



No.132/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO 77 OF 2007

REPUBLIC .....PROSECUTION

VERSUS

SOMOLON MUTUKU MATIVO .....ACCUSED

JUDGMENT

1. **SOMOLON MUTUKU MATIVO**, the accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars thereof being that on the night of 8<sup>th</sup> and 9<sup>th</sup> December, 2007, at Mbee village, Kathiani location in Machakos District within Eastern Province, jointly with others not before court murdered **Rebecca Muthuu Mwanzia** (deceased)
2. On the night of 8<sup>th</sup> and 9<sup>th</sup> December, 2007 the house of the deceased was burnt down. The deceased was found lying facing upward on the path leading to her house some approximately 50 metres away. Her legs were tied apart and were fastened to a tree. There was visible discharge from her vagina. She had multiple cuts on both left and right side of the face and neck. She lay in a pool of blood.
3. PW1, **Erastus Ndolo Mwanzia**, her son heard some noise at about 12.30am emanating from his brother **John Wambua Mwanzia's** house. On coming out he saw his father's house on fire. The light from the fire aided him to see the accused, his uncle. He called him out twice. He then turned and cut him on the eye with a panga. Despite the pain he ran to the father's house and opened the door. His younger brother, **Vincent Mwanzia** came out. They screamed. Neighbours went to their aid.
4. PW2, **Vincent Musyoki Mwanzia** was woken up by the noise and on managing to leave the house, he saw PW2 bleeding. He told him that **Mutuku** their uncle had cut him. Neighbours went to their aid. **Major Waita** took **Ndolo** (PW1) to hospital. He aided his brother, **Wambua** who collapsed. He led the police to the arrest of his uncle. Thereafter he saw his mother's body.
5. PW3, **John Wambua Mwanzia** was woken up at about 12.30 am by people who broke into their house. He lit his torch and was able to see his uncle, the accused person. He was holding a panga. He held his neck, pushed him to the wall and cut his head and left hand. He remains deformed to-date. He heard a voice he believed was for her Aunt, **Jane Sila** saying they finish and go to the next session. He lost consciousness. He regained it to find himself at Kenyatta National Hospital where he was admitted for three months. In the course of the attack he lost his cellphone Nokia 3310.
6. PW4, **Samuel Mutei** a neighbour to **Mwanzia Mativo** was woken up by screams at about 12.30pm – 1.00am. He ran there. He encountered PW1 who shouted that he had been cut by **Mutuku**. He heard another boy screaming. Other people came and said they had seen a body of a person along the path. He concentrated on putting out the fire. It is after the police arrived that he

- saw the body which turned out to be for the deceased.
7. PW5, **Jemima Munee Mutua** a sister to **Geoffrey Musyoka Mutua** the employer of the accused was with him until 9.30pm. She could not tell where he went thereafter.
  8. PW6, **Christine Syombua Kieti** went to the scene on hearing screams. She encountered PW1 who said he had been injured by his uncle **Mutuku**. She assisted in putting out the fire.
  9. PW7, **No. 37248 Sgt Nicholas Murgor** visited the scene found the house burnt and the deceased dead. He arrested the accused. He found him where he worked, some 4-5kms away. He recovered a panga at the accused's house the same day.
  10. PW8, **Major (RTD) Wilson Waita Muasya** was woken up at midnight (between 12.00am – 2.00am) by a person who was screaming. On going out he encountered **Ndolo** (PW1) who had a cut wound. He was bleeding from the right side of the face. On observing, the right eye had been ruptured. He told him that he had been cut by his uncle **Mutuku** and their house had been burnt. He rushed him to hospital. On the way he telephoned **Muthini Nzau** and told him about the incident at their village. **Nzau** on going to the home found another victim who had been cut. He also rushed him to hospital. The two (2) were admitted in hospital. They returned to the scene of the incident and found the deceased's body. The home of the deceased had been burnt down. He later took the police to where they found the accused and arrested him. He provided them with the means of transport.
  11. PW9, **No. 230436 Chief Inspector Moses Mwangi** visited the scene of crime and carried out investigations. He established that there were footprints at the scene. He took a sample of the soil where the footprints were. He collected other exhibits – ashes from the scene and accused's shoes, coat and underpants. He also took blood stains that littered the house.
  12. In his defence the accused denied the charge. It was his evidence that on the night of 8<sup>th</sup> – 9<sup>th</sup> December, 2007 after dinner which was served by his employer's sister (PW5) he went back to the shop where he used to sleep. He prepared dough for cooking mandazi. He slept, woke up in the morning between 4.30am – 5.00am. He made the buns. PW5 opened the shop at 6.30am. At about 7.30am, PW2 arrived with police officers who arrested him. He was taken to his home. His house was searched. Nothing was recovered. He was informed he was a murder suspect. He was made to remove the shoes he wore. He denied having had a grudge with his brother's family.

### Issues for determination.

- Whether death resulted from the action of perpetrators.
- Whether there was intent to cause death or do some grievous harm to any person killed or not.
- Was there knowledge on the part of the perpetrators that their act would probably cause death or grievous harm to some people or person?
- Was there some indifference whether or not death or grievous harm was caused or did result.
- Was there any act to commit a felony?
- Was the accused one of the persons who caused the death of the deceased.?

### Analysis of evidence

13. It is not in doubt that the deceased died on the 8<sup>th</sup> and 9<sup>th</sup> December, 2007. The cause of death is confirmed by **Dr. Mutunga** who performed a post-mortem on the deceased who formed an opinion that the cause of death was multiple lacerations on the head and neck.
14. All witnesses who were at the scene gave testimonies of what transpired. There was an attack by more than one person. Houses at the homestead of the deceased were burnt down. PW9 directed **Cpl Mogaka** to take photographs of the scene. They were produced in evidence. Other than the house being burnt, in the main house, the rooms were blood stained. The bedroom area had been broken into and blood splattered all over. PW2 on hearing noise ran to open the door only to find it locked from outside. He heard PW1 calling him to come out of the house. The house was on fire. Whoever set the house ablaze had an intent of committing a felony. Had he not come out he would also have burnt to death. The act of the perpetrators of the crime of injuring victims and even locking some of them inside houses that were set ablaze was evidence of the knowledge on their part that the victims would either sustain grievous harm or die.
15. Looking at the evidence of the State in which the deceased was found, her legs were tied apart by

ropes that were fastened on a tree, her private parts were visible. There was a lot of fluids/discharge flowing from her private parts. She had multiple cuts on both left and right face and throat. She lay in a pool of blood. Following the post-mortem examination, it was established that several lacerations on her body had been caused by a sharp object. An eye had been gouged out. The deep laceration went up to the skull and brain.

16. Severity of injuries sustained clearly showed that those who occasioned the same had some indifference on their part as to what results they would achieve.

**The issue to be considered is therefore whether the accused was one of the persons who caused the death of the deceased?**

17. All witnesses who testified did not see the accused in the act of occasioning injuries on the deceased at the time of her death.

18. In his defence, denying having committed the offence he said he was some 4 – 5 kilometres away from the scene of the incident. He was at his place of work. At about midnight when the offence was committed he said he was at the shop where he used to sleep.

19. PW5 was with him until 9.30pm. She could however not tell where he was at midnight.

20. PW1, his nephew said when he came out of his house there was light emanating from the fire that was burning. His father's house was on fire, he turned towards the father's house only to see his uncle the accused. He called him out. He turned and cut him in the eye using a panga. When cross-examined he said he did not notice his clothing but he saw his face. He managed to open the door for his brother PW2. PW2 on coming out of the house did not see the accused but PW1 told him right at the outset that their uncle **Mutuku** (the accused) had cut him.

21. PW3, on the other hand was woken up by people who had broken into his house. He lit his torch and on flashing it he saw the accused person, his uncle. He held a panga. He pushed him towards the wall while holding his neck. He cut him on the head and left hand. A woman whose voice he recognised as her aunt, **Jane Sila** urged him to finish up.

22. The two (2) witnesses identified the voices of their assailants.

23. According to them their assailant was their uncle. This was therefore a case of recognition as opposed to identification.

24. In the case of *Anjononi and others versus Republic [1980] KLE 54* the Court stated *inter alia*;-

***“Being night time the conditions for identification of robbers in the case were not favourable. This was however, a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.***

25. The evidence adduced by PW1 and PW3 is direct evidence. But in his defence the accused denies having been at the scene. He stated that he was asleep at his place of work. The question to be asked is whether circumstances would have enabled him to be at the place of the incident?

26. Having parted ways with PW5, at 9.30pm, was it possible for him to walk to the scene of the incident? There were 2½ hours or thereabout that lapsed. It was possible for him to travel to the home of the deceased.

27. After the arrest of the accused the police took him to their home. In the course of investigations, they came across shoeprints. They took possession of shoeprints that resembled those of the accused person's shoes. They took possession of the accused persons shoes, coat and underpants.

28. Some soil was collected outside the house of the deceased. There was some soil from the pair of shoes belonging to the accused and soil sample collected outside the house of the deceased. The soil from the shoes on examination was found to be similar to the soil collected outside the deceased's house but not similar to that collected outside the house of the accused.

29. In his defence, the accused said he was taken to his house which is adjacent to the gate. It was searched. Then he went back to the motor vehicle. He was taken to the police station and that is when the shoes were removed. He did not state that he was taken to the house of the deceased that morning. That being the case is evidence that at one point he was at the house of the deceased. This evidence corroborates the evidence of witnesses who said he was at the scene on the fateful

- night.
30. The coat said to be owned by the accused was blood stained but the analysis carried out generated a DNA analysis that was of unknown DNA origin.
31. In accepting the offence of recognition, I am aware of what was stated in the case of **Roria versus Republic [1967] E.A. 583** where it was stated thus:-

*“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 a question of identity.”*

32. This would call on me to act cautiously in accepting this kind of evidence. (see also **Julius Waititu Muthuita versus Republic [2006] eKLR**).
33. With this in mind, from the foregoing although the accused gave an *alibi* defence, the evidence adduced by PW1 and PW3 of recognition was of a person they were not strangers to. He is their uncle, a person they have known since childhood. Light from the burning house enabled PW1 to see his assailant therefore there was no possibility of any error. Circumstances prevailing then favoured correct identification.
34. What is not clear in this case is the motive of the attack. The heinous act was committed by more than one person. PW3 said he identified the voice of his aunt, a wife to his uncle, **Jane Sila**. If that was the case it meant that the murder was committed by relatives. No evidence was however adduced as to why exactly they had the intent to commit the felony.
35. The upshot of the above is that the accused having been recognized as one of the persons who committed the offence, the prosecution has proved its case against him beyond any reasonable doubt.
36. In the circumstances, I find him guilty of murder contrary to section 203 as read with Section 204 of the Penal Code and I convict him of the offence accordingly.

**DATED, SIGNED and DELIVERED at MACHAKOS this 6<sup>TH</sup> day of NOVEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**