accused 3 a cousin and accused 4 from his home area. He denied any involvement in the murder; that on 10/9/2011, he was at home where his brother's wife had left him with her children and he stayed with them till she returned at 8.00 p.m. thereafter they cooked, ate and slept at 11.00 p.m. On the next day, he heard from people talking about the murder and him and his brother's wife Faith (DW6) went to the scene, saw the burnt body; he went to inform his mother who then told him to go and inform his uncle Erastus. He remained at the uncle's house from where he was arrested by the chief and Administration Police. He denied having had any dispute with the deceased, his wife or children; that he had learnt that accused's children died of malaria. He denied being at the murder scene.

DW3, Zachary Murangiri Ngumba (accused 3) testified that the deceased was his uncle and his good friend. He denied killing the deceased; that on 10/9/011, Erastus had invited him to accompany him to his sister Mary Muthoni's home at Muthambi. They were about 50 people and used a bus to travel to the home from Magenga at noon and returned to Magenga at 11.00 p.m. He arrived in his house at 11.30 p.m., found his wife and never left again. He was arrested by the chief on 11/9/2011 at 8.30 p.m. and found the other three accused already under arrest. He had not known of the uncle's death till the chief told him that he was a suspect of murder; that he used to do several jobs in the deceased's home. He was shocked to hear the testimonies of the witnesses.

DW4 Jamlick Musyoka Mwikamba (accused 4) knew the deceased and used to do for him some casual jobs and take his farm produce to the market for sale. He denied having been involved in the murder or knowing the co-accused well save that they hail from same area; that on 10/9/2011, he hired an ox-cart to transport his manure to his farm at Magenga. He returned home at 5.00 p.m., found his wife Georgina and slept. Next day, he went to check on his cow when he found many people on the road saying a person had been killed and burnt but did not know who it was. Police took the body. He was arrested on the same night by the chief but not told the reason why. He denied having seen the deceased for a month nor was he with the other accused on the fateful date.

DW5 Timothy Kinyua Ngure of Mukuuni testified that he is married from accused 1's elder sister's home; that accused 3 is his nephew. He recalled that accused 1 went to his home in August, 2011 with his cattle, wife and children, because his children were dying due to malaria. He allowed him to live there. Accused 1 informed him of his intention to visit Joy at Runyenjes on 11/9/2011 and since he was going to Embu, they agreed to go together but they met the chief at the bus stage who alleged that they were running away for killing his brother and both were arrested. He denied that accused was involved in the murder and that he was living at his home. He denied knowing of any dispute between accused 1 and the deceased; that on 10/9/2011, he parted with accused 1 at 11.00 p.m.; that he had fenced his home such that accused 1 could not have left without him opening for him.

DW6 Faith Kanini, is the wife to one Robinson; DW6 stated that accused 2 is a brother to her husband, accused 1 is an uncle and accused 3 a cousin and accused 4 a neighbour. DW6 said that on 10/9/2011, she was going to Maua and requested accused 2 to go to her house to look after her children which he did. She returned home at 9.00 p.m., cooked and he slept in the children's room. She learnt of the death next day and together with accused 2, went to the scene. DW6 said her house is 3 roomed and that accused 2 never left the house that night. She was not aware of any dispute between accused 2 and the deceased or the family. She was aware accused 1's children died of malaria.

DW7 Geoffrey Mukuru recalled that on 6/9/2013, he had been invited for a function together with accused 3 to go to Mary Muthoni's home with 50 other people. They used a bus arriving at the home at 3.00 p.m. and arrived back at their home at midnight. He heard of the deceased's death on his way from church next day.

The charge facing the accused persons being murder, the prosecution has the onus to prove beyond any reasonable doubt the following ingredients:

(1) The death and cause of death of the deceased;

(2) That the accused caused the death through an unlawful act or omission;

(3) That the accused possessed malice aforethought as defined under Section 206 of the Penal Code:

PW7 Dr. Nkonge, who performed the postmortem on the body of the deceased found the following injuries; an amputated left leg at the knee; displaced skull; fracture on the frontal region, 3rd degree burns covered the body. He formed the opinion that the cause of death was cardio pulmonary arrest due to severe burns. The findings of PW7 corroborated the testimonies of PW3, 5 and 6 who saw the deceased's body on the morning following the murder. The body was found besides the road with injuries and was burnt. The death must have been caused by another person who injured deceased then set the body ablaze.

There is no dispute that the deceased was last seen alive on the night of 10/9/2011 at about 10.00 p.m. when PW1, 2 & 4 said that he was removed from his house by people who alleged that he was a witch.

Being night, the question of identification comes into issue, that is, whether, PW1, 3 & 4, identified the people who took away the deceased from his house after which he was found murdered.

It is also not in dispute that all the accused are persons known to the three witnesses, PW1, 2 & 4. Whereas accused 1 was a brother to the deceased, accused 2 & 3 were the deceased's nephews while accused 4 is known to the witnesses as a neighbour. The accused persons admitted that fact.

Although the accused 1 – 3 deny that there was any allegation of the deceased being a witch, PW1, 2, 3 told the court that those who took the deceased away alleged that he was a witch and that he had bewitched accused 1's children and caused their death. PW3, the chief of the area, PW5, the investigating officer who went to the scene after the murder, also learnt of the said allegation. The defence contends that accused's children died of malaria and there was no such allegation of witch craft.

Having noted that this case turns on the question of identification, this court must carefully analyze the evidence of the three identifying witnesses, PW1, 2 & 3 to determine whether their testimony is watertight, to connect the accused persons to the offence. There is now a host of case law on the issue of identification under unfavourable conditions like those that prevailed in the deceased's house on the fateful night. One of the leading cases that gives guidelines on what the court should consider before convicting an accused based on evidence of identification under unfavourable conditions is **Republic v Turnbull (1973) 3 ALL ER** where the court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The court should warn itself of the dangers of relying on such evidence and the need to take great care in relying on such evidence. In **Roria v Republic (1967) EA 583 (P584)** the Court of East Africa stated as follows:

"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.”

In the instant case, PW1, 2 and 3 told the court that they were all seated in the sitting room (table) taking supper when they heard voices outside. They had a lantern lamp on the table which lit the room. It is their testimonies that I need to interrogate.

In her testimony, PW1 told the court that accused 1 first entered the house and grabbed the deceased followed by the three others who helped

pull the deceased outside. PW2 on the other hand told the court that accused 1 did not enter the house but stood at the door and grabbed the deceased and the others helped him pull the deceased outside; PW4 told the court that accused 1 entered the house and grabbed the deceased but that the others remained at the door and helped accused 1 pull the deceased outside. PW2 said that the deceased had been seated next to the door. From PW2's explanation, accused 1 only stood at the door. It means that accused 1 never entered the house. The other accused never entered the house either and she was not able to tell the court how she was able to see those who stood outside. PW2's evidence totally contradicts PW1's evidence when she said that all the accused entered the house. PW4 went on to explain where the deceased was seated next to the door. That may explain why PW2 said that those who took away the deceased remained at the door, meaning that the people did not enter the house. PW4 did corroborate PW2's testimony that the other people remained at the door save for accused 1 who entered the house.

The light from a lantern lamp is not very bright and this court is at a loss as to how PW2 and 4 were able to see the people who stood outside the door or where were they seated in the house in relation to the door to be able to see those people who were outside. PW2 confirmed that there were no electricity lights outside the house. That was not clarified. There remains a doubt hovering over PW1, 2 & 4's evidence as to whether accused 1 entered the house or stood at the door and therefore, whether they were able to see the accused. This doubt is fortified by the fact that neither PW1 nor 4 recorded in their statements that accused 1 entered the house followed by others or that the others remained at the door.

PW1, 2 and 4 also testified that even before the door was hit with a stone and flew open, they heard the accused persons' whose voices they knew very well, talking outside. Again, the evidence was contradictory as to what the accused persons allegedly said.

PW1 said she heard the accused say that "***you witch who has been killing our children you shall die today***". She then heard accused 1 say '***you cannot finish my children***'; that accused 2 said you cannot finish my uncle's children, while accused 4 said they had been sent by Kariuki (accused 1) and they would kill the deceased that day; that she heard one after the other speak.

PW2 on the other hand said that she heard accused 1 say it is the deceased that they wanted because he was a witch and that they were going to pick the witch; that accused 3 said he had come to kill the witch while accused 4 said they had been sent to kill the witch.

PW4 said that she heard each of the accused say in turn that they were coming to kill the witch. PW1, 2 & 4 said that they recognized the voices of the accused even before they hit the door open. However, to the surprise of this court, neither PW1, 2 or 4 recorded in their statements that even before the door was hit open, they were able to recognize the introducers by their voices. The excuse the witnesses gave for not telling the court about recognizing the voices of the attackers was that they were not asked. However, the investigators must have known that identification of the assailants was crucial and should have enquired from the witnesses how they were able to identify/recognize the assailants. Failure to mention the fact that the witnesses identified the accused by their voices leaves a doubt in the court's mind whether indeed PW1, 2 & 4 did hear the accused speak and identified their voices.

Voice identification would have gone a long way in corroborating the witnesses' evidence on identification of the accused persons but I find their evidence on voice identification to be weak and doubtful.

During cross examination of PW1, 2 and 4, it emerged that all the 3 witnesses mentioned six people as having entered their house on that fateful night and they included Mwenda Mati and Mutwiri Munyi in addition to the 4 accused. However, PW1, 2 and 4 vehemently denied having mentioned the other two people to the police. The question is where the police got the two extra names of Mwenda and Mutwiri Munyi? Was there a change of mind or did the witnesses act on suspicion and guesswork? PW2 told the court that the other two people named, had earlier attacked them on 1/9/2011. So why were they mentioned in the witnesses' statements as having been present on that fateful night when the deceased was murdered and why was there a change of mind to omit the two witnesses out of the charge. One can only be left to guess why, that, they may not have been certain who the assailants were.

PW3 the chief of the area is the person who arrested accused 1 on the morning of 1/9/2011 after he received a call that accused 1 was a suspect. PW3 also suspected accused 1 because he had earlier alleged that the deceased had bewitched his 2 children who had died a month earlier. PW3 said that the other 3 accused were mentioned by PW2. PW5, the first police officer to arrive at the scene also told the court that PW2 named the 4 accused as the culprits. PW6, the investigating officer, also told the court that PW2 informed her who the suspects were. However, during cross examination of PW3, 5 and 6, it turned out that none of them mentioned in their statements that they had been given any names of the suspects. In PW5's statement which was produced as a P.Ex.No.1, doctor PW5 stated that PW2 told them they were attacked by known people. The statement was recorded on 13/9/2011, the question is why these witnesses never mentioned the fact that PW2 had named suspects and their names. One would expect that the police officers would take note of the first report which has been held to be some of the best evidence because it has not been interfered with or manipulated to suit the circumstances. The Court of Appeal in the case of ***Terekali & another v Republic 1952 EA***, the court stated that:

"Evidence of a first report of the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment and made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others."

Guided by the above decision, this court is in doubt whether the accused persons (2 – 4) were named to the police as the suspects on the morning of 10/9/2011. It seems that arrest was made as an afterthought. The investigating officer and those who recorded statements recorded the accused's names as well as other two suspects in PW1, 2 and 4's statements but there was totally no explanation as to what happened to the two others who were not charged. In addition, PW3, 5 and 6 failed to record the names of the suspects given to them by PW1, 2 & 4 in their statements. That is telling, that no names may have been given to police in the first report.

I am convinced that no names were given to the police on the 10/9/2011, otherwise the police officers who recorded the statements would have included them in the statements.

The last question then is whether PW1, 2 & 4 did identify the accused persons as the assailants. I have considered the defences of the accused. Each of them gave an alibi denying to have been present at the deceased's home on the fateful night. As earlier noted, this being a criminal case, the burden squarely rests on the prosecution to prove their case beyond any reasonable doubt. The accused do not bear any burden and do not need to prove the truth of their alibis. I find that the identification of the accused persons on the fateful night either visually or by voice was wanting and the fact that they were never mentioned in the statements of PW3, 5 & 6 too raises doubts in the court's mind as to whether PW1, 2 & 4 knew or saw who the assailants were.

There is strong suspicion against the accused persons especially the 1st accused who had alleged and even reported to the chief that the deceased had bewitched his children. However, suspicion alone cannot be a basis for a conviction. There must be evidence to prove the allegation beyond reasonable doubt. The prosecution has failed to meet that test.

In the end, I resolve the doubts that still linger in my mind in favour of all the accused persons and they are hereby acquitted of the charge of murder. If in custody, they are set at liberty unless otherwise lawfully held.

Signed and Dated at NYAHURURU this 2nd day of July, 2018.

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R.P.V. Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 4th day of July, 2018.