



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL

AT NYERI  
(Coram: Gicheru, Shah & Owuor, JJ.A.)  
CRIMINAL APPEAL NO. 9 OF 1998  
BETWEEN

DAVID MUTUA MBITHI.....APPELLANT

AND

REPUBLIC.....RESPOND ENT

(Appeal from a judgment of the High Court of Kenya at

Meru (Etyang, J.) dated 5th December, 1997

in

H.C.CR.C. NO. 5 OF 1994)

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JUDGMENT OF THE COURT:

The Appellant was on 5th December, 1997 convicted by the superior court on two counts of the murder of **MARY MBOLUA** aged about 7½ months and **ELIZABETH NDITI** aged about 4½ years contrary to section 204 of the Penal Code . He was on the same day sentenced to suffer death in the manner authorized by law in respect of the murder of **ELIZABETH NDITI** but no sentence was passed in regard to the murder of **MARY MBOLUA** . It is against that conviction and sentence that he now appeals to this TChoeu rta.ppellant's defence to the two counts of murder referred to above was encapsulated in his unsworn statement in the superior court which latter read as follows:

"I remember on 15/9/91 my father sent me to go to my stepbrother, Elijah Kitavi. He sent me to collect money from him which my step-brother had sold a cow on behalf of my father. My father was sick and he wanted to go to the hospital. At around 2.00 p.m., I went to my stepbrother's home. I did not find him at home and his wife told me that he might come home at around 5.00 p.m. I went back to my home and stayed until 5.00 p.m. I then went back to Elijah Kitavi's home. I again did not find him and his wife told me to wait for him. I stayed there with his wife and I did not talk anything about their home with her. I did not even tell her that I would burn her house. Mr. Kitavi came at about 6.00 p.m. We greeted one another. I told him that I had been sent by our father to collect money from him. I told him to give me Shs. 10,000/- which he had received from the sale of our father's cow. I told him that our father was sick and he wanted to go to hospital. Mr. Kitavi told me that he did not have money then and that he would take the money to our father the following day, 16/9/91. I did

not talk any bad words with him. I did not ask for a panga from his wife. There was no tug-of-war between me and him. I told him that because it was dark, I would go home and would check the report with my father. I did not stop anybody from coming to Mr. Kitavi's home. I bade him farewell and I went home. I did not meet anybody. I reached home and slept. At about 2.00 a.m. I heard a bang on my door. It was Peter Kiilu who was knocking. He is our relative. My wife opened for him and when I went out I found him with a policeman. They told me that they had been told by Kitavi that I burnt his house and two children were burnt to death. I was taken to Karaba Police base.

I had no grudge with Elijah Kitavi and I don't know who burnt his house and his children."

Against this story was the evidence of **BEATRICE KITAVI (P.W.2)**, the wife of **ELIJAH KITAVI MBITI (P.W.17)** - the appellant's step-brother. According to her, at about 9.30 p.m. on 15th September, 1991, she and her husband were sitting at the verandah of their house when the appellant emerged from the corner of the said house. He went to where they were and asked **P.W.1** what time he had arrived home and the latter responded by saying that he had arrived earlier. Thereupon, the appellant grabbed **P.W.1's** neck and then pulled out a letter from his pocket and gave it to her. Thereafter, he dragged **P.W.1** some distance away from the house and somehow she heard a sound as if somebody had been hit. She then heard the appellant talking and saying that **P.W.1** had run away. Indeed, according to her, she heard the appellant say to **P.W.1** that he had run away and yet he had a home and children. He also said:

"You people have run away and yet you have eaten Shs. 10,000/- belonging to my father."

This according to **P.W.2**, was followed by the appellant saying that **P.W.1's** homestead was not worth K.Shs. 3,000/- and that he was going to burn it. On hearing this, she screamed and ran to seek assistance from her neighbours and on looking back towards her home, she saw the houses on fire. It would appear that she and her neighbours ran towards her burning home wherein were two of her children, **MARY MBOLUA** and **ELIZABETH NDITI**, and as they approached the homestead the appellant emerged, it is not clear from where, and asked them why they were going to the burning home. The houses at the homestead burnt to ashes and the two children mentioned above burnt therein beyond recognition. Post-mortem examination on their bodies revealed that each one of them had sustained 100% burns and the cause of death of each one of them was 100% burns due to fire flames.

When **P.W.2** was cross-examined by counsel for the appellant in the superior court, she had this to say:

"I saw a person holding fire from the store to the kitchen, then to the main house. I can only say that that person was the accused because he was the only one there. I could see him and identify that it was him.

I said when I looked at my homestead, I saw flames of fire. I told the previous judge who heard this case that I had not seen the accused. I told the previous judge that I did not see David Mutua because I could not see from behind. I have now told this court that I actually saw him doing so. I heard the accused collecting maize stalks when I was running away but I didn't know what was happening behind. My husband was brought home at 6.00 a.m. by Philip Kiilu.

When the home was burning the accused was there and I saw him when he was barring us from entering the homestead."

The foregoing called into question the veracity of **P.W.2's** evidence. In her evidence-in-chief it would appear that she and her sister **RODA KANINI MAKU (P.W.3)** together with **RESA MUKONYO w/o TIMOTHY (P.W.4)** had run towards her burning home and on approaching the homestead the appellant emerged and asked them why they had gone there. Yet **P.W.3's** evidence was to the effect that when she ran to the burning home she was alone and had been there for about one hour before **P.W.2** arrived. Indeed, according to her, she was walking around the homestead of **P.W.2's** burning home with the appellant for hours and even talked to him. According to **P.W.4**, it would seem that she did not

accompany **P.W.2** to the latter's burning home as she had to lock her child in her house first before she proceeded to **P.W.2**'s homestead where she heard **P.W.2** say that her children had been burnt in her house by the appellant.

The evidence of **PETERSON MUTUNGI THYAKA (P.W.5)** in the superior court where material was as follows:

"I met Beatrice Kitavi who was crying that her children had been burnt in the house. She was going to report and I returned to Beatrice's home. On the way, I met somebody who looked like David. He went off the road and hid himself. After we passed, he came out and approached me. It was then I knew he was accused. He asked me if I was not going to the scene of the fire. I said I was not going there. David Mutua asked me if I was not going to the scene of the fire. I told him that I was not interested. I was escorting my visitor. Then David Mutua told me that he had been at the scene of the fire where he had taken his father's letter to Elijah Kitavi, P.W.1, in which his father was asking for a refund of his money. He said he gave out the letter to Beatrice so as to give to Elijah Kitavi. He said that when Beatrice had given her husband the letter, he, Elijah Kitavi went into the house and took out a knife. David Mutua, accused, did not tell me what Elijah Kitavi did with the knife. David Mutua, the accused, then told me that he burnt Elijah Kitavi's homestead, all houses. He told me that he was going to sleep in his house. He knew Police would be informed. He said he would wait for them in his home. He had nothing to fear. Then I went into my house and the accused went away. Shortly thereafter, I decided to go to the scene to find out what was happening. I found that the home of P.W.1 had been burnt."

In his judgment dated and delivered on 5th December, 1997, the learned trial judge accepted the prosecution case against the appellant and rejected the appellant's defence. He, however, rejected that part of the evidence of P.W.2 relating to her having seen the appellant burning the houses in her homestead. Nevertheless, according to the learned trial judge, the circumstantial evidence in the case before him was such that it irresistibly pointed to the guilt of the appellant to the exclusion of anybody else. It was this finding that counsel for the appellant has taken issue with.

As counsel for the respondent, Mr. Kabitu, quite rightly submitted when this appeal came up for hearing at Nyeri on 28th October, 1998, the conviction of the appellant for the murder of **MARY MBOLUA** and **ELIZABETH NDITI** was dependent on believing the story of P.W.2, P.W.3 and P.W.5 as against that of the appellant. Without believing the evidence of these three prosecution witnesses, the appellant's conviction would not stand.

The burden of the appellant's appeal before us is that the evidence of the prosecution witnesses above mentioned was unreliable and therefore incapable of sustaining the appellant's conviction. Indeed, while counsel for the appellant, Mr. Mogikoyo, acknowledged that the learned trial judge did warn himself on convicting the appellant on the basis of circumstantial evidence, he, however, faulted him in not going further to warn himself of the non-co-existence of other evidence inconsistent with the inference of the appellant's guilt. According to counsel, anyone else other than the appellant might have set on fire the houses at the homestead wherein **MARY MBOLUA** and **ELIZABETH NDITI** were burnt to death.

As earlier indicated in this judgment, the credibility of the evidence of **P.W.2** is suspect. Indeed, even the learned trial judge had rejected certain aspects of her evidence. The testimonies of the other three main prosecution witnesses, namely; **P.W.3**, **P.W.4** and **P.W.5** have **P.W.2** as their point of reference in connecting the appellant with setting on fire the houses at her homestead. Remove her evidence from the scene and the rest of the prosecution evidence against the appellant is left hopelessly limping to merit any consideration of its irresistibly pointing to the appellant as the person who set fire to the houses on **P.W.2**'s homestead wherein her two children were burnt to death to the exclusion of anyone else. The appellant's explanation of the events of 15th September, 1991 as are set out towards the beginning of this judgment may very well be true. In the result, we think that the appellant's conviction on the two counts of murder *contrary to section 204 of the Penal Code* as are referred to at the commencement of this

judgment is unsustainable. Consequently, we allow this appeal, quash the conviction as is mentioned above, set aside the sentence of death and order that the appellant be released from custody forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 6th day of November, 1998.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR