



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HCCRC NO. 12 OF 2013**

**LESIIT J**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOSEPH MBITHI MUNYAO.....1<sup>ST</sup> ACCUSED**

**SIMON MWANGI KIMANI.....2<sup>ND</sup> ACCUSED**

**PETER MBURU NDUNGU.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

1. The three accused persons **Joseph Mbithi Munyao** hereinafter the 1<sup>st</sup> accused, **Simon Mwangi Kimani** the 2<sup>nd</sup> accused and **Peter Mburu Ndungu** the 3<sup>rd</sup> accused are jointly charged with the offence of murder contrary to **section 203** as read with **section 204** of the **penal code**:

**“The particulars are that: on the 19<sup>th</sup> day of November, 2012 at Mururui Estate within Nairobi County the three accused with others not before court murdered Isaack Yusuf Abdi.”**

2. The prosecution called a total of 13 witnesses.

3. This case was started by Hon. Muchemi, J. who heard the evidence of PW1 and PW2, before I took over the case and heard the rest of the case after invoking **Section 201(1)** and **Section 200** of the **Criminal Procedure Code**.

4. The brief facts of the prosecution case were that the three accused persons were part of a *bodaboda* group of people that apprehended the deceased on suspicion that he had stolen a motorcycle belonging to one of the group members. The prosecution case is that the three accused persons in company with other motor cycle riders commonly known as *bodaboda*, took the deceased to his mother’s house and conducted a search which did not yield what they wanted. The group then took the deceased to the Marurui stage where they placed a tyre around his head, doused him with petrol and lit him, lynching the deceased. The deceased died at the scene.

5. In their defence, the three accused persons denied being involved in the lynching of the deceased. They all denied playing any role at the scene where the incident took place. The three accused called four witnesses who stated that the three accused persons were not part of the group of *bodaboda* who lynched

the deceased. The defence witnesses stated that the persons who lynched the deceased were not from Marurui area, where the accused persons hail from.

6. The learned Prosecution Counsel Ms. Onunga urged the court to find that the prosecution had proved their case beyond any reasonable doubt. Counsel urged that the events leading to the death of the deceased were clearly stated by the prosecution witnesses. Counsel urged that the defence of the accused persons was not tenable as their witnesses could not give a detailed account of where the accused persons were at the time of the incident.

7. Mr. Kariuki learned Counsel representing the 1<sup>st</sup> and 2<sup>nd</sup> accused submitted that what the court ought to determine was whether the identification of the accused persons met the test laid out in **R V Turnbull and others (1976) 3 All ER 549**, whether the evidence of PW3 and 4 who he submitted were minors required corroboration, whether the evidence of PW1 and PW2 was credible, whether the identification parades conducted in respect of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were a sham; whether there was need for independent witnesses since all witnesses were relatives of the deceased, and finally, whether the circumstances considered cumulatively had formed a chain so complete to establish that the accused persons committed the offence.

8. Mrs Omungala learned Counsel representing the 3<sup>rd</sup> accused urged that the accused person was not at the scene of the incident and therefore the court ought to dismiss the charges against him.

9. The accused persons face a charge of murder contrary to **Section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

**“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”**

10. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **Section 206** of the **Penal Code** as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

**a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,**

**b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**c) An intent to commit a felony;**

**d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

11. The onus and evidential burden of proof lies with the prosecution to prove its case against the three accused persons beyond any reasonable doubt. The prosecution must prove that the accused persons were the perpetrators of the unlawful act of lynching the deceased. The prosecution must also equally prove that at the time the accused persons lynched the deceased, they had formed an intention to either cause death or grievous harm to the deceased.

12. Having considered the entire evidence adduced by both sides, I find that the following issues are not in dispute. It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons hail from Marurui, which is the same area where PW1, 2, 3 and 4 come from. It is not disputed that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons operated

bodaboda business within Marurui, while the 3<sup>rd</sup> accused was a driver. It is also not in dispute that the deceased was lynched by a group of bodaboda on allegation that he had stolen a motorcycle from one of them.

13. Having carefully considered the evidence adduced by the prosecution and the defence, the learned counsels' submissions and their authorities, I find these as the issues for determination in this case are:

**a) Whether the identification of the accused persons by the prosecution witnesses was free from error or mistake.**

**b) Whether there were material inconsistencies in the evidence of PW1 and PW2 as to affect the veracity of the prosecution case.**

**c) Whether PW3 and PW4 were minors and whether their evidence required corroboration.**

**d) Whether the defence of the accused persons was plausible and tenable.**

14. **As to whether there were material contradictions in the evidence of the PW1 and 2.** PW1 stated that on 19<sup>th</sup> November, 2012 while at her mother's place in Marurui, and in the company of PW2, PW3 and PW4, the son who is the deceased herein was brought home escorted by five people. PW1 testified that she recognised the five as bodaboda and gave their names as Mburu identified as the 3<sup>rd</sup> accused, Mwangi identified as the 2<sup>nd</sup> accused, Joseph identified as the 1<sup>st</sup> accused, one Wa Njane, not before court, and one Maina also not before court.

15. PW1 stated that she asked the men what the deceased had done and that the men shouted that she should produce one Njenga. She stated that the group proceeded to search their house but that they did not get what they were looking for. PW1 testified that the five bodaboda then left with the deceased and were joined outside the house by a huge crowd.

16. PW1 said that she followed the group closely while pleading with them to take her son to the police station but that Wa Jane declined. PW1 testified that when they reached Thome Shepherd School she saw that the 3<sup>rd</sup> accused was armed with an iron bar and that the 1<sup>st</sup> accused took it from him and hit the deceased with it. PW1 later changed and said that she saw the 2<sup>nd</sup> accused hit the deceased with an iron bar.

17. PW1 testified that soon thereafter, the crowd forced the deceased to sit down. PW1 said that she then heard a man, whose voice she could not recognize say "**leteni tairi**" meaning "**bring a tyre**". A tyre was brought by someone she did not identify. PW1 then heard another man, also not identified state "**leteni Petroli**" meaning "**bring petrol**". PW1 stated that the 1<sup>st</sup> accused brought the petrol in a plastic container, poured it on the deceased and lit a matchstick. PW1 said that she stepped away as she could not withstand watching the deceased burning. PW1 stated she could see clearly as all these events unfolded because of a big streetlight at the stage that lit a large area.

18. When PW1 was cross examined by the defence counsels she admitted that she did not give the names of the accused persons to the police at the time that she recorded her statement. She said that all she told the police was that she could identify the assailants physically. PW1 also admitted that in her statement to the police she had said that she did not recognize the man that hit the deceased with an iron bar. PW1 in cross examination by the defence stated that in her statement to the police she stated that the petrol used to lynch the deceased was brought by motor cycle people that she did not identify.

19. PW2 in her evidence stated that the three accused persons led a group of bodaboda operators to their house. She testified that the group asked PW1 to request the deceased to produce one Njenga who had their motorcycle. PW2 stated that it was the 2<sup>nd</sup> accused who was holding the deceased. PW2 testified that she asked the 2<sup>nd</sup> accused whether he was part of the group upon which the 2<sup>nd</sup> accused replied that she should ask PW1 to produce Njenga or die.

20. PW2 stated that the 3<sup>rd</sup> accused and one, Wa Njane searched the rooms in the house but did not find what they were looking for. She stated that they pleaded with the group to be allowed to talk to the deceased to persuade him to disclose who Njenga was but they declined. PW2 followed the group holding the deceased up to the bus stage. She stated that the crowd asked for a tyre and petrol. PW2 said that she saw the 1<sup>st</sup> accused siphon petrol from a motorbike, put it in a container and proceed to pour it on the deceased.

21. In cross examination, PW2 stated that though she knew the accused persons very well, in her statement to the police she did not mention any names, neither did she describe them physically. PW2 admitted that in her statement to police she had stated that she did not know the man who poured petrol on the deceased.

22. Having analysed the evidence adduced in court by PW1 and PW2, I find that each of them departed from their statements to the police. The said departure was quite significant. While in evidence PW1 identified the three accused persons by their names, and stated that she had recognized them when they came to her house with the deceased, to the police she stated that she could only identify the assailants physically. PW2 likewise, while claiming that she knew the accused persons very well prior to the incident admitted that she did not mention their names nor describe them to the police.

23. In regard to the roles played by the accused persons at the scene of lynching, PW1 and 2 contradicted themselves and also each other in their evidence. PW1 stated that the 3<sup>rd</sup> accused was armed with an iron bar and that the 1<sup>st</sup> accused took the bar from him and used it to hit the deceased. In cross-examination by the defence PW1 admitted that in her statement to the police she had stated that she did not identify the man who hit the deceased. In re-examination PW1 stated that the one she saw hit the deceased with an iron bar was in fact the 2<sup>nd</sup> accused. On the issue of the petrol used to lynch the deceased, PW1 testified that it was PW1 who syphoned the petrol from a motor cycle and then poured it on the deceased. However in her statement to the police, she did not say that she recognized the person who delivered the petrol.

24. PW2 on the other hand admitted that even though she knew the accused persons very well, she did not give their names to the police as the perpetrators of the offence. More significantly however, she stated to the police that she did not identify the person who gave petrol used to lynch the deceased.

25. Considering the evidence of these two key witnesses I find that even though they claimed they knew the accused persons very well, and they purported to identify them in court for the various roles they played, they did not implicate them to the police. They were clear to the police they could only identify the culprits physically. I find that the two contradicted their own statements and also gave conflicting evidence before the court. The inconsistency in the evidence goes to the very root of the matter.

26. In regards to the identification of the accused PW3, and 4 all stated they identified the accused persons as the people who came into their house holding the deceased. They also stated that they knew the accused very well because their mother/aunty meaning PW1 and 2 used to call them on phone to pick them up at home with their bodaboda. In cross examination, PW3 stated that he did not know any of the accused persons by name but that he had seen the 1<sup>st</sup> and 2<sup>nd</sup> accused ferry people with bodaboda.

27. PW4 was not clear concerning who amongst the accused persons she saw at the scene, yet she was the one that opened the door to let them in. She first stated that she saw the three accused persons. Later she changed and said she saw only two who she identified as the 2<sup>nd</sup> and 3<sup>rd</sup> accused. PW4 later changed her testimony and stated she saw all the three accused persons.

28. The evidence of PW3 and 4 that the accused persons ferried PW1 and 2 in their bodaboda was incredible as neither PW1 nor PW2 alluded to being customers of any of the accused. Having considered the evidence of PW3 and 4 I find it highly conflicted, inconsistent and incredible.

**29. As to whether PW3 and 4 were minors and whether their evidence required corroboration.**

PW3 was 15 years when he testified and 13 years when the incident occurred. PW4 was 12 years old when he testified and 10 years at the time of incident.

30. **Section 124** of the **Evidence Act** regarding the evidence of children provides as follows:

**“s.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”**

31. **Section 2** of the **Children Act** defines a minor as *one below the age of 10 years*. PW3 13 years during the incident. He was not a minor. PW4 was however a minor as she was 10 years during the incident. I do not find it necessary to go into the issue whether the evidence of these two witnesses required corroboration. That will be an academic exercise having found that their evidence was conflicted and incredible.

32. **As to whether the identification of the three accused persons by the prosecution witnesses was free from error or mistake.**

33. In Michael Kimani Kungu –vs- Republic CA CR. Appeal No.686 of 2010 it was held:

**“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”**

34. The court of appeal further stated in Maitanyi -vs- Republic (1986) KLR 198,

**'..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.'**

35. In this case it was very clear that the key witnesses in the case, PW1, 2, 3 and 4 were at their home at 7.30 pm when the deceased was escorted by a group of people. PW1 and 2 followed the group until the scene where the deceased was lynched. It is clear that even though all these witnesses purported to know the accused before the incident, none of them gave their names to the police. None of them described them to the police either.

36. On 24<sup>th</sup> January, 2013 PW1 and 2 identified the 1<sup>st</sup> and 2<sup>nd</sup> accused persons to PW13 who arrested them two months after the offence had taken place. Soon after the arrest, the 1<sup>st</sup> and 2<sup>nd</sup> accused were ferried in the same vehicle as the witnesses. The same day an ID parade was conducted in which PW1 and 2 identified the 1<sup>st</sup> and 2<sup>nd</sup> accused.

37. Thereafter PW1 identified the 3<sup>rd</sup> accused to PW11 who was a police officer at Kariobangi Police Station upon which the 3<sup>rd</sup> accused was arrested. PW2 was later summoned to the police station where she identified the 3<sup>rd</sup> accused in an ID parade.

38. In DAVID KARANJA & OTHERS V REPUBLIC CA No.117 of 2005 the Court of Appeal

addressed itself to identification parade as thus:

**“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”**

39. The identification parades conducted for PW1 and 2 to identify the 1<sup>st</sup> and 2<sup>nd</sup> accused were not properly conducted. The accused had been exposed to the witnesses. They were therefore unfair, a sham and were of no probative value. This court can only find that they were conducted as a formality and served no meaningful purpose in this case.

**40. Were the defences advanced by the accused persons tenable and plausible.** The 1<sup>st</sup> accused stated that having spent the day without his motorcycle, he was given some money by other riders upon which he proceeded home. On reaching Marurui, he met a huge crowd of people which he assumed to be part of a political rally and he proceeded home.

41. The 2<sup>nd</sup> accused stated that on the fateful day, he had spent the day at Kasarani Police Station together with his father. After they were done with the station, they boarded his bodaboda and proceeded to his sister DW7 place of residence where they had dinner. He left the sisters' place past midnight.

42. The 3<sup>rd</sup> accused in his unsworn evidence admits to being at the scene at the material time. He stated that it was for a short duration and that while there PW2 approached him informing him that some people had apprehended their kin. He stated that he advised her to contact the authorities and left for Nairobi town in his matatu.

43. All three accused persons denied being at the scene of crime at the material time when the deceased was lynched by a group of bodaboda riders. DW4, 5 and 6 who testified in defence of the three accused persons all claimed to have been present at the scene at the material time when the deceased was lynched. They stated that the bodaboda riders who committed the erroneous act were people they were unable to recognise because the crowd comprised of more than 200 riders whose faces one could not see as they were all wearing helmets. The witnesses stated that if they had recognised any of the three accused persons as being part of the crowd, then they could have intervened and could have persuaded them to listen to them and stop the lynching. DW4, 5 and 6 said they were leaders in the village.

44. DW7 was a sister to the 2<sup>nd</sup> accused. She stated that between 7.00 pm and 9.00 pm, the 2<sup>nd</sup> accused was in her house having dinner having spent the day with her father at Kasarani Police station.

45. From the evidence availed by the accused persons in their defence it is evident that they all deny taking part in the lynching of the deceased at the scene.

46. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in **Criminal Appeal No. 12D 68 of 1969** where his lordship observed:

**“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”**

47. I have considered the evidence of the defence witnesses. The fact that DW4, 5 and 6 acknowledge being at the Marurui stage when the deceased was lynched, and the fact they stated that they never saw any of the three accused persons at that scene raises doubt in the prosecution case. This is more so in light of the conflicting and inconsistent evidence adduced by the prosecution witnesses. DW4, 5 and 6 said that they could not identify anyone from the crowd because all the bodaboda riders were dressed in helmets. That raises doubt in regard to the ability of PW1 and 2 to identify and single out the three accused persons from the crowd of over 200 bodaboda who were at the scene at the time of incident.

48. This is a case that relied purely on the evidence of identification of the accused persons. The evidence availed by the prosecution has failed to convince this court beyond reasonable doubt that the accused persons were part of the bodaboda who apprehended and lynched the deceased. As I have stated there was material contradiction in the testimony of each of the four witnesses, PW1, 2, 3 and 4. The four witnesses also contradicted each other's testimonies. This gave the impression that the evidence was fabricated. In respect to the minor witness PW4 it created the impression that she was coached on what to say in court.

49. The action of lynching the deceased was barbaric, disgusting, abhorring and highly inhuman and high handed. The court looks upon it with the disgust it deserves. Having said that it was the prosecution duty to prove the charge on the required standard of proof. Having carefully considered the entire evidence, I find that the prosecution has failed to prove their case against the accused persons beyond any reasonable doubt. Consequently, I give them the benefit of doubt and acquit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons of the charge of murder contrary to **section 203** of the **Penal Code**. Accordingly under **section 322** of the **Criminal Procedure Code**, I set the accused persons at liberty forthwith unless otherwise lawfully held.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2017.**

**LESIIT, J.**

**JUDGE**