



## **COURT OF APPEAL AT NAKURU**

### **CRIM APP 75 OF 99**

**DAVID ROTICH KIPNGENO TEMBUR ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

### **JUDGMENT OF THE COURT**

A total of twelve persons were tried before the High Court at Kericho on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code . The charge against those persons had alleged in its particulars that on the 29th day of August, 1995, at Keben Village in Kericho District of the Rift Valley Province, the twelve of them jointly murdered JANE NGENY (hereinafter the "Deceased"). At the close of the prosecution's case, the trial Judge (Rimita, J) found that the Republic had failed to establish a prima case against the first four accused persons who were all women and he acquitted them. At the end of the trial, the 6th to the 11th accused persons were convicted on a lesser charge of common assault under section 250 P.C. and were each sentenced to nine months imprisonment. That left the 5th and 12th accused persons who were and are known as David Rotich (1st appellant) and Kipngeno Tembur (2nd appellant). The two were convicted of the murder of the Deceased and were sentenced to death. They now appeal to this Court against their conviction and sentence.

It is just as well for us to state at this stage that all the assessors who aided the learned Judge in the trial unanimously found the 2nd appellant guilty of murder while only two of the assessors found the 1st appellant guilty of murder. The third assessor thought the case against the 1st appellant was not proved beyond a reasonable doubt and the third assessor was for acquitting the 1st appellant. The Deceased was a simple village woman at Keben Village of Kericho District. She was a widow with two children; Geoffrey Kipkoech Kiwai, a son born in 1983 and who was a Form II student at Kericho Technical Secondary School at the time he gave evidence in 1998. Geoffrey gave evidence as P.W.1. The second child was Michael Kipkurui Kiwai, who was a primary school student in Class 8 at Sosiot; Michael gave evidence as P.W.4.

It is obvious to us from the recorded evidence that the villagers of Keben Village thought that the Deceased was a witch and was exercising her art to the detriment of the village. The village elder Joseph Sawe Mutai (P.W.3) put it thus when cross-examined:-

"... I have a duty to see development in the area. I sensed danger. I could not go to the scene. Some people were also looking for me, they alleged I was protecting a witch. I had said I do not want witchcraft in the village. I have announced it in meetings. I do not believe in witchcraft. The villagers never used to take sick to hospital as they believed the sick had been bewitched. I heard some rumours that Jane was a witch. ...".

Because the Deceased was believed to be a witch, many villagers descended on her house early in the

morning of 29th August, 1995, at about 5 a.m. They demanded that she produce her magic charms; she said she had none. They removed her from her house and took her to some road. There, they assaulted her demanding that she show them her witchcraft charms. They gathered fire-wood, started a fire and threatened to roast her alive on the fire. Still she would not admit that she was a witch. They took her back to her house, assaulting and insulting her all the way. In the house, she was asked to produce the implements of her sorcery; her boxes were removed from her house and searched outside. Nothing relevant to sorcery or magic was found. Yet they would not leave her. Her teeth were knocked out and her sons (P.W.1 and P.W.4) were constantly threatened with death. Her brother-in-law, Isaiah Kipsiele Arap Chepkwony (P.W.2) tried to intervene on her behalf; he was himself threatened with being burnt. Sarah Kipkoech Kilele (P.W.6), the sister of the Deceased, heard about the matter and went to see what was happening to her sister; she was threatened with death by burning. Kipngeny Arap Maina, the father of the Deceased (P.W.8) went to save his daughter; he was unable to save her and after unsuccessfully appealing to P.W.3, the village elder for assistance, P.W.8 went and reported the matter to the police but by the time the police arrived at the scene, the Deceased had literally been burnt alive.

This was the sad story the Judge and the assessors heard from the mouths of P.W.1, P.W.2, P.W.6 and P.W.8. Those who identified the two appellants as being participants in the crime were P.W.1 and P.W.2. Concerning the two appellants, P.W.1 said and we quote him:-

"They were carrying a tyre . Kipngeno Tembur Accused 12 was carrying a tyre. I went out as ordered. I went outside the house and left mother in the house. David Rotich went for paraffin. Tembur removed my mother from the house and took her outside. Tembur took a stick and hit my mother. He put a tyre around her. Rotich Accd 5 came back with the paraffin. He poured paraffin on the tyre. They lit a match and set fire on her. David Rotich accused 5 lit the match. Mother was still alive. The crowd dispersed and they left the tyre burning and burning her. I did not do anything to save her life. I only brought water and poured on the tyre. The fire died out. The tyre had burned completely only wires remained. My mother was dead. The crowd dispersed when there was a big fire. They removed my mother's clothes and mine and buried them in the fire. Tembur accused 12 removed the clothes assisted by Rotich accused 5. Nobody attempted to save my mother. The crowd alleged that my mother had bewitched so many people. I do not believe in witchcraft myself. ....".

And for his part, P.W.2 said:-

"I went to the deceased's house. There was a lot of work (sic). I found Jane had been beaten and taken to the road. I found Jane on the road. She was bleeding from the face and mouth and had lost some teeth. There were so many people that I could not pass. I told them to leave the deceased alone. They did not listen to me. It was dawn and I was able to identify some of the people. They also wanted to burn me. One of them is Joseph Kipngetch Arap Rotich. He was not arrested. He is at home. The other was Anthony Rono - Accused 9 pointed at. Weldon Keter was also there. he is not here. Donald Arap Rotich was there - pointed at accused No. 5. Kipngeno Tembur was also present (pointed at accused 12). There were so many. Another I remember was Wilson Siele. He is not here. Tobias Arap Sile. He is in the bush. I also saw Kenneth Arap Rotich. I think he is here. These are two sons of one person (points at accused 8)". So both P.W.1 and P.W.2 were certain that the two appellants were present and participated in the killing of the Deceased. The appellants, for their part, each said in an unsworn statement that none of them was present during the assault upon and the burning of the Deceased and that they only came to the scene long after the deceased had been killed.

Mr Orege for the appellants, told us that the evidence of P.W.1 and P.W.2, part of which we have set out, was not credible because of certain discrepancies and some of the discrepancies pointed out to us by Mr Orege were, first that in their statements made to the police soon after the incident, P.W.1 and P.W.2 did not give the names of these two appellants.

While this complaint, at face value, may be considered a valid one, we do not think we ought to attach any weight at all to it. We notice from the record that except for one, all the statements recorded by the police were made by the witnesses in the English language. In court, it is apparent most of them gave evidence in Kipsigis, their mother-tongue. It appears to us that what the police did was to record the

statements in English while the witnesses might well have spoken to them in either Swahili or Kipsigis languages. We are unable to place any importance on the witnesses' police statements. In any case, those statements were before the trial court and the Judge and the assessors must have seen them, or had them brought to their attention. They still believed the evidence of P.W.1 and P.W.2 and there is no law, as far as we are aware, that where a witness' statement recorded by the police is in conflict with the evidence given by the witness in court, the evidence must of necessity be disbelieved. We have gone through the cross-examination of P.W.1, for instance, and we are unable to find any place at which P.W.1 was asked to explain the discrepancy between his police statement and his evidence in court. As we have said, we do not think the Judge and the assessors were wrong in believing the sworn testimonies of P.W.1 and P.W.2. The other discrepancy pointed out by Mr Orege was that P.W.2 said he did not see P.W.1 at the scene while P.W.1 said he saw what was going on. Once again we do not think there is any merit on this point. The fact that one witness says he did not see another witness at the scene of crime does not and cannot mean the witness allegedly not seen was in fact not there. Both P.W.1 and P.W.2 were clear in their evidence that they saw these two appellants assaulting the Deceased. The Judge believed that evidence and in respect of the 2nd appellant, all the assessors were unanimous that he was at the scene of the crime. Two of the assessors agreed with the Judge that even the 1st appellant was present at the scene and participated in the assault on the Deceased. We have already set out the evidence of P.W.1 in particular regarding the role played by each appellant during the assault on the Deceased. We do not think for one moment that that young man (P.W.1) could have dreamed out of thin air the small details he gave to the Judge and the assessors.

True, P.W.1 might not have known the name of the 2nd appellant but he explained how he came to know his name. We can do no better than to quote P.W.1 on this aspect of the matter. He said when cross-examined:-

"I noticed the presence of the 12th accused at 1.00 p.m. I saw him present at that time. I also saw him when he arrived at the scene. When he arrived my mother was inside the house. I was also inside the house. The 12th accused was inside the house. I had not known him before. I came to know him after the offence had been committed. I asked my uncle what is the name of the person who had burned my mother. The 12th accused was moving away. He was going away, I could see him. My uncle gave me his name. I talked to my uncle after one day. I did not ask my uncle at the scene. I did not see the 12th accused passing the following day. When going to record the statement I asked my uncle who the person who burnt my mother was. When we discussed with my uncle we did not see the 12th accused. It is my uncle is P.W.2. Were it not for my uncle I would not have known the name of the 12th accused. ....".

What we understand P.W.1 to be saying here is that though he saw the 2nd appellant assaulting his mother, he (P.W.2) did not then know the name of the 2nd appellant and on the following day he asked his uncle (P.W.2) the name of the 2nd appellant. P.W.1 explained it thus in re-examination:-

"... I told my uncle about the brown man who was drunk. I saw the 12th accused at the police station about 4 - 3 days after I had talked to my uncle about the man who set my mother ablaze ....."

Though not put as succinctly as a lawyer would have put it, what P.W.1 was telling the Judge and the assessors was that though he saw the 2nd appellant whom he did not know before assault his mother, the following day before he recorded his police statement, he asked P.W.2 the name of the brown man who was drunk and who had set his mother ablaze. We see nothing inherently improbable in this explanation and we are not surprised that the Judge and the assessors accepted it. We too accept it.

Mr Orege also argued that the evidence of Dr Timona Thomas Obura (P.W.7) regarding the cause of death ought not to have been believed because the witness was inconsistent as to when he performed the post-mortem examination on the remains of the Deceased. Mr Orege contended that in his evidence in court, P.W.7 said he examined the body on the 31st August, 1995, while the post-mortem report which he produced in court as exhibit No. 1 showed that the examination was done on 1st September, 1995. On closer scrutiny of the evidence on record, there is no substance in this allegation. In his evidence which was not challenged even by way of cross-examination, P.W.7 said and we quote him:-

"... I carried out the post -mortem on 1st September, 1995 at 12 noon. ....".

The post mortem form itself shows:-

"DATE AND TIME OF POST -MORTEM 1ST SEPTEMBER, 1995 12 NOON."

This complaint is clearly baseless. Having looked at the whole of the recorded evidence, we are satisfied that these two appellants were correctly convicted. To be sure, there were some discrepancies in the evidence of the prosecution witnesses, but we agree with Mr Onyango Oriri, for the Republic, that the discrepancies pointed out on behalf of the appellants were minor and did not go to the root of the prosecution's case. Indeed they were the sort of discrepancies one would expect from unsophisticated village witnesses trying their best to recall events which took place some two years ago. Like the Judge and the assessors, we are ourselves satisfied, having independently examined the recorded evidence, that the witnesses for the Republic were basically honest and their evidence proved the charge against the appellants beyond any reasonable doubt. That being our view of the matter, the appeals by the appellants must fail and we order that they be and are hereby dismissed.

**Dated and delivered at Nairobi this 10th day of March, 2000.**

**R. S. C. OMOLO**

-----

**JUDGE OF APPEAL**

**A. B. SHAH**

-----

**JUDGE OF APPEAL**

**M. KEIWUA**

-----

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**