



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL (MURDER) NO. 31 OF 2014

REPUBLICPROSECUTOR

VERSUS

D A 1ST ACCUSED

AMOS BICHANGA 2ND ACCUSED

BEN BICHANGA OMWANCHA3RD ACCUSED

FRED OSEKO JOHN Alias MAGORO 4TH ACCUSED

JUDGMENT

1. The four accused, **D A, Amose Bichanga, Ben Bichanga Omwancha** and **Fred Oseko John Alias Magoro**, are charged with two counts of murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 25th February 2014, at Getenga Sub-location in Sameta District within Kisii County, jointly with others not before court murdered Clemencia Bonareri Nyamao (in count one) and Alice Moraa Mokua (in count two).

2. The case for the prosecution was that on the material date somewhere in Sameta District within the County of Kisii, villagers were attracted to a scene where shouts, noises and screams were heard. They found the first accused (D) alone and in a stupor. Allegations emerged that he was “bewitched”. Among the villagers who appeared at the scene were the first deceased, Clemencia Bonareri, and the second deceased, Alice Moraa. On being questioned by the villagers, the first accused who was now in his senses stated that he was “bewitched” by the first and second deceaseds.

3. The villagers reacted to that information by setting upon and assaulting the deceased persons before lynching them by using old tyres and petrol to burn them.

Both deceaseds suffered severe body burns which led to their deaths as confirmed by the post mortem reports. The first deceased died at the scene of the lynching while the second deceased died while undergoing treatment at the Kisii Level 5 hospital.

4. The incident was reported to the police at Ogembo Police Station. Police officers visited the scene and commenced investigations which revealed to them that the first accused, the second accused (Amos), the third accused (Ben) and the fourth accused (Fred) were among the villagers who lynched the deceaseds on suspicion of being “witches” and responsible for “bewitching” the first accused.

5. The four accused were arrested and eventually charged with the present offences. They all denied the charges.

The first accused's defence was that he is aged sixteen (16) years old and a Primary School pupil. He was asleep at his home on the material date when he was allegedly taken away by "witches" to an unknown place where he was to be made a wizard. He declined the offer and was forced to take some food. He later found himself at a road and out of his senses. Villagers appeared at the scene and raised alarm. They spit saliva on him and he regained senses.

6. Thereafter, he (first accused) said that he had been taken away by the two deceaseds. The village mob proceeded to attack and lynch the two deceaseds. He did not know what was happening and was at the scene moving around. He contended that he did not participate in lynching the deceaseds.

7. The second accused's defence was that he is aged 30 years old and a farmer by occupation. He was at his farm on the material date when he was called by a chief and told to meet him at Ogembo. He went there and waited for the chief who arrived with the first accused who was to be taken home for causing two women to be lynched. The first accused is his (second accused) brother. He (second accused) was instructed by the chief to take the first accused to the chief's office on the following day. The two went to the chief's office on that date but were arrested on allegation that they had lynched the two women.

8. The third accused's defence was that he is aged 31 years old and a businessman within Kisii town. He was at his rural home at a place called Nyagiti on that material date and while asleep he was awakened by an old man and told that the first accused was sleeping outside the house and should be taken into the house. He called his other brothers and upon their arrival he left the scene and went to call a priest. He was however, called back to the scene and on arrival found that the two deceaseds had been lynched by a mob of people. The police arrived and took away the deceaseds. He was later arrested together with his brothers (first and second accused) and charged with the present offences.

9. As for the fourth accused, his defence was that he is aged 21 years old and employed at a slaughter house within Kisii town. He woke up on the material date and went to a market called Morata. He left the place at 6.00 pm driving a herd of cattle and on arrival home heard that some people had been killed. He slept at home and on the following day went to work as usual. After work, he returned home only to be arrested by police officers for allegedly stealing a cow. He denied the allegation but his parents went ahead to pay Kshs. 40,000/= to the complainant so that the matter could be ended. He was surprised to be told later that he had another case of murdering people. He knew nothing about that offence.

10. In his final submissions, the learned counsel for all the accused, **Mr. Okenye**, submitted that the prosecution failed to prove its case beyond reasonable doubt. That, PW 1 stated that her mother was lynched by a mob and that the first accused was the person who lit the fire that burnt the deceaseds to death. However, if the fire was lit with five (5) litres of petrol, then it could have not only burnt the deceaseds but also those who were by-standers at the scene. Therefore, PW 1 and PW 2 could not be heard to implicate any of the accused as they did not know what was going on at the scene.

11. The learned defence counsel further submitted that the post-mortem reports did not indicate the primary cause of death and that the video clip which was displayed in the court was taken by a person who did not record a statement and in any event, the owner of the video camera was not called to testify, neither was his duration at the scene indicated. That, it was only the first accused who was seen in the scene but he was only dancing around the deceaseds' dead bodies.

The learned defence counsel also submitted that apart from the burns, there was no other physical injury to the deceaseds. He urged this court to find all the accused not guilty and acquit them.

12. In response to the foregoing submissions, the learned Prosecution Counsel, **M/s Mbelete**, stated that the prosecution proved that the deaths of the two deceased were caused by the four accused. That, seven (7) witnesses were called by the prosecution and some of them identified the accused as being part of the crowd who lynched the deceaseds. That, the evidence of PW 1 was clearly corroborated by that of PW 2

and PW 3 witnessed the entire commotion and when he attempted to rescue the deceaseds he was threatened and assaulted by accused one and two.

13. The learned Prosecution Counsel further submitted that the doctor (PW 6) clearly indicated the cause of death to be body burns and the investigations officer (PW 7) produced a video-recording of the events as they occurred on the material date and in which the first accused was clearly captured.

Learned Prosecution Counsel contended that the prosecution proved its case beyond reasonable doubt and showed that the deceaseds were murdered by the four accused and others.

14. From the evidence and the submissions by both the defence and the Prosecution Counsels, it was apparent that there was no dispute that the deceased were lynched by being burnt to death by a mob of villagers with deep beliefs in witchcraft who branded them “witches” and blamed them for whatever happened to the first accused, real or imagined.

The cause of death was in essence not disputed. There was undisputed evidence from the prosecution that the deceased met their deaths by being assaulted and lynched.

The post mortem reports (P.Ex 1 & 2) clearly indicated that the cause of death respecting the first deceased (Clemencia) was 95% body burns and 65% body burns respecting the second deceased (Alice).

15. Without doubt, the two deceased suffered very gruesome and violent deaths at the hands of a “bloodthirsty” mob of villagers who “crowned” themselves as being the prosecutor, the judge and executioner of the deceased persons for their “greatest sin” of being “witches”. Even a “witch”, if any exists in this world, deserves the right to be heard before being condemned.

What happened to the deceased persons was murder most foul as there was clear intention on the part of those who accused and lynched them to put them to death and nothing more.

16. There being no dispute and no doubt that the deceased were murdered, the basic issue for determination was whether the four accused or any one of them was identified as having been part of the villagers who participated in the lynching of the deceased.

The defence raised by each of the four accused was a denial and an indication that they were arrested and charged without good cause. Apart from the first accused, they all indicated that they were not at the scene when the actual lynching started and ended.

17. In criminal cases, a duty is cast upon the prosecution to prove the guilt of an accused person on a standard of proof which is beyond any reasonable doubt. An accused person shoulders no obligation to prove his innocence (see, **Chemagong Vs. Republic (1984) KLR 611**).

18. In the present case, the prosecution’s evidence was sufficient to prove that the deceased were lynched by a mob of irate villagers in an incident which occurred in broad daylight thereby providing favourable conditions for the identification of the persons or some of the persons who participated in the unlawful transaction which ultimately led to the deaths of the two deceased.

The evidence showed that the criminal transaction commenced from the time when the two deceased were pointed out as “witches” to the time they were killed by being lynched.

19. Among the people present at the scene at the material time was **Rael Osebe Mokuu (PW 1)**, daughter to Alice (second deceased). She said that on the material date they woke up at 6.00 am and commenced their usual household chores. Her mother went to the farm but returned home later with news that the first accused had been found alone and in a stupor at the place known as Nyagiti. He had allegedly been “bewitched”.

Rael (PW 1) proceeded to the scene accompanied by her mother and others and on reaching there found

the first accused being questioned by villagers and in the process, he alleged that the “witches” were Rael’s mother (second deceased) and the first deceased. It was then that the villagers descended on the two women by assaulting and lynching them.

20. It was Rael’s evidence that she identified the four accused as having been among the villagers who executed the unlawful transaction against the deceased women.

She firmly indicated that the first accused provided the matchstick used to ignite the petrol which was provided by the second accused. She stated that the third accused provided the rubber motor cycle tyre while the fourth accused played the role of assaulting her mother.

21. **Isabella Nyaboke Nyamao (PW 2)**, daughter to Clemecia (first deceased), was also at the scene at the material time. She more or less corroborated what was stated by Rael (PW 1) particularly the fact that the four accused participated in assaulting and lynching their mothers. She (PW 2) was with her mother at their farm when they were attracted to the scene by shouts and noises and on their arrival were confronted by a crowd of people led by the first accused who then pointed at Isabella’s mother and the crowd descended on her.

22. Isabella (PW 2) confirmed that the second accused provided the petrol while the third accused provided the rubber tyre. She also confirmed that the fourth accused assaulted her mother using a “panga” (machete).

George William Mabeya (PW 3), was attending a school board meeting at the material time when he heard shouts and noises. He enquired and learnt that the second deceased was in the process of being assaulted for allegedly “bewitching” the first accused.

23. George (PW 3), rushed to the scene and found the four accused assaulting the deceased women. He confirmed that the fourth accused used a “panga” to assault the deceased.

He attempted to rescue the two women but was instead assaulted by the first and fourth accused and chased away from the scene by the third accused. All his attempts to rescue the deceased were futile. He therefore retreated to his home only to later learn that the two deceased women had been lynched to death by burning. He indicated that the four accused led the mob of villagers in assaulting the deceased persons.

24. **John Angwenyi Anunda (PW 4)** and **Nelson Mbira Nyaigero (PW 5)**, respectively identified the bodies of the two deceased persons for purposes of post mortem examinations.

Dr. Nyabera Omari (PW 6), conducted the post mortem examinations and produced the necessary reports (P.Ex 1 & 2) showing that the two deceased sustained fatal body burns.

PC Zakaya Kipcheum (PW 7), investigated the case and eventually preferred the present charges against the four accused.

25. In the course of investigations, PC Kipcheum (PW 7) and his team proceeded to the scene and found a large crowd of people and the dead body of the deceased Alice. The deceased Clemencia had been injured and rushed to hospital where she died. He (PW 7) later arranged for the necessary post mortem examinations and obtained statements from necessary witnesses. He also obtained a mobile phone video recording of the events and produced the necessary memory card (P.Ex 3(a)).

26. PC Kipcheum (PW 7) played the video clip in court and produced the necessary video-disc (P.Ex 3b)) without any objection from the defence. However, the only person clearly captured on the video was the first accused who did not dispute the fact but contended that he did not participate in lynching the deceaseds.

27. It is clear from the foregoing evidence by the prosecution that despite the four accuseds’ denial of

having participated in the lynching and killing of the deceased persons, they were all at the scene not as innocent bystanders but active participants of the entire criminal transaction. They were all placed at the scene by Rael (PW 1), Isabella (PW 2) and George (PW 3). The defence by the second, third and fourth accused suggesting that they arrived or never arrived at the scene when the two deceased were being assaulted and lynched was disproved, discredited and displaced by the evidence of Rael (PW 1), Isabella (PW 2) and George (PW 3).

28. The three witnesses knew the four accused very well. They were very firm and credible in implicating the four accused. They did not impress this court as having acted without good reason and with malice in firmly and corroboratively identifying the four accused as having been among the mob of villagers who assaulted and lynched the deceaseds.

The first accused was clearly captured in the video recording as having been at the scene. However, this court would not rely on the video clip to hold him culpable for the material offences as there was sufficient and credible evidence in that regard from PW 1, 2 and 3. Besides, the origin of the video clip and the manner in which it was produced and handed over to the investigating officer (PW 7) created doubt as to its authenticity.

29. It is the ultimate finding of this court that the prosecution succeeded in proving its case against the four accused beyond any reasonable doubt. They are each found guilty as charged in each of the two counts and are convicted accordingly.

[Delivered and signed this 12th day of July 2016]

J.R. KARANJAH

JUDGE

12/7/2016

Before J.R. Karanjah – J

CC Njoroge

State Counsel – Mr. Otieno

Accused 1 – 4 present

Mr. Okenye for all accused

J.R. KARANJAH, J

Court: Judgment delivered to accused.

J.R. KARANJAH, J

State Counsel: Accused may be treated as first offenders.

Mitigation by Mr. Okenye: Accused one is a minor aged sixteen (16) years old. As for accused two, three and four they acted as a mob and may have been unduly influenced. All the accused are praying for leniency. They are from the same family.

J.R. KARANJAH, J

COURT: The Court has considered that the accused are first offenders and what has been stated in mitigation on their behalf.

As for accused one, sentence shall be deferred to allow for assessment of his actual age.

As for accused two, three and four they are hereby sentenced as follows:-

Count 1: Accused two, three and four to suffer death as prescribed by Law.

Count 2: Accused two, three and four to suffer death as prescribed by Law.

However, sentence on count two may be held in abeyance.

A person only dies once. With regard to accused one, he shall be produced for sentence on 19/7/16 after necessary assessment of his actual age.

J.R. KARANJAH , J

12/7/16

19/7/2016

Before J.R. Karanjah – J

CC Njoroge

State Counsel – Mr. Otieno

Accused 1 – Present

Mr. Okenye for accused person

J.R. KARANJAH , J

COURT: According to the age assessment report dated 22/4/16 filed herein, the first accused (Dennis Aswera) is aged 18 years old meaning that he is an adult. A previous report in the file dated 18/3/14 indicated that the first accused was about 18 years old at the time meaning that he may now be 20 years. The bottom line is that accused one is an adult.

J.R. KARANJAH , J

Sentence (Accused one – Dennis Aswera)

Count 1: To suffer death as prescribed by law.

Count 2: To suffer death as prescribed by law.

However, sentence on count two (2) be held in abeyance.

J.R. KARANJAH , J

19/7/16