



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO. 12 OF 2008**

REPUBLIC-----PROSECUTOR

VERSUS

1. AMOS OMANYALA MUNYEKENYE

2. CHRISPINUS OUMA OMOLLO

3. KAROLI SANDE SOKONI -----ACCUSED

4. CHRISTOPHER EKESA MUNYEKENYE

5. WILBERFORCE OKUMU AMOLLA

**JUDGMENT**

1. The remains of the body of Barasa Omanyala Ekine (the **Deceased**) were recovered from his home by the Police on 21<sup>st</sup> October 2008. Dr. Z. G. Njau who conducted postmortem on those remains on 24<sup>th</sup> October 2008 formed the opinion that the cause of the Deceased's death were severe burns of 100% and 6<sup>th</sup> degree. Amos Omanyala Munyekenye (**A1**), Chrispinus Ouma Omollo (**A2**), Karoli Sande Sokoni (**A3**), Christopher Ekesa Munyekenye (**A4**) and Wilberforce Okumu Amolla (**A5**) are jointly said to be responsible for that death and face the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Prosecution case was constructed by the evidence of 8 witnesses. Josephine Amoding (PW1) is daughter of the Deceased and was in the same house as the Deceased on the night of 20<sup>th</sup> October 2008. Whether she was asleep or whether she was serving food to her late father is not clear because of the inconsistent evidence she gave. Anyhow, it was her evidence that people known to her and who were her relatives stormed into the house at about 9.00 p.m. Although the house was lit by a tin lamp, one of the assailants put it off. However, a torch which A4 had was able to provide some light. The witness saw A1 cut her father and turn on her and cut her on her forehead. As this happened, she was ordered to keep quiet by A2. After the assailants had injured their victims, they set the house on fire. The witness was able to escape from the house and as she was outside, she saw the attackers make away. She said she was able to recognize them as Kanga Omuse (A1) Chris Mukhayo (A2) Karoli Sokoni(A3) Ekesa Munyekenye (A4) and Joseph Okumu (A5). It was her testimony that all these five persons are her relatives and they all belong to the same clan as her being the Batesio Clan.
3. Margaret Nasimiyu Barasa (PW2) and Consolata Amoit Barasa (PW3) heard some distress call on the night of 20<sup>th</sup> October 2008 at around 9.00 p.m. The distress call came from the direction of the house of the Deceased. The Deceased was husband to PW2 and father to PW3. Both PW2 and PW3 responded to that distress call and ran towards the house of the Deceased which was

- blazing under fire. PW2 says that she saw one Amos Omanyala, Okumu, Chris, Karoli and Ekesa leave the scene. When she reached the scene she found PW1 on the ground injured while the Deceased was inside the burning house. PW1 had a cut wound to her head and was bleeding. That the Deceased was burnt in the house and could not be saved. On the identity of the persons she saw leave the scene, the evidence of the witness was that Amos (A1) and Ekesa (A4) and Karoli (A3) were her relatives while Chris (A2) and Okumu (A5) were her neighbours. It was her further evidence that at the time of his death the Deceased had a land dispute with Ekesa (A4).
4. It was the evidence of PW3 that the fire from the burning house of the Deceased provided enough light for her to see some people leave the scene and she was able to see 5(five) people and she recognized them. They were Moses Omanyala(A1) who was armed with a panga, Wilberforce Okumu (A5) who was armed with a machete and a club, Chris Omolo (A2) who was armed with a club , Christopher Munyekenye(A4) who was armed with a machete and club, and Karoli (A3) who was armed with a club. It was also her evidence that she saw her sister PW1 outside the house and she had a deep wound to her head.
  5. The death of the Deceased was reported to Busia Police Station on 21<sup>st</sup> October 2008. Upon receipt of that report, IP Stephen Irungu Mwangi (PW6) and Bernard Gitau (PW7), in the company of other Police Officers, visited the scene. At the scene, they found a grass thatched house that had completely burnt. They also saw the remains of a human body which had been completely charred. The remains were removed from the scene and taken to Busia District Hospital Mortuary. It was the evidence of PW7 that members of the public present at the scene pointed out two suspects who were also at the scene. The two are Christopher Ekesa (A4) and Chrispinus Ouma (A2). The police officers arrested the two. The other accused persons were arrested on later dates. It was the evidence of PW6 that he together with PW7 conducted the investigation. On his part PW7 stated that he recorded statements from witnesses and handed them over to PW6 for further investigation and it was PW6 who made the decision to have the suspects charged with the offence they currently face.
  6. While the remains of the Deceased lay at the mortuary in Busia District Hospital, a post mortem was conducted on by Dr. Njau on 24<sup>th</sup> October 2008. The body was completely charred and in the opinion of the Doctor the cause of death was severe burns of 100% and 6<sup>th</sup> degree. Dr. Patson Kubuta (PW8) who produced the post mortem report on behalf of Dr. Njau who had at the time of giving evidence passed on, explained that 6<sup>th</sup> degree burns are burns to the bone.
  7. Back to the happenings of the night of 20<sup>th</sup> October 2008, Moses Peter Opiyo (PW5) is the Chief of Bukhayo North Location. At about 10.00 p.m. whilst at his home Ekesa, (A4) and Karoli (A3) visited his home and informed him that some unknown people had killed Mzee Barasa Omanyala (the Deceased) and burnt him in his house. An hour later at about 11.00 p.m., Amos Omanyala (A1) who is a Village elder came to his home and gave him the same information that he had received from Ekesa and Karoli. The witness was aware that there existed a land dispute between the parents of A1 and the Deceased and that the court had determined the dispute. Francis Oicho Papa (PW4) is both a Village Elder and a Clan Elder. He too was aware that there existed a land dispute between the Deceased on the one hand and the A1, A3 and A4 on the other hand. That a week before the death of the Deceased, A1 had told the witness that the Deceased was disturbing him over the land and that A1 would kill the Deceased and burn him.
  8. It is upon receipt of that evidence, that I shall evaluate in detail shortly, that I placed the Accused Persons on their defence. All the Accused Persons chose not to offer any defence whatsoever. At the close of hearing the State and the Defence made closing arguments.
  9. Mr. Obiri for the State submitted that PW1, PW2 and PW3 were able to recognize and place all accused persons at the scene at the time of commission of the offence. That PW1 who was assaulted by the Accused Persons was able to recognize A1 as the first person to enter the house. That she was able to recognize the other Accused Persons from the light of the burning house. It was also the argument of the Prosecution that that bright light was sufficient enough to enable PW2 and PW3 recognize all the Accused Persons as they got away from the scene. This court was asked to find that there was evidence beyond reasonable doubt that the Accused Persons murdered the Deceased.
  10. Mr. Jumba who jointly with Mr. Ashioya represented the Accuseds Persons asked this court to find that PW1 who was the star witness for the Prosecution gave evidence that was inconsistent. He pointed out for instance that the witness gave conflicting evidence as to whether she was

- asleep or serving food to her Deceased father at the time the attackers entered the house. Secondly, the court was asked to find that the PW1 could not have been able to see the attackers while she lay outside the house because she had lost consciousness after being hit by one of the attackers.
11. The Defence made some arguments in respect to the alleged evidence of recognition by PW1. That there was no evidence as to the intensity of light from either the tin lamp or the torch. There was no evidence as to how long the witness had observed the Accused Persons. There was no inquiry as to the distance between the witness and the Accused persons.
  12. On the evidence of PW2 and PW3, the court was asked to find that no evidence was given as to how bright the flames were and the distance between the witnesses and the assailants. It was also pointed out that there was a conflict between the evidence of PW2 and PW3 as to how the Accused Persons left the scene. That when PW2 saw the Accused Persons leave the scene A2, A3, A4 and A5 were to her right while A1 was to her left. And that the Accused Persons were walking. This court was asked to contrast this with the evidence of PW3 which was supported by that of PW1 that the assailants left the scene running in the opposite direction towards the swamp. But further it would have been impossible for PW3 to see the faces of people who were running in the opposite direction.
  13. The Defence also criticized the manner in which the Police carried out investigations as to the death of the Deceased. First it was noted that PW6 who described himself as Investigating Officer did not record a statement of his role and because of this the Accused Persons did not have an opportunity of knowing the nature of his evidence prior to the hearing. On another front it was submitted that the investigating officer's judgment was clouded because he was the one who recorded statements from the witnesses.
  14. I propose to start with the Defence attack on the investigations. The evidence is that PW6 assisted by PW7 carried out the investigation. PW7 recorded the statements of the witnesses and passed them on to PW6 for further investigations. According to PW7,

### **“CI Irungu made the decision to have the suspects charged”**

CI Irungu is PW6

From this evidence the officer who made the decision to charge the suspects is not the same officer who recorded the statements. In the absence of evidence to the contrary, it cannot be said that he directed the manner in which the statements were recorded. I find no merit in the Defence argument that his decision to charge the accused person was negatively influenced.

15. A component of a fair trial is that as accused persons must “be informed in advance of the evidence prosecution intends to rely on, and to have reasonable access” to it (Article 50(2)(j) of The Constitution 2010). PW6 conceded, in cross examination, that he did not, record a statement yet he was the Investigating Officer. It is therefore not in dispute that the Defence was not, in advance, informed of his evidence and its contents. How then is the Court to treat his evidence? It would have been obvious to the Defence, and it seems reasonable to so presume, that when the witness took the oath and introduced himself that he was not one of the witnesses they expected. For some reason, the Defence did not raise any objection to the witness testifying. The intention of advance notice is that the Defence should not be taken by surprise and it must know the Prosecution case well in advance to enable it adequately prepare an answer to it. Once the Defence did not object to PW6 testifying, then it is not upon it to now complain that it was prejudiced. Again I find no merit in this latter objection.
16. The Prosecution theory is that three(3) witnesses recognized the people who set the Deceased's house on fire while he was inside. That theory stands or falls depending on the quality of the evidence of PW1, PW2 and PW3.
17. The Prosecution case was that PW1 was in one house and room with the Deceased at the time, some people attacked them. What was troubling about the evidence of PW1 was that she was not consistent as to what she was doing at the time of attack. At one point she said,

### **“At the time I was serving food, the five accused persons stormed into the house”**

Clarifying this she testified,

**“The accused persons entered the house after I had entered it with the food. They stormed in about 3 minutes after I entered the house. My father was sitting while I was standing preparing to help him wash his hands”**

That must be contrasted with what she told the police officer who recorded her statement a day after the incident. She told the police,

**“...after the assailants came into (sic) as I lay on the floor and my father was sleeping on his bed, it is true, they stormed into the house as I was sleeping. When we had finished eating.”**

My attention is also drawn to the testimony of this witness before Muchemi J on 8.10.2009. This was before this matter started De novo before me. Before Judge Muchemi, the witness stated,

**“He was sleeping in his house and I was with him. As he slept I was on the table reading the Bible. I used to stay with my father”**

The Defence is therefore correct in arguing that the witness gave three versions as to what she was doing at the time some people stormed into the house. This Court bears this inconsistency in mind in assessing the overall evidence of the witness vis a vis that other two key witnesses (PW2 and PW3)

18. Was PW1 able to see who assailed them on that night? The evidence of PW1, and this is supported by PW2 and PW3, is that all the Accused Persons are either relatives or neighbours and are well known to the three witnesses. If the three witnesses saw the Accused Persons then their evidence would be of recognition. The evidence of PW1 was that as the attackers came into the room, the room was lit by a tin lamp. But there was no evidence as to the quality and intensity of that source of light. In any event, the entry into the room was sudden and one of the attackers, named as Ekesa (A4), put off the lamp. The suddenness coupled with the putting off of the lamp would no doubt have made this difficult circumstances for the witness to see the people who rudely invaded their privacy.
19. It is also the evidence of PW1 that she saw the Assailants as a torch carried by A4 provided sufficient light. Again, there was no evidence as to the intensity and quality of that light. While I can believe PW1 when she says that some people stormed into the house and injured both herself and the Deceased, I am not able to say, with certainty, that she was able to see and recognize any of the people who attacked them while she was still in the house.
20. There is however, evidence that PW1 successfully escaped from the burning hut. Both PW2 and PW3 gave evidence that they found her outside the house injured and bleeding from a wound to her head. At that time the hut was burning intensely. PW2 and PW3 described the intensity of light from the fire. PW2 said,

**“...The light from the flames was bright”**

In cross examination she added

**“I think that the arsonist had used petrol because the fire was intense and even burnt the wall of the house”**

In re-examination she said,

**“The flame was bright, very bright”**

21. PW3 supporting the evidence of PW2, stated

**“the fire was raging and provided enough light”**

What PW5 saw on reaching the scene would also give an impression of the intensity of the fire. He stated,

**“The entire hut had burnt and collapsed.” It was a grass thatched house. It had completely burnt only the wall were standing.”**

PW6 also saw the hut when he visited the scene on 21<sup>st</sup> October 2008 and this is how he described I,

**“The house was completely burnt”**

22. In my assessment of the evidence, the fire that burnt the hut of the Deceased on the night of 20<sup>th</sup> October 2008 was intense. The flames from the intense fire provided a bright light around the seat of fire. I would agree with PW1, PW2 and PW3 that the light was sufficient for them to see any person close to the bright flame.

23. There is no clarity as to whether or not PW1 lost her conscious after she was wounded. There is however evidence that she soon thereafter, without help, found herself outside the hut. She said so in her evidence and so did PW2 and PW3. So there is evidence that soon after the attack, PW1 was outside the house. As to PW2 and PW3 there were consistent evidence that on hearing a distress call and a bang from the house of the Deceased they immediately ran to that house. PW2 said in cross examination,

**“When I heard the bang and after the yell I immediately went to the Deceased’s burning house. I left the kitchen directly to the scene, it took about 2 minutes... it took me a short time to get to the scene.”**

24. There was some disparity of the evidence of PW2 and PW3, about the distance of the kitchen (where the two witnesses were before the attack) and the Deceased’s house. PW2 put it at 100 metres while PW3 at 15 metres. It was nevertheless the evidence of PW3 that she reacted quickly reached to PW1’s scream and, with PW2, ran towards the burning house of the Deceased.

25. From the evidence I find that PW1, PW2 and PW3 were soon after the attack of the Deceased, outside the burning house of the Deceased. PW1 told Court that while there she was able to see the attackers and she recognized them as the accused persons. The light of the flames enabled her to her them.

26. PW2 also told Court that she was able to recognize the assailants from the bright light of the flames. She gave some details. A1 had a machete. A2 and A3 were armed each with an axe she never saw A4 and A5 armed with anything. PW3 saw A1 armed with a machete, A2 with an axe and A3 with a club and A5 with an axe. There is convergence in the evidence as to what A1 and A2 were carrying but there is disparity in respect to A3, A4 and A5. That said, the witnesses, even, under cross-examination were firm in who they saw.

27. It was the evidence of PW1 that she saw the attackers run towards a swamp. Although in her statement to the police, PW2 says she saw attackers run, she testified that they walked away. A1 was to her right and the rest of the Accused Persons to her left. PW3 saw the five people “disperse” and they ran and went passed a swamp. While this Court does not find that the witnesses gave similar evidence, word for word, it does not find any material disparity on the evidence as to how the assailants left the scene.

28. I reach a decision that although the circumstances in the hut made it difficult for PW1 to see who the attackers were, she, PW2 and PW3 were able to see the Accused Persons, using the bright light from the flame, leaving the compound of the Deceased very soon after the Deceased and PW1 had been attacked. True, the accounts of the witness had some disparities but as a whole the disparities, in my view, were not material. The recognition by PW2 and PW3 bolsters the account of PW1 that it was the Accused Persons who attacked her and the Deceased on that fateful night. All the Accused Person were well known to the three witness.

29. It was suggested by the Defence that the witnesses did not mention the names of the attacker to the police and this showed that they were not sure about the attackers identity. On this the Defence asked me to follow the decision of **Simiyu & Another Vs Republic [2005] KLR 192.**

The submission by the Defence is not correct at all because PW6, the Investigating Officer testified,

**“the Deceased wife and her daughter Consolata managed to see 5 people. They named the five people who are before court.” (My emphasis)**

The Deceased wife is PW2 while Consolata is PW3. A day after the attack, they named the 5(five) Accused Persons as the attackers. This may strongly suggest that they were certain about the people they saw on the scene on the fateful night.

30.The result of my analysis is that all the five(5) Accused Persons attacked the Deceased and PW1 on the night of 20<sup>th</sup> October 2008. The five injured the Deceased and PW1 and thereafter set the Deceased’s house on fire. The Deceased was caught up in the fire and died under its flames. His body was burnt completely burnt and charred. There was evidence by PW2, PW3, PW4 and PW5 that the attack may have been motivated by an ongoing land dispute between the parents of A1 and the Deceased. Even if this Court was not able to find that there was indeed such a dispute and that it provided the motive for the Accused Persons to attack and kill the Deceased, the Court nevertheless finds that the 5 Accused Persons had malice aforethought because of the brutal manner in which they attacked and killed the Deceased. When they set the house on fire with an old and injured man in it, their only intention could have been that he should burn to death. I hold and find that the Prosecution established Malice aforethought in terms of Section 206 of the Penal Code which provides -

**Malice aforethought 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 cause;**
- 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.**

31.The outcome, I find Amos Omanyala Munyekenye (A1), Chrispinus Ouma Omollo (A2), Karoli Sande Sokoni (A3), Christopher Ekesa Munyekenye (A4) and Wilberforce Okumu Amolla (A5) Guilty of jointly murdering Barasa Omanyala Ekine on 20<sup>th</sup> October 2008 and convict each one of them of the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 9<sup>TH</sup> DAY OF JUNE 2015.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**JUMBA.....FOR THE ACCUSED PERSONS**

**OBIRI.....FOR THE REPUBLIC**