



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 8 of 1996

REPUBLIC..... PROSECUTOR

VERSUS

ATHANAS MWENDO KIAMBA.....1ST ACCUSED

BERNARD MUSYOKA MUKONZO..... 2ND ACCUSED

Coram: J. W. Mwera, J.

Mulu Advocate for 1st Accused Kavila Advocate for 2nd Accused Mrs. Ntarangwi for Republic

Court Clerk Muli

JUDGEMENT

On 25.3.96 the two accused persons herein Athanas Muendo Kiamba formerly an assistant chief and Bernard Musyoka Mukonzo formerly an administration policeman were charged with the murder of one Winfred Mutiwa Masambili. It was alleged that the offence took place on the night of 17th and 18th December 1994 at Kilala chief's camp, Makueni. The pair denied the offence and their trial opened on 21.4.97 in the presence of Mr. Mulu for the 1st accused, Mr. Kavila for the 2nd accused, the Learned State Counsel prosecuting with 3 assessors in attendance.

Muendo Masambili (PW.1), the deceased's uncle was the first in the witness box. His niece who lived at various market places once had a baby boy. She would at times come home. But sometime in 1994 Masambili heard that the deceased had been seen by her 2 friends but she did not have the child. This must have made PW. 1 uncomfortable so he reported to Chief Masaku (PW.6) at Kilala market to find Winfred and inquire from her whether she still had the boy or not. On 18.12.94 PW. 1 learned that Winfred, the deceased had been arrested at Kilala market on 17.12.94 but that she had been found dead the following day. So PW. 1 took a bicycle and rode to the Chief's camp. There he found a police motor vehicle with the deceased inside. He recognized it as Winfred's. He identified it at the post mortem operation carried out by Dr. Kibore (PW. 11) {See Exh.P1}. Winfred's child was never traced.

Nicodemus Musau Indo (PW.2) told the court that he went to water cows at a pond in Musyoka's land. He found a woman's dead body floating in it. Indo sent one Musyoki to report the incident at the Chief's camp. Musyoki went and returned with the 2 accused in this case. Nobody seemed to recognise the dead woman. Police were called and they removed the body from the pond.

David Kivuva (PW.3) a watchman and lay reader at A.B.C. church Kilala was on duty on the night of 17th/18th 1994. The church is near the Chief's camp. At about midnight he saw in the moonlight the assistant chief (AI) with another man going into the chief's office. Then PW.3 heard a glass window break and sound of maize pouring. Then later he heard screams from the same building followed by movement of a wheelbarrow past the nearby fence. Another wheelbarrow movement was also heard. PW.3 did not see or know who was pushing the wheelbarrow(s). He inspected the church compound and hedge but could not see anybody.

In cross examination this witness insisted that he saw and recognised accused 1. He heard a woman's screams as if people were fighting.

Catherine Mwithi Mutinda (PW.4) was the deceased's friend at Kilala. The deceased had a child, a boy, in 1991 but when she came back to this place in 1994 she was without the boy.

On 17.12.94 the deceased and Catherine visited a certain woman. While mere Chief Masaku, as the story goes, arrived. This was at about 8

p.m. The assistant chief, no doubt accused 1 was around and they all trooped to the chief's camp. There Catherine stated how she knew the deceased and also that in 1991 the deceased had a child. The chief told this witness to go away and return the following morning. She left the deceased there. But in the same night the 2 accused persons found Catherine at a bar and asked her to take them where the deceased's Kisii boyfriend lived. She did so.

On 18.12.94 at about 6 a.m. the 2nd accused woke up Catherine and told her to report at the Chief's office which she did. The chief asked PW.4 if she had traced/seen the deceased. She answered in the negative and was allowed to go home. At about 10 a.m. the 2nd accused called PW.4 and led her through a thicket to a place where some clothes were. She recognised them as Winfred's. Soon they got to the pond and there she recognised her friend's body laid out in a motor vehicle with police present.

In cross examination by Mr. Mulu, Catherine told the court that in her presence the chief asked Winfred where her child was. She answered that he was at a place called Yekanga. The chief then ordered accused 1 to lock up the deceased and that is the time PW.4 left. This was at about 10 p.m.

Onesmus Masaku Katilu (PW.6) is the chief about whom the foregoing witnesses have spoken. According to him he gave the bunch of office keys to Kiamba (A1) when he went to fetch relief food from Emali. This was on or about 16.12.94. When the team stopped at Nziu en route to Emali, Masambili (PW.1) acquainted the chief with the story that his niece the deceased no longer had her child. A story had reached the chief's office that a child had been found dead in Kaiti River.

On 17.12.94 PW.6 on returning to his office, he met accused 1. He decided to follow up PW.1's report. He sent for and on location of Winfred, she was brought to the chief's office. Another assistant chief, Ndolo was also present. This was at 6.30 p.m.

The chief put questions to the deceased about the whereabouts of her child. She answered that he was with her aunt at Makueni. Catherine (PW.4) was summoned and also asked about the deceased and her child. Ultimately PW.6 did not seem satisfied with the deceased's answers so he ordered accused 1 to lock her up in a grilled corridor adjoining the chief's office overnight. Accused 1 gave the keys to the chief and all left the premises. He went home. Musyoka (Accused 2) was supposedly on duty at the chiefs camp that night.

The following morning PW.6, accused 1 and 2 met at the chief's office. They were surprised with the absence of Winfred from where she was locked up. An escape was suspected. Yet the nature of the corridor was such that an escape would be impossible. No breaking-out was noted. But maize was poured on the floor, yes. Apparently that building was also used to store relief food.

PW.6 directed accused 1 to go and report the escape of Winfred to the police while accused 2 had to report to Masambili's assistant chief at Nziu. The chief then went to church. Later he was called from there to go to the said pond and there he found Winfred's body. Accused 1 and 2 had not gone on their errands yet so they also came to the pond.

The evidence then went back to the night of 17th/18th December 1994 when Edward Malulu (PW.7) was heard. He is a night watchman at a KENOL filling station also near the chief's office. At about 10.30 p.m. he saw accused 1 with another man going into the chiefs office. They were there up to 12.30 a.m. and all the time there were noises from that office. A motor vehicle owned by one Mwaka had gone into that compound before this witness came on duty. He was positive that he saw and identified accused 1 going into the chief's office with another person unknown to the witness. PW.7 did not hear screams but noises of quarreling people from the chief's office. He did not see people leaving that office with wheel barrows. He did not see PW.6, the chief going into his office on the evening of 17.12.94.

One Joachim Musyoki Nzulu (PW.8) an employee of the Miu of Water Development at Kilala told the court that the chief's office was accommodated in their building. The chief had one set of keys and he kept the other set that allowed access to this building. He did not come to the building on the night of 17/18 December 1994. All the time he had his set of keys. Besides the chief, P.W.8's senior officer Johnson Kitia Kamulo (PW.9) had another set of keys. Kamulo told the court that he had his set all the time at home. He did not come to the office on the night of 17th/18th December 1994.

Similarly when chief Masaku (PW.6) was cross-examined he maintained that he never went back to the office after he directed accused 1 to lock up the deceased in the corridor and hand the keys to him. He remained with the keys at home all the time until the following day when he went back to the office with a view to hand over the detained Winfred to the police for further inquiry into the whereabouts of her son. He only asked her questions and never assaulted her. That the deceased was locked up in the corridor because the cell block had no door lock.

The next witness was C.I. John Nderitu (PW.10). He did investigate the case and arrested the 2 accused herein. He took statements from them too. Dr. Zachary Kibore (PW.11) carried out the post mortem examination on the accused body which was swollen grossly. Blood filled her chest and lungs were soaked with it. The doctor formed the opinion that the cause of death was severe bleeding in the chest cavities which resulted in lung failure.

Both accused gave evidence on oath. Essentially they denied the charge. The evidence of Athnas Kiamba (Accused 1) followed more or less the pattern of that of Chief Masaku (PW.6). He was ordered by the chief to lock up the deceased in the office corridor on suspicion that she killed her child by drowning in a nearby river. He did not assault her or come back at night to do any harm to her. When he returned he did not have the keys to the chief's office. He had given the keys to PW.6 in the evening after locking up the suspect (deceased). His coming to the office was to show accused 2 the suspect and then he would pass on home. They did not find the suspect but this did not surprise them much because they assumed that probably the chief had come back after they left and released her. He had done that before. Then in the morning the course of things leading to the pond where the deceased had drowned unfolded.

The accused 2 Musyoka gave more or less the same evidence but beginning where accused 1 found him at a bar on the night in issue and informed him of the suspect they had locked up in the chiefs office corridor. The two then went to ensure that she was still there only to find her missing. There was no breaking out of the place which was so solidly built that it looked like a mystery that the suspect had escaped unless the corridor door was opened. He never saw this suspect and he never did anything to her. But she was found dead the following day in a pond.

Both sides did not wish to make final submissions and so the court summarised the evidence to the two assessors particularly pointing out the evidence, all was mainly circumstantial as opposed to direct. The assessors rose and later returned a similar opinion of "not guilty as charged".

This court is of a similar opinion. The evidence is mainly circumstantial. Masambili (PW.1) reported to Chief Masaku (PW.6) that his niece, the deceased, apparently was no longer with her young child. She was living in Kilala area and if the chief would follow up the matter. Some time before that report a child's body had been fished out of a nearby river. The deceased was traced by the chief and his assistant accused No.1 one evening. She was interrogated but the chief and accused 1 were not satisfied with her answers. The chief decided to lock her up in her office and directed accused 1 to do so. As evidence had it, that was done. The chief took the keys and went home for the night. The other 2 sets of keys which could open the areas where the deceased was locked were with other public servants who testified here that they never showed up at the building where the suspect was locked up that night.

The case then went thus: Accused 1 finds accused 2, an administration policeman who was on guard at the chief's office that night. They go to ensure that the suspect is still locked up. They find nobody. No breaking in and they have no key to get in anyway. They assume that the chief has come back that evening to release the suspect so they rest for the night. The following morning the suspect is found dead in a pond.

Any evidence that came near to pointing at accused 1' return to the office on the fateful night came from 2 watchmen: One at a nearby church and another at a nearby filling station. They saw accused 1 whom they knew going into the chief's office with another man they did not know that night. They spoke of noises/screams emanating from that office, breaking of glass and pouring of maize. Later the church watchman said he heard wheelbarrows being pushed past his place of work. The accused 1 and 2 told the court that they indeed went to the chief's office that night but to ensure that detained suspect was still there so that accused 2 would guard her overnight. That they did not cause any screams or breaking of glass. They simply did not find the suspect where she was left.

With this kind of evidence nothing much points to the guilt of the 2 accused persons. They are acquitted of the charge and should be set at liberty forthwith unless otherwise lawfully held.

Judgement accordingly.

Delivered on 19th January 1998.

J. W. MWERA

JUDGE