



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE 41 OF 2012**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**CHARLES MBUGUA KINYUA..... 1<sup>ST</sup> ACCUSED**

**ROSE WAIRIMU MBUGUA.....2<sup>ND</sup> ACCUSED**

**TABITHA WAITHIRA KINYUA.....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

CHARLES MBUGUA KINYUA, ROSE WAIRIMU MBUGUA AND TABITHA WAITHIRA KINYUA herein after referred to as 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused are charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars as stated in information are that on 26<sup>th</sup> April 2009 at Mutithi Village in Kirinyaga District of Central Province murdered Jeremiah Kinyua Kigundu.

The case of the Prosecution is that on 26<sup>th</sup> April 2009 at around 3 a.m. PW2 and her husband (deceased) were asleep in their house at Mutithi when she heard people talking outside. She woke up and heard a bang on the door. She heard people talking and recognized their voices, as those of 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused. 1<sup>st</sup> Accused then called the deceased and told him that the time to die had come. He hit the window pane. She then called PW1. Petrol was poured inside the house and fire thrown. There was a lot of smoke inside. PW2 told PW1 and PW9 that they had been attacked by 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused. This witness (PW2) said she was able to see through the window and also 2<sup>nd</sup> Accused breaking the window panes. PW1 with his group arrived and rescued them, and took them to Mwea Hospital. The deceased died on 28<sup>th</sup> April 2009.

Dr. Paul Mbaru (PW7) who conducted the post mortem was of the opinion that the deceased died from severe head injury and burns which were in keeping with assault or murder. (EXHB6) He found the body to have the following injuries

- (a) Multiple stitch cut wounds on his head. (5 in number) on both sides and top of the head.***
- (b) One cut on the left was deep and penetrated into the brain tissue which was physically damaged.***
- (c) Multiple bruises on front knee.***

**(d) Superficial burns on back aspect of upper limbs, back of the head and right side of the chest.**

**(e) Body had 20% burns**

**(f) The only internal injury was the brain.**

PW3 (Ag. I.P. Mutegi) of Wanguru Police Station visited the scene and collected debris which he sent to the Government Chemist to establish the cause of the fire. The Government Analyst (PW8) analyzed the debris sent to them and detected kerosene in them (EXB7A&7B).

When 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused were placed on their defence they elected to give unsworn statements. 1<sup>st</sup> Accused stated that he was woken up on 26/4/2009 by the village elder. When he opened he found him with officers from Wang'uru Police Station. He was taken to the station and placed in cells. The next day he learnt that his father was in hospital. From his home to his father's was a distance. He was then charged with this offence. He denied the charge.

The 2<sup>nd</sup> Accused who is 1<sup>st</sup> Accused 1's wife denied the charges. She explained how 1<sup>st</sup> Accused was arrested. When he went to see 1<sup>st</sup> Accused the next morning, she learnt that the deceased was in hospital. She visited him. She even found PW2 there. She learnt of his death on 29/4/2009 and was arrested on 30/4/2009.

The 3<sup>rd</sup> Accused also denied the charge. The deceased was her husband. She also denied knowing PW2. On 26/4/2009 and 27/4/2009 she was at Thiba (home). On 28/4/2009 she went to do her business and then returned home. On 30/4/2009 she was arrested while doing her business at Mwea trading Centre. She said she had not been staying with the deceased since 2004.

The 3 defence counsels all submitted that malice afore thought had not been established. And that PW2 who was the only eye witness said she identified the accused persons by voice. There are said to be grudges between PW2 and the accused persons. They asked that the accused persons be acquitted.

This is now the case before Court for determination. The Prosecution called a total of 9 witnesses. From the evidence of Dr. Mbaru (PW7) the deceased died from **“severe head injury and burns which were in keeping with assault or murder”**. It is also clear from his evidence that the deceased had several cut wounds on the head, multiple bruises on front knee and burns. **“In cross exam he stated that the main injury was the head injury which caused brain damage and had been caused by a sharp object. He could have survived with the burns if he had no brain injury. The burns accelerated his death”**.

When PW1 and PW9 arrived at the deceased's home they found him outside the house bleeding from the head and had burns. Apparently he was not talking. They then heard PW2 shouting from the house and they opened for her. They took both PW2 and PW9 to Hospital. It is clear from the evidence of these two witnesses that neither PW2 nor the deceased told them who had burnt them. PW1 and PW9 are part of the first people to arrive at the scene. These two witnesses stay a bit of a distance from the deceased's home. No neighbours had come to the deceased's home to assist them.

PW3 – PW5 came to the scene after the occurrence of the incident. The star witness remains PW2. Before I analyze her evidence I find it important to mention the following.

- **Accused 1 is a son to the deceased,**
- **Accused 2 is Accused 1's wife,**
- **Accused 3 was a wife to the deceased but not a mother to Accused 1**
- **PW2 was a wife to the deceased.**

It is PW2's evidence that they were asleep at 3 a.m. when she heard people talking outside and she woke up. I assume she was in the same bedroom with the deceased. In her evidence she does not mention anything about their movement in that house from the time she heard people outside. It is therefore not clear how the deceased was found outside the house with injuries and burns.

PW2 says she heard those outside talking and she identified them by their voices. How were these people talking? Were they shouting or speaking in low tones? She does not say. At one point she says she saw 3<sup>rd</sup> Accused through the window and 2<sup>nd</sup> Accused was breaking the window panes. And she had heard 1<sup>st</sup> Accused tell the deceased that the time for him to die had come.

She then called PW1 and PW9 and told them they had been attacked by 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused. PW1 and PW9 have not mentioned ever being given any names of the attackers by PW2. It is obvious she was not being truthful. This clearly emerges in cross examination by Mr. Gitonga at page 15 line 18 of proceedings when she says **"I did not give him any names. I discovered who they were later"**.

There was a fierce fire and the house was full of smoke. It cannot be true that PW2 saw anyone through it. She has further said she identified them by their voices. Considering that PW2 is a single identifying witness, and the fact that this incident occurred at night, and PW2 and the deceased had been woken up from sleep, this Court must be very careful with the manner in which it handles PW2's evidence.

As was held in the case of **RORIA VS REPUBLIC [1961] EA 583** and followed in **KARANI VS REPUBLIC [1985 KLR 290]**. A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence.

And in the case of voice identification it's been held by the Court of Appeal in the following cases viz

1. **KARANI VS REPUBLIC – SUPRA**
2. **MBELE VS REPLIC [1984] KLR 626**
3. **CHOGE VS REPUBLIC [11985] KLR 1**
4. **LIBAMBULA VS REPUBLIC [2003] KLR 683**

That;

Evidence of voice identification is receivable and admissible in evidence and it can be depending on the circumstances carry as much weight as visual identification. And in admitting and relying on such evidence necessary care must be taken to ensure the following.

**(a) The voice that was heard was that of the accused;**

**(b) The witness was familiar with it and recognized it;**

**(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.**

In this matter we have three (3) accused persons whose voices the witness says she identified. I will start with 1<sup>st</sup> Accused:-

PW2 states as follows about him at page 14 lines 4-5;

**"I heard them talk and I recognized their voices"**

Page 14 lines 8-9 she states:

**"Charles Mbugua called his father and told him that the time to die had come."**

In cross examination she read from her statement to the police where she said:

***“That 1<sup>st</sup> Accused told deceased that he had come to accomplish his mission and not specifically that he had come to kill him”.***

So what did she hear 1<sup>st</sup> Accused exactly say? It should also be noted that though 1<sup>st</sup> Accused was a son to the deceased he is not a biological son to PW2, 3<sup>rd</sup> Accused nor the deceased's other wife Marion. PW2 had not stayed long with the deceased. How familiar was she with 1<sup>st</sup> Accused's voice and under what circumstances? All she says is that Accused 1 had a dispute with the deceased over a rice paddy and there were several assault cases. There is no evidence of any report of an assault case involving 1<sup>st</sup> Accused and the deceased. Secondly, PW2 has not shown any interaction if any she ever had with 1<sup>st</sup> Accused to give her an opportunity to know his voice.

Coming 2<sup>nd</sup> accused and 3<sup>rd</sup> accused, PW2 generally said she heard the people talking and she identified their voices. She has not told this Court what she heard them say as they talked. Each of them must have spoken something or words which made her identify her/his voice; were they shouting, whispering or what were they doing?

2<sup>nd</sup> Accused is a wife to 1<sup>st</sup> Accused. PW2 has not in her evidence shown any interaction between her and 2<sup>nd</sup> Accused or 3<sup>rd</sup> Accused to know their voices so well as to identify them even without seeing them. There is no familiarity established between PW2 and the accused persons (2<sup>nd</sup> Accused and 3<sup>rd</sup> Accused) to make this Court exclude the possibility of error. This case can be distinguished from the case of ***ROSEMARY NJERI VS REPUBLIC [1977] CRIMINAL APPEAL 27*** when a victim of the offence of Grievous harm testified that she heard the appellant say ***“break her legs”***.

And in ***SIMON MBELLE VS REPUBLIC 1 KAR 578*** where only two words ***“ni mimi”*** (it is me) were uttered. What had PW2 to show before this Court to prove that she identified the voices of 2<sup>nd</sup> Accused and 3<sup>rd</sup> Accused. Even if she knew their voices before this day, she had to show case by demonstrating what it was that they said that night for her to know they were the ones out there. I find none of such evidence laid.

PW2 had in her evidence in chief tried to say that she had seen 3<sup>rd</sup> Accused through the window and 2<sup>nd</sup> Accused was the one breaking windows. This house had no electricity light. There is no evidence from PW2 indicating how she was able to see 2<sup>nd</sup> Accused and 3<sup>rd</sup> Accused. This incident occurred at 3 a.m. It was dark and they had been woken up from their sleep. Thereafter there was a big fire and a lot of smoke inside the House. Was she really able to see anyone? The answer is NO.

PW1 was called by PW2 who told him the following at page 10 line 11-13;

***“She told us that their house was surrounded by people who wanted to attack them. She told me that the people had petrol which they were spilling inside the house”.***

According to what PW2 told PW1 she did not know the attackers. But from what she told PW9 the attackers were people who had threatened to kill her before. Apparently no names were given to both PW1 and PW9. It however appears that some threats had been made before but no evidence of reports made availed to this Court. People do not threaten you and you just keep quiet.

Another angle came up from the evidence of the doctor (PW6) about the cause of death. PW1 and PW9 also saw the deceased bleeding from the head. He had a blunt injury to the head which caused brain damage. The evidence from PW2 is about fire set on their house. She did not mention anything about a person or persons entering the house and beating anyone. She is the only one who was in that house with the deceased.

The deceased did not really die from the burns. He received only 20% burns. Even PW2 did not receive

life threatening burns. So who caused the fatal injury to the deceased? It is not for this Court to speculate. The Prosecution ought to have laid evidence showing that the accused persons are the ones who killed the deceased. PW2 should have told this Court who inflicted the fatal injury to the deceased. The deceased was found outside bleeding. When and how did he leave that house?

The evidence of the voice identification of 1<sup>st</sup> Accused by PW2 is so shaky. And besides that PW2 never saw 1<sup>st</sup> Accused on that material night. The evidence of PW2 is one of a single identifying witness. The law is that the Court can rely on evidence of a single identifying witness to convict. This is what the Court of Appeal held in the case of **OGETO VS REPUBLIC [2004 2 KLR 14]**.

***“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identifying evidence of such a witness especially when it is shown that the conditions favouring identification were difficult. Further the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”***

PW2 may appear to be a very honest witness but she gave her evidence in a very casual manner. She ought to have been asked to explain who inflicted the fatal injuries on the deceased. She is the one who was with him in that house. The mere fact that the accused persons may have issued threats to the deceased did not obviously mean they are the ones who came there that night.

There was no light in that house, how was PW2 seeing what she alleges she saw? She never told the Court what those talking outside were saying to make her identify their voices. She allegedly heard 1<sup>st</sup> Accused call the deceased. What did he exactly tell the deceased in her hearing? Was it on telephone or was he talking from outside the house?

Very many questions remain unanswered. And from my analysis of the evidence of the Prosecution plus the unsworn defences raised by the accused persons, I do find that the Prosecution has failed to prove beyond reasonable doubt that the three accused persons are the ones who killed the deceased, and that they had any reason to do so.

For my part I find them all not guilty and acquit them accordingly under Section 322(1) of the Criminal Procedure Code.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 11<sup>TH</sup> DAY OF JULY 2012.**

**H.I. ONG’UDI  
JUDGE**

**In the presence of:-**

**Ms. Macharia for State**

**Mr. Gitonga for 1<sup>st</sup> Accused and holding brief for**

**Ms. Njeru for 2<sup>nd</sup> Accused**

**Mr. Momanyi for Mugusu for 3<sup>rd</sup> Accused**

**All Accused present**

**Njue CC**