



Case Number:	Criminal Case 20 of 2014
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Case Class:	Criminal
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Stephen Nyangau Riechi
Citation:	Republic v Rasto Wanyama Masinde & 4 others [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	2nd Accused convicted
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 20 OF 2014.

REPUBLIC.....PROSECUTOR

VERSUS.

- 1. RASTO WANYAMA MASINDE alias DAVID ALUKOYE CHESOLI.....1ST ACCUSED**
- 2. GEORGE SIMIYU NABIKOTO alias SAITOTI.....2ND ACCUSED**
- 3. EDWIN WANJALA JUMA.....3RD ACCUSED**
- 4. RODGERS AKOTO INDEHERI.....4TH ACCUSED**
- 5. PETER ORIRI IMAETI.....5TH ACCUSED**

JUDGMENT.

The accused 2, 3, 4, 5 together with Accused 1 Rasto Wanyama Masinde alias David Lukoye Chesoli (now dealt with) were charged with 4 counts in Count 1: **Murder contrary to Section 203 as read with Section 204 of the Penal Code.** Particulars of the Offence: **(1) RASTO WANYAMA MASINDE alias DAVID ALUKOYE CHESOLI**

(2) GEORGE SIMIYU NABIKOTO alias SAITOTI (3) EDWIN WANJALA JUMA (4) RODGERS AKOTO INDEHERI (5) PETER ORIRI IMENTI: On the night between 15th and 16th April 2014 at Wekelekha Village within Bungoma County jointly murdered: **AI.**

Count II: **Murder contrary to Section 203 as read with Section 204 of the Penal Code.** Particulars of the Offence: **(1) RASTO WANYAMA MASINDE alias DAVID ALUKOYE CHESOLI**

(2) GEORGE SIMIYU NABIKOTO alias SAITOTI (3) EDWIN WANJALA JUMA (4) RODGERS AKOTO INDEHERI (5) PETER ORIRI IMENTI: On the night between 15th and 16th April, 2014 at Wekelekha Village within Bungoma County jointly murdered: **CI.**

Count III: **Murder contrary to Section 203 as read with Section 204 of the Penal Code.** Particulars of the Offence: **(1) RASTO WANYAMA MASINDE alias DAVID ALUKOYE CHESOLI**

(2) GEORGE SIMIYU NABIKOTO alias SAITOTI (3) EDWIN WANJALA JUMA (4) RODGERS AKOTO INDEHERI (5) PETER ORIRI IMENTI: On the night between 15th and 16th April, 2014 at Wekelekha Village within Bungoma County jointly murdered: **HILDA IMBAYA.**

Count IV: **Murder contrary to Section 203 as read with Section 204 of the Penal Code.** Particulars of the offence: **(1) RASTO WANYAMA MASINDE alias DAVID ALUKOYE CHESOLI (2) GEORGE SIMIYU NABIKOTO alias SAITOTI (3) EDWIN WANJALA JUMA (4) RODGERS AKOTO INDEHERI (5) PETER ORIRI IMENTI:** On the night between 15th and 16th April, 2014 at Wekelekha Village within Bungoma County jointly murdered: **JL.**

The case for the prosecution is that the deceased in Count I AI was the mother of the deceased in Count II CI, deceased in Count III

HI and deceased in Count IV JI. The deceased in Count I was robbed and the 1st accused (now dealt with) was charged with the offence of robbery with violence and was acquitted under Section 215 CPC. On the night of 15th – 16th April, 2014 the deceased were found having been attacked and killed.

Pw2 NI the husband of the deceased in Count I and father of the deceased in Count 2, 3, 4 testified that on 10.4.2014 he was in Nairobi when he received information that all the deceased had been killed in an attack at his home in Bungoma. He came home to Bungoma and confirmed the same. He went to the Mortuary where he found the bodies of the 4 deceased. He testified that Rasto (accused 1) had earlier robbed the deceased in Count 1 and was charged. He was later acquitted and on same day he committed this offence. He confirmed that accused 2 and 4 are persons known to him.

Pw4 PC. John Andrew Kahindi then attached to Bungoma CID Flying Squad accompanied CI. Kirui (OCS) and IP. Kitheika to a Murder scene at Musikoma area on arrival they found the house locked but forced the door open. In the house they found a woman on the bed with injuries and was dead. In the 2nd room they found one girl lying on the floor and another on the sofa all dead. There was also all dead. There was also a 3rd baby girl also dead in the sitting room. The scene was processed and photographs taken. The 4 bodies of the deceased were taken to Bungoma Hospital Mortuary.

He later attended the Post Mortem on 10.5.2014 Sgt. Odera and PC. Terer tracked the mobile phone of deceased in Count 1 Agnetta from Safaricom data and found that one Peter had used the phone. Peter was arrested. Peter is 5th accused. On being interrogated he said his brother Godrick Luta Amutete who explained that Peter had sold it to him.

On 11.5.2014 they arrested Rodgers Akoto (Accused 4) who had also used the deceased's phone. On interrogation he would not give a satisfactory explanation. The records show he had inserted sim card No. 0720*****. From the records it shows that Edwin Wanjala Juma (accused 3) had also used the Mobile phone after the death of deceased in Count 1. He would not give an account of how he came to use it.

On 22.6.2014 Rasto Wanyama was arrested. Upon interrogation he led police to David Alukoya Chesoli but David was released as there was no evidence against him.

Pw6. No. 231507 CID Simon Kirui while Investigating the offence of Murder arrested David Chesoli alias Castro (now dealt with) upon investigation David mentioned in his statement under inquiry he mentioned Accused 2 George Simiyu alias Saitoti and Accused 3 Edwin Wanjala Juma.

Pw7 Senior Superintended of Police Douglas Chikanda was asked on 30.6.2014 to record a confession from George Simiyu Nabikoto alias Saitoti (Accused 2). In the statement he disclosed that he was with Edwin (Accused 3) and Kelvin, and Rasto (Now dealt with) and they went to the house of deceased A. Kelvin, Edwin and Rasto entered the house and that Edwin raped one of the Children of A who is also deceased. Recording the statement he made a Certificate which was signed by Accused 2 one Lilian Nasimiyu Nanyama a 3rd Party and the officer.

The accused gave sworn evidence. Accused 2 George Simiyu Nabukoto testified that on that night of 15th – 16th April 2014 he was at his home with his family. On 16.4.2014 when he came back he heard of the Murder. On 26.4.2016 he was arrested and taken to the police station where he was asked about a phone he used to call his sister. He denied knowing any of the accused.

Accused 4 Rodger Akoto Indengere testified that on the night of 14th – 15th April 2014 he was at home the whole night. He testified that police came and informed him that his number 0720***** had been seen in the call record of the telephone of A the deceased. He explained that the phone had been given to him to repair and after repair tested it on his line and he gave it back to Edwin (Accused 3). He confirmed using the phone using his sim card.

Accused 5 Peter Oriri Imaeti testified that his Tel. No.0722***** was used on A's phone because Geoffrey Luusa Amakate gave it to him. He used it and returned to him. He does not know how the Mobile phone was obtained.

The accused are charged with the offence of Murder. The Prosecution must prove beyond reasonable doubt all the ingredients of Murder. The ingredients of murder are;

- 1) *The killing or fact of death of the deceased;*
- 2) *existence of malice aforethought or mens rea and*
- 3) *the unlawful act or omission on the part of the accused the actus reus.*
- 4) *That it is the accused who inflicted the injury.*

That deceased in Count 1, 2, 3, 4 died was confirmed by the evidence of Pw5 Dr. Philip Koskei. He produced the Post mortem form filled by Dr. Were who performed the Post mortem on 22.4.2014. From the report AI had; The cervical spine was fractured. He formed opinion that cause of death was likely due to strangling asphyxiation and rape.

Pubic hair was taken for further analysis. I produce Post Mortem report (PMFI – 5) as Exh.5.

CI was also examined on 22/04/2014 – a 15 year old female African in good natural status - she had rigor mortis and externally there were swellings at the back of both ears and there was bleeding from the ears. Genital area had blood stains in the birth canal. There was hematoma in both ears, contact with fracture of the skull. There was subdural hematoma with collection of blood under the cover of the brain. Dr. Were formed opinion that caused the death was severe head injury with sexual assault, the death Certificate No is shown.

To confirm sexual assault genital hairs was taken as a specimen. I produce the Post Mortem report (MFI – 4) as Exh. 4.

JJ's Post mortem was done on 22/04/2014 at 12.10 p.m. Female African in good natural status and had undergone rigor mortis. There were deep laceration on the head and left alecular area had laceration and also on nose and forehead. The genitalia was normal. The base of the skull was fractured and hematoma behind the left ear and subdural hematoma. (i.e. allocation of blood under skull along brain) Cause of death was severe head injury with subdural hematoma. No specimen was taken in the Post mortem report was signed and I produce it as Exh.2. (earlier PMFI -2). HI's Post Mortem was done on 22/04/2014 at 12.44p.m. 13 years old female African in good natural status. She had under gone rigor mortis. There was bleeding from both ears, associated with scratching at back of ears with hematoma, dislocation of its shoulder joint.

The base of the skull was fractured and there was subdural hematoma cause of death was severe head injury with subdural hematoma. No specimen was taken. I produce the Post Mortem report (PMFI – 3) as Exh. 3.

The second issue is whether it is accused who inflicted injuries that caused the death of the deceased in Count 1, 2, 3, 4, 5. Evidence against Accused 2 George Simiyu Nabokoto is that on 27.6.2014 Pw1 Joseph Nyongesa Pakali Chairman Community Policy received information that accused was required at the Police station to record a statement to assist Police in the Investigation of the Murders. He went to accused's house. Found him and took him to the Police station. While at the Police Station Pw7 who asked to record a confession from the Accused 2 which he did. This confession was produced as Exhibit 10. In the statement he admitted having been requested by Rasto (now dealt with) to go and assist in killing A (deceased) in Count 1 because she was the complainant in a robbery case Rasto had been charged with and for which he had been acquitted that day. He further stated that they sought the services of Kelvin, Edwin (Accused 3) who armed themselves with a knife and a metal bar. Where they committed the offence of rape defilement and Murder. In his confession which was admitted in court the accused stated; *I then told him we cannot manage the two of us. Then he said, he will look for other people. He then went out to look for Kelvin and Edwin. The four of us met at Milimani area around 08.10 p.m. We then went straight to the house of Mama C at Wekelekha on arrival Rasto was the first person to enter the house, he was then followed by Kelvin and Edwin then was the last person to enter the house. When I entered the house three children who were girls were reading at the sitting room. Rasto and Kelvin went to the Bedroom. When you enter the house from the front the bedroom is on the left. Edwin went to where the Children were leaving me on the door. Before we went to the house Rasto had a knife, while Kelvin had a metal bar, while Edwin had a knife. While in the house Edwin used clothes he found on the sofa set to block the eyes and the mouth to avoid them raising any alarm.*

Rasto and Kelvin started beating C inside the bedroom, I was at this time near the bedroom when C became unconscious the two Rasto and Kelvin raped Mama C. By then I was seeing them. Then after that Rasto stabbed Mama C on the left side. I then asked the two to leave the house as the Mission was complete, but Rasto replied saying that the three children must also be killed.

The evidence against accused 4 Rodgers Akoto Indeheri is the Pw4 P.C. John Andrew Kahindi while investigating the murder found that accused 4 had used the late A's Mobile phone, through the assistance of Safaricom data. He was arrested asked as to how he came to use the phone. The data records showed he had inserted his sim card No. 0720***** into the deceased A's phone and made a call. When Accused 4 was asked he said he was a phone repairer. In his defence Accused 4 stated that he was given the phone by Accused 3 Edwin to repair and after repairing it he tested it with his Saficom sim card.

The evidence in respect of Accused 5 Peter Oriri Imaeti Accused 5 is that on 10.5.2014 through Safaricom data Accused 5 was traced. He was found to have used A's phone a day after the Murder. He was arrested and informed Police that his brother Godrick Lutta Amutete had given it to him. Godrick was called released. The Accused 5 in his defence testified that Godrick is the one who gave the phone, he used it and returned it to him. Godrick was released by Police.

The evidence connecting Accused 4 Rodgers Akoto is that from the Safaricom data records he had used Agnetta's mobile phone which had been stolen during the murder to call. The Accused 4 both to the police and this court explained that he is a mobile phone repairer and had been given by Accused 3. Edwin Wanjala Juma (now at large) to repair which he did and used his sim card to test whether it was working. In respect to Accused 5 Peter Oriri Imaeti was also arrested because Safaricom data had indicated that he used A's phone stolen during the murder. He explained to both the police and in his evidence in court that he indeed used the phone but had got it from his brother Godrick Luka Amutete. Godrick was called to the police questioned and released. He was not a witness admit or deny the assertion by the Accused 4.

I have considered the evidence in totality I find that Accused 4 Rodgers Akoto and Accused 5 Peter Oriri Imaeti only connection which the alleged offence is that they used the mobile phone of the deceased. Pw4 Rodgers has explained the circumstances how he came by the mobile phone. This explanation has not been dispatched by evidence in respect of Accused 5 Rodgers he explained how he came by the mobile phone. He obtained it from one Godrick who was not called as a witness. I find that they have explained how they came to use the mobile phone. The inference of guilt on basis of recent possession or use has been displaced. I therefore find no sufficient evidence to connect that to the offence and acquit Accused 4 Rodgers Akoto Indeheri and Accused 5 Peter Oriri Imaeti under Section 215 C.P.C. Accused 4 and 5 be set at liberty unless otherwise lawfully detained. As for Accused 2 George Simiyu Nabikoto alias Saitoti. I am satisfied that the prosecution established that he one of the members of the group that armed itself and went to the house of AI, with the intention of killing her and did kill not only A but also her 3 children. I find the prosecution established its case on the 4 counts of Murder. I find Accused 2 George Simiyu Nabikoto alias Saitoti guilty of Murder and all the Four counts and convict him accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF NOV, 2019.

S.N.RIECHI

JUDGE

Court: The court has considered the fact that accused is first offender and what has been stated in mitigation. However, the offence is serious and caused the death of 4 people. This court is aware of the Supreme Court decision in *Petition No. 15/2015 Muruatetu & 2 Other -Vs- Republic*. The accused is hereby sentenced to Life imprisonment on Count 1. The sentence in Count 2, 3, 4 be held in abeyance. R/A within 14 days.

S.N. RIECHI (JUDGE)

29/11/2019



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