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Court:	High Court at Kapenguria
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	Republic v Musa Lotolim Chakartin & 8 others [2021] eKLR
Advocates:	Mr Makori for the State Messrs Chebet Ngetich Fancy for the 1st, 2nd, 4th, 5th, and 6th Accused Messrs Chebet holding brief for Messrs Chebii Cherop for the 3rd, 7th, 8th and 9th Accused
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MUSA LOTOLIM CHAKARTIN.....1ST ACCUSED

CHRISTOPHER TERER CHAKARTIN.....2ND ACCUSED

CHACHA SILINYANG KODOMUK.....3RD ACCUSED

WILSON LEMTUKEL.....4TH ACCUSED

LISORENG CHAKARTIN.....5TH ACCUSED

SIMON MUKERENG KODOMUK.....6TH ACCUSED

KEDINGURA LOMWAI.....7TH ACCUSED

JACKSON LOMWAI.....8TH ACCUSED

SAMUEL LOMWAI.....9TH ACCUSED

JUDGEMENT

Procedural history

The nine accused persons are charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya in respect of the deceased, Chepoghli Loyarer.

The prosecution called eight (8) witnesses in support of the charge.

Upon being put on their defence, each of the nine accused persons made an unsworn statement and none called any defence witness.

The first four (4) prosecution witnesses testified before Githinji, J. The next remaining four (4) prosecution witnesses testified before Sitati, J.; after they informed Sitati, J that they wanted their trial to proceed from where it had reached before Githinji, J in accordance with section 200 (3) as read with section 201 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. Thereafter, Sitati, J. put all the accused on their defence after dismissing the submission of counsel for the accused that their clients had no case to answer. She retired before taking the evidence for the defence.

All the accused testified before me.

The case for the prosecution.

The prosecution called Loyerer Kitenangoria (Pw 1), who was the husband of the deceased. Pw 1 testified that he was suspected of bewitching a son of his brother. As a result, Pw 1, and some elders had a meeting at the police station on 28/1/2016. The elders who attended the meeting were Cheptiya, Cheposi, Simion (6th accused), Christopher (2nd accused), Musa (1st accused), Chacha (3rd accused), Wilson (4th accused), Lisareng (5th accused) and Kendingura (7th accused). They resolved that Pw 1 had to go to Ortum mission hospital and bless the ailing son of his brother with saliva. Pw 1 did so. Pw 1 was then told that he was not to be blamed whatever happened to the ailing son. Later Pw 1 was told that the ailing son had died and that the family of the dead son were going to kill someone to revenge.

Pw 1 then asked the wife as to why the family of the dead son wanted to revenge since they had resolved the issue.

The following day on a Sunday Pw 1 woke up and went to his land. At about 7.00 am Pw 1 saw a big crowd of people at his home. Three of those persons went to where he was. Two of those three people were armed with clubs. Two of those three persons were Christopher and Lempukei. They did not get Pw 1 since he had gone beyond the river. These people then left his home at 11.00 am and went towards the home of his neighbour, Nguletukei.

Pw 1 then heard screams from the home of the ailing son (Nguletukei). Thereafter again Pw 1 saw the crowd heading to his home. Pw 1 then heard his wife screaming. The wife ran towards the farm. Pw 1 then saw his kitchen on fire. Pw 1 could see those people but they could not see him. Pw 1 saw two of his houses and a store catch fire. At that time Pw 1 saw two people going to his house in the farm. These two people were Christopher Terer Lomtukei and Chacha. There was a third person called David Silinyang. These three people went to the home of Pw 1 where his wife was and he saw fire in his home.

There was a group of people who searched for Pw 1 till mid-night and were unable to get him. The following morning on Monday, Pw 1 reported to the police. Pw 1 told police that his houses had been torched. The police told him that they were at his home the previous day and had taken the body of her deceased wife to Kapenguria. Pw 1 went there and saw the body of his deceased wife. The body was burned.

Pw 1 further testified that two of his stores and one house in the second homestead were also torched. His motor cycle was also torched. Pw 1 also testified that his two homesteads were two (2) kilometers apart.

Pw 1 continued to testify that he was unable to recognize anyone among the crowd of 30 people and that he did not know who killed his wife.

The prosecution then called Tecla Chelimo (Pw 2), who is the daughter of the deceased. She was aged 21 years old. On the material date on 31/1/2016, she awoke up and saw many people in the home of Ng'oletukei. Ng'oletukei is her brother and his home is near their home. She further testified that after her mother deceased had made tea, they drank and she went away alone. While en route, her mother met the 1st accused and one Musa Kapelinyang. These two men returned her back to her home and took tea; but Musa Kapelinyang refused to take the tea. Pw 2 and other people proceeded to Ng'oletukei. Thereafter the village elder, Solomon Domoreng arrived, but refused to take part saying that he had no interest in clan issues.

Pw 2 continued to testify that Christopher Lemtukei rose with a club and hit the deceased on the leg. He then told her to show them the witchcraft she was using. Kenginurai and Simon Mukereng also attacked my mother. She further testified that Lisoreng Charaitin was among them. She also testified that the 1st accused told her (Pw 2) to leave to avoid being killed. Kendingura (7th accused) said that Pw 2 was also a witch and should be killed. They then took her mother back to her home. She then saw them torch their houses; although she was far from them.

Pw 2 continued to testify that Christopher Lemtukei and Chacha Silinyang (the 3rd accused) then proceeded to the other home of Pw 2; which is near the river. They got a motor bike in the house and took fuel and torched the house. They also torched their two maize granaries (stores). The 1st accused attacked the deceased first before taking Pw 2 away.

Pw 2 continued to testify that the 4th, 8th, and 9th accused persons also attacked the deceased. She also testified that she the accused before this incident as they are relatives. She further testified that she had never disagreed with them before. In all the accused torched four houses and three stores.

When Pw 2 was cross examined, she testified that there was a big crowd of people numbering about 30 persons. Pw 2 also testified in cross examination that she was about two kilometers away from the boma, where her mother was killed. She also testified that her father (Pw 1) had ran away and that they threatened to kill her. She further testified that those who had come to that home were all annoyed. She finally testified, that she did not witness what they did with her deceased mother.

The next witness called by the prosecution was Sofia Relin (Pw 3), a minor who testified on oath after successfully undergoing a *voire dire* examination. Pw 3 is the daughter of the deceased. Pw 3 testified that she was a pupil at Ortum Girls Boarding school in class 8. Pw 3 also testified that on 31/1/2016 she was at home with her deceased mother and her sister Pw 2. They awoke up and she saw many people in the home of Ng'oletukei, who is their neighbour. Their mother made tea and left for church. Her mother was told to return to her home by the 1st accused and one Musa Kapelinyang. At home they took tea which was in a kettle.

Pw 3 further testified that her mother told them that they should go to the witch doctor to find out who bewitched Ng'oletukei. They then left and she went to graze cattle. At about 3.00 pm the 1st accused went to where she was and told her that her sister (Pw 2) was calling her. She then accompanied the 1st accused and one Pekan Kulon and she then met her sister beside the road. Her sister (Pw 2) told her that they had killed their mother. Finally, Pw 3 did not know who killed her mother.

The prosecution also called Moses Lotudo (Pw 4), who was the village elder. Pw 4 testified that on 31/1/2016 at 11.00 am he was at home. He then saw the accused heading to the house of Loyerer. Loyerer is his neighbour. The accused then left the house of Ng'oletukei. Pw 4 further testified that they left the house of Ng'oletukei and went to the house of Mzee Loyerer. Pw 4 heard some noise and then heard a woman shouting: "*There is no one to help anyone in this world.*" Pw 4 then saw fire burning the house of the woman. Pw 4 further testified that the entire house was torched. Pw 4 also testified that he could see from the homestead as the burning happened.

Pw 4 continued to testify that at 3.00 pm the Ortum village elder called Tudoreng (Pw 6) told him to go there. Pw 4 then met Pw 6 at Psiywa village. Thereafter police, village elders and Kenya Police Reserve officers (herein after referred to as KPR) arrived. They proceeded to the home of Loyerer and found the woman still on fire and dead. Pw 4 testified that they went to the river and brought water and proceeded to put off the fire. The police then took the body. Later four villager elders including Pw 4 arrested the accused and handed them to Ortum police station. Pw 4 further testified that the accused are his neighbours and that he knows all of them physically although he did not know all of them by their names.

Pw 4 continued to testify that he saw the 1st, 5th, 4th and the 8th accused heading to the home of the deceased till he heard the woman crying. Pw 4 further testified that his home is 2 kilometers from the home of the deceased.

Pw 4 further testified that he did not know who torched the houses. He also testified that he did not know who killed the deceased.

The prosecution also called Losiangura Lopodok (Pw 5), who was a member of the Kenya National Police Reserve (KPR). Pw 5 testified that on 6/2/2016 he received a report of this incident and that a certain woman had been burned. Pw 5 also testified that he had been given the names of the three suspects whom he and his three KPR fellow officers arrested. These were the 7th, 8th and 9th accused persons. They took the three accused to the police Ap police post at Lomut. Pw 5 testified that he knew the three accused before this incident. He also testified that he had no grudge against the three accused.

The prosecution also called Solomon Domoreng (Pw 6), who was the villager elder. Pw 6 testified that on 31/1/2016 at about 2.00 pm, he was in church. After church service Pw 6 passed at Psiyo village, where he heard rumours that a person had died in his village. Pw 6 then saw smoke from his village. Pw 6 then proceeded to the sub-chief's office. He went with him to Ortum police station. They then accompanied the police to the crime scene and police removed the body of the deceased wife of Pw 1. It was the wife of Pw 1 who was burned.

The prosecution called Dr Jotham Mukhola (Pw 7), who performed a postmortem examination on the body of the deceased. Pw 7 testified that the deceased was alleged to have been in her home when a group of people went to her house, grabbed her, beat her and set her ablaze. The findings of Pw 7 were as follows. The body was burned beyond recognition. The body was that of a female African aged 50 years. The body had been completely burnt. The limbs were dismembered at the elbows and knee joints with tissues burnt down to the bones in multiple areas.

Furthermore, Pw 7 found the following in respect of the skull. The frontal parts of the head were missing. Abdominal and chest viscera were exposed due to missing abdominal chest wall especially on the right side. Both lungs, heart, and the area around the heart were partially burnt and viscera slightly contracted. The abdomen, liver, intestines were burnt completely and contracted. The genito-urinary system was burnt out with parts of the major and minor majora missing.

Furthermore, in respect of the head Pw 7 found as follows. There were injuries mainly on the right side of the head with parts of the bones partially burnt. Part of the exposed brain was partially burnt. The spinal bones were partially burnt with spinal cord contracted.

In his opinion, Pw 7 found death was caused by multiple organ failure secondary to 3rd degree 100% burns. Pw 7 then produced his report as exhibit Pexhibit 1.

In cross examination Pw 7 testified that the burns were caused by dry fire.

The prosecution finally called No. 71707 Cpl Chris Obati (Pw 8), who was the investigating officer. Pw 8 was the deputy in charge of Ortum police post. Pw 8 testified as follows. On 31/1/2016 he received a report from the assistant chief of Kerelwa sub-location that a group of people had gone to a village and burnt houses on suspicion that the owner of the home (Pw 1) was a witch. Pw 8 then accompanied the OCS and some KPR officers to the scene.

Upon arrival at the scene, they found the body of the deceased burnt beyond recognition. They took the body to Kapenguria hospital mortuary pending a postmortem.

Furthermore, on 2/2/2016 the first three accused persons were arrested by villagers and were taken to Ortum police post. On 6/2/2016 three other suspects were arrested at Lomut area and were taken to Lomut APC camp and were later taken to Ortum police post. He then charged them with murder. In the course of his investigations Pw 8 established that the deceased and the accused were neighbours.

Pw 8 further testified that the accused ordered the deceased to abandon her journey to church and asked her as to why they were practicing witchcraft within the family.

The accused then burnt her together with the houses. The accused are cousins of the deceased. Pw 8 further testified that none of the accused had been bewitched, but they believed that members of the Mafuta Pole Church practised witchcraft.

Pw 8 further testified that he charged each of the accused persons because they were mentioned by the witnesses.

Pw 8 took all the accused for mental assessment and all were examined. He then produced their mental assessment reports as Pexhibit 2 (a), (b), (c), (d), (e), (f), (g), (h) and (i).

In cross examination, Pw 8 testified that the assistant chief told him that it was a mob that had attacked the home.

The case for the defence.

All the accused made unsworn statements and called no witnesses.

The case for each of the accused is separately set out herein below.

The case for the 1st accused.

The 1st accused made unsworn statement in which he denied the charge. He testified that on 2/2/2016 he was in his store of onions. At about 4.00 pm a person called him. This person told him that they go to Ortum police station. They went there. Upon arrival he was handcuffed and put in cells. He was later charged with murder and thereafter released on bail. He finally, testified that he did

not know how the deceased.

The case for the 2nd accused.

The 2nd accused also made an unsworn statement in which he denied the offence. He testified that he did not know anything about this offence. He further testified that police arrested him and told that he had killed somebody. He told them that he did not kill anyone. He also told them that he did not know who killed the deceased and that he did not know where the deceased died.

The case for the 3rd accused.

The 3rd accused also made an unsworn statement in which he testified that he does not know anything concerning the instant murder. He further testified that the KPR told him that he was required at Ortum police station. Upon arrival he was arrested and detained and told that he had killed a person.

The case for the 4th accused.

The 4th accused person also made an unsworn statement in which he denied knowing anything concerning this murder. He further testified that on the material day he was in church. On Tuesday the 4th accused went to Ortum where he unloaded his donkeys. After he was arrested, he was taken to court. In court he was told he had killed mama. He further testified that he did not that mama died. He also did not know how mama died.

The case for the 5th accused

The 5th accused made an unsworn statement in which he denied knowing anything concerning the offence. He testified that on the material day he had gone to hospital, where his mother was hospitalized. His mother then sent him for a soda. Before he brought the soda, he was arrested by police from Kapenguria police station.

Following his arrest, the accused was taken to court and after six months he was released on bail.

The case for the 6th accused.

The 6th accused testified that he was arrested by the KPR upon arrival at the stage at the centre (market).

He was then taken to Ortum police station and later he was transferred to Kapenguria police station. At Kapenguria police station he was told he had killed the deceased (Chepoy Loyerer).

The case for the 7th accused.

The 7th accused made an unsworn statement and called no witnesses.

He testified that he knew nothing concerning this murder.

He further testified that on the material day, he had gone to buy goats at Lomut. He had gone there with 8th and 9th accused who are his brothers.

He further testified that at 2.00 pm he tied a goat to a tree and sat under the tree. Shortly, thereafter KPR officers arrived and arrested him and took him to Ortum police station. He was then told he had killed a certain lady.

Finally, he testified that he was taken to court and released on bail.

The case for the 8th accused.

The 8th accused made an unsworn statement in which he stated that he knew nothing about the murder.

He testified that he went to the market at Lomut, where he was till 2.00 pm. Later he was arrested by KPR and was taken to the police at Lomut. From there he was taken to Ortum police station, where he was told that they had killed someone.

Later he was transferred to Kapenguria police station and was taken to court, where the charge was read over to them. He was then released on bail after six months. He also testified that he was arrested along with the 7th and 9th accused.

The case for the 9th accused

The 9th accused denied knowing anything about this murder.

He testified that after finishing his business at 2.00 pm he went to the hotel. While at that hotel six (6) KPR officers arrived there and arrested him and took him to Ortum police station.

Thereafter they were transferred to Kapenguria police station, from where they were taken to court. It is in that court that they were told they had killed a lady called Chepoy Loyerer.

They were then taken to Kitale prison where they stayed for six months. After that they were released on bail.

The submissions of counsel for the 1st, 2nd, 4th, 5th and 6th Accused persons.

Based on the evidence adduced at trial, Messrs Chebet Ngetich Fancy, counsel for the accused persons submitted that none of the prosecution witnesses saw the accused burn the deceased. They have therefore submitted that the evidence against the accused is circumstantial in nature. They therefore submitted that for a court to convict on such evidence, the chain of circumstances must form a chain so complete to point only at the accused as the only persons who committed the offence. Counsel further submitted that all the prosecution witnesses confirmed that a mob of people were heading to the home of Pw 1. They have therefore submitted that the burning of the stores and houses of Pw 1 and her deceased wife was done by the mob and not the 1st, 2nd, 4th, 5th and 6th accused persons.

Counsel has therefore submitted that the prosecution has failed to prove *mens rea* and the ingredients of murder as set out in section 203 of the Penal Code. Counsel has therefore urged the court to acquit his clients of murder under section 215 (*sic*) of the Penal Code.

The submissions of Messrs Chebii Cherop, counsel for the 3rd, 7th, 8th and 9th accused persons.

Counsel has submitted, based on the decision of this court (Chemitei, in *R v. Nicholas Onyango Nyolo (2014) e-KLR*), that the prosecution has to prove the following ingredients in order to establish murder. 1) Proof of the fact and the cause of death of the deceased. 2) proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused, which constitutes the *actus reus* of the offence. 3) proof that the said unlawful act or omission was committed with malice aforethought, which constitutes the *actus reus* of the offence.

In the light of the foregoing, counsel submitted the prosecution failed to prove the above ingredients to warrant the conviction of the 3rd, 7th, 8th, and 9th accused persons on a charge of murder.

Furthermore, counsel submitted that the evidence of Pw 1, Pw 2, Pw 3, Pw 4 and Pw 5 was riddled with inconsistencies and unsubstantiated allegation; since they were not at the scene of crime.

Counsel further submitted that Pw 1 went to hide in the bush. There was no possibility that Pw 1 would have witnessed the events

as they unfolded; as he was in a state of fear and shock, since group of people who were 30 in number, were also after him.

Counsel further submitted as follows. Pw 3 did not witness the incident as she was grazing their cattle. She could not tell who burned her deceased mother and their houses.

Pw 4 admitted that he did not witness the incident.

Pw 5 did witness the incident as he was not at the scene of crime.

Counsel cited the decision of the Court of Appeal in *Wamungu v R [1989] e-KLR*, in which that court observed that where the only evidence against a defendant is one of identification or recognized, a trial court must examine such evidence carefully to ensure that there is no room for mistaken identity for such mistaken identity of close relatives and friends are sometimes made. Counsel has also cited other authorities which restate the same principles.

He has therefore urged the court to acquit the accused persons under section 215 (*sic*) of the Penal Code.

Issues for determination.

I have considered the entire evidence in the light of the applicable law. Additionally, I have also considered the submissions of both counsel including the authorities they cited. As a result, I find the following to be issues for determination.

- 1) Whether the accused caused the death of the deceased.
- 2) Whether the evidence discloses murder or manslaughter.

Issue 1

I find as credible the evidence of Loyerer Kitenangoria (Pw 1). He was suspected of bewitching the son of his brother Ngo'letukei. Pw 1 met with the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons at the police station and it was resolved that he goes to Ortom mission hospital to bless the ailing son of his brother. Pw 1 went there on 28/1/2016 and blessed the son with his saliva. As a result, Pw 1 was then told that he was not to be blamed whatever happened to the ailing son.

Later when that son died, Pw 1 heard that the family of the deceased son wanted to revenge his death. I find that Pw 1 then sensed danger to his person. As a result, he went to hide in the bush. On the following day, which was a Sunday at 7.00 am, Pw 1 saw a crowd of people of 30 people at his home from his hideout. The 2nd accused and one Lempukei went close to his hideout as they were looking for him. At about 8.00 am, so many people who were armed with clubs went to look for him. They were asking others whether anyone had seen Pw 1. They did not get him since Pw 1 had gone beyond the river. At 11.00 am they left.

Furthermore, Pw 1 saw the crowd heading to the home of Ng'uletukei. They were many people at the home of Nguletukei. Pw 1 heard screams from the home of Ng'uletukei. Pw 1 then heard his wife screaming. She then ran away towards the farm. At that point in time Pw 1 saw his kitchen on fire. Pw 1 saw the 2nd and 3rd accused among the crowd. He then saw his two stores and one house on fire.

The crowd also torched one house and two stores in the other homestead of Pw 1. They also torched his motor cycle. The whole incident took about one hour.

Finally, I find as credible the evidence of Pw 1 that he was unable to recognize anyone in that crowd of 30 people and that he did not know who killed his deceased wife.

Furthermore, I find as credible the evidence of Tecla Chelimo (Pw 2), the daughter of the deceased, that the 1st accused and one Musa Kapelinyang returned the deceased mother to her house. They told the deceased to lead them to her house and show them the

witchcraft she was using. I further find as credible her evidence that one Christopher Lemtukei rose with a club and hit her deceased mother on the leg. I further find as credible her evidence that the 6th and 7th accused also attacked her deceased mother. They then took the deceased back home, who was on her way to church. I also find as credible her evidence that the 4th, 8th and 9th accused persons attacked her deceased mother and that she had known them before this incident.

I further find as credible her evidence that Pw 2 did not witness what they did to her deceased mother and that her father (Pw 1) had ran away.

Furthermore, I find as credible the evidence of Sofia Relin (Pw 3), the daughter of the deceased, that on the material date the deceased was going to church; while en route she was returned back by the 1st accused and one Musa Kapelinyang. She also did not know who killed her deceased mother.

I also find as credible the evidence of Sofia Relin (Pw 3), who is also the daughter of the deceased. Her evidence was that on 31/1/2016 she saw many people at the home of Ng'oletukei, who was their neighbour. I also find as credible her evidence that her deceased mother while going to church was returned back by the 1st accused. and one Musa Kapelinyang. She returned back accompanied by these two persons.

I further find as credible her evidence that the 1st accused is her step brother and Musa Kapelinyang was her neighbour. Equally credible is her evidence that her deceased mother told the 1st accused and Musa Kapelinyang to go to the witch doctor to find out who bewitched Ng'oletukei. I further find as credible her evidence that that these two persons had that morning taken tea in her deceased mother's house. Pw 3 then proceeded to graze their cattle.

I also find as credible her evidence that the 1st accused went to where she was and told her that her sister (Pw 2) was calling her. She accompanied the 1st accused and one Pekan Kulon to where her sister (Pw 2) was. Both Pw 2 and Pw 3 proceeded to the house of the P.C. at Ortum. Thereafter Pw 2 told Pw 3 that they had killed their mother. Pw 3 did not witness her mother being killed.

Furthermore, I find as credible the evidence of the village elder (Pw 4- Moses Lotudo), who was a neighbour of the deceased woman. His evidence is that he saw the accused heading to the home of Ng'oletukei at 11.30 am. The accused then left the home of Ngoletukei and proceeded to the home of the deceased. Pw 4 continued to testify that: *"I heard some noise and then heard a woman shouting, "There is no one to help anyone in this world." I then saw fire burning the house of the woman. The entire house were (sic) torched. I could see from the homestead as it happened."*

Furthermore, I find as credible the evidence of Pw 4 that at 3.00 pm he met the village elder of Ortum (Tudoreng-Pw 6). His evidence was that they met at Psiywa and together with KPR officers, police and some other village elders, they proceeded to the home of the deceased. Upon arrival they found the woman still on fire but dead. They went to the river and brought water with which they put off the fire. The body of the deceased was taken by the police. It was the evidence of Pw 4 that his home is 2 km from the home of the deceased and that he does not know who torched the house of the deceased and who killed her. In re-examination, Pw 4 testified that the houses are on ridges and there is a valley in between. He also testified that he could see and hear. I find as credible his evidence that he knew all the accused physically but not by their names.

Finally, I find as credible the evidence of Dr. Jotham Mukhola (Pw 7) that the cause of death of the deceased was due to multiple organ failure secondary to 3rd degree 100% burns. The other evidence of Pw 7 was that the deceased was burned beyond recognition.

Furthermore, I find the unsworn evidence of the 1st accused to be incredible in view of the credible and ample evidence of the prosecution witnesses. His evidence consisted of a bare denial of the offence.

I further find the unsworn evidence of the 2nd accused to be incredible in view of the credible and ample evidence of the prosecution witnesses. His evidence consisted of a bare denial of the offence.

Furthermore, I find the unsworn evidence of the 3rd accused incredible in view of the credible and ample evidence of the prosecution witnesses. His evidence consisted of a bare denial of the offence.

I also find as incredible the unsworn evidence of the 4th accused in view of the credible and ample evidence of the prosecution witnesses.

Furthermore, I find as incredible the unsworn evidence of the 5th accused in view of the credible and ample evidence of the prosecution witnesses.

The unsworn evidence of the 6th accused is incredible in view of the credible and ample evidence of the prosecution witnesses.

Furthermore, I find as incredible the unsworn evidence of the 7th accused in view of the credible and ample evidence of the prosecution witnesses.

I also find as incredible the unsworn evidence of the 8th accused in view of the credible and ample evidence of the prosecution witnesses.

Finally, I find as incredible the unsworn evidence of the 9th accused in view of the credible and ample evidence of the prosecution witnesses.

The upshot of the foregoing is that I find from the credible evidence of Pw 4 that the accused went to the home of the deceased in the morning hours of 31/1/2016 after 11.30 am. They did so after leaving the home of Ng'uletukei that morning. It is also clear from the credible evidence of the husband of the deceased (Pw 1) the accused were among the group of 30 people who went to the home of the deceased. Shortly, thereafter the granaries and houses of Pw 1 were set on fire. Both Pw 1 and Pw 4 did not see who set the deceased ablaze. Pw 1 Pw 4 were unable to recognize anyone in the crowd of 30 people. Again, both Pw 1 and Pw 4 did not see who set the deceased ablaze.

It therefore follows that the evidence against the accused is circumstantial.

I further find from the evidence that any one in that group of 30 persons had the opportunity to set ablaze the deceased. I find that the prosecution has not produced evidence to show that the accused had the exclusive opportunity to set the deceased ablaze. It is possible that in that group of 30 people there were curious bystanders, accomplices, sympathizers and spectators.

It is the law that for a court to convict the accused on circumstantial, the said evidence must exclusively point to the accused as the perpetrators of the instant crime of murder. In other words, the chain of evidence must irresistibly point to the accused alone or in conjunction with others as the ones who caused the death of the deceased. Any break in that chain of evidence will weaken that evidence with the result that an acquittal will have to be entered. In the case at hand the chain is broken by the presence of other unidentified thirty (30) persons at the scene of crime; who equally had an opportunity to commit the crime. See *DPP v Kilbourne [1973] AC 729 and Sawe v Republic [2003] e-KLR*.

In the case at hand the prosecution has not produced the chain of evidence that exclusively points to the accused as the sole perpetrators of the crime.

In the premises, I find that the circumstantial evidence produced by the prosecution does not exclusively point to the accused as the persons who caused the death of the accused.

I find that the prosecution has proved the motive for the murder which is that the deceased and her husband (Pw 1) were suspected to have bewitched the deceased son of Ng'oletukei; although the prosecution are not required to prove the motive: See section 9 of the Penal Code.

The question that falls for consideration is whether the offence of assault was proved as against the 1st, 4th, 6th, 7th, 8th and 9th accused persons. This is tied up with the question whether the offence of assault is a minor and cognate offence to murder.

On the credible evidence of Pw 2 and Pw 3, who are the daughters of the deceased, I find that the offence of assault contrary to section 250 of the Penal Code was proved beyond reasonable doubt against the 1st, 4th, 6th, 7th, 8th and 9th accused persons.

The next issue for consideration is whether the offence of assault is a minor and cognate offence to murder. The answer to the issue lies in the provisions of section 179 of the Criminal Procedure Code, which read as follows: “(1) *When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*”

(2) when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted although he was not charged with it.”

The Court of Appeal in *Robert Mutungi Muumbi v Republic [2015] e-KLR* observed that section 179 of the Criminal Procedure Code empowers a court to convict an accused of an offence, even though he was not charged with that offence and that the court contemplated by that section can either be the trial or the appellate court.

Furthermore, the High Court (Spry, J) in *Ali Mohammed Mpanda v Republic [1963] EA 294* observed that while construing the provision of the Tanzanian Criminal Procedure Code, which is equivalent to section 179 of the Kenyan Procedure Code: “*subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of the minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.*”

However, I find that the 1st, 4th, 6th, 7th, 8th and 9th accused persons are guilty of assault contrary to section 250 of the Penal Code based on the credible evidence of both Pw 2 and Pw 3. The basis for this finding is that the offence of assault is a minor and cognate offence to murder; which offence I find proved beyond reasonable doubt by the prosecution.

In view of the foregoing statutory provisions and the case law, I find on the totality of the evidence that the assault is a minor and cognate offence to murder.

Additionally, it is important to point out that by virtue of the doctrine of common intention as set out in section 21 of the Penal Code these accused persons are guilty of assault contrary to section 250 of the Penal Code as the act of one or some of them constitutes an act of all of the accused. The hitting of the deceased on the leg with a club by Christopher Lemtukei was an act done in furtherance of prosecuting a common purpose. I find as credible the evidence of Pw 2 and Pw 3 that the accused had a common intention in forcefully returning the deceased by ordering her to go back to her house to show them the witchcraft she was using. I find that the act of preventing the deceased from going to church on that Sunday amounted to an act done in pursuit of a common intention. The inseparable act of assaulting the deceased although inflicted by one person was an act done in pursuance of the common intention. This is the position in law, since none of these accused disassociated himself with that act of assault. See *Solomon Mungai & Others v Republic [1965] EA 782*. I further find as credible her evidence that the 6th and 7th accused also attacked their deceased mother. They then returned the deceased back to her home.

Furthermore, I find that the 1st, 4th, 6th, 7th, 8th and 9th accused persons had a common intention in assaulting the deceased and subjecting her to mob justice for they believed that the deceased and her husband had bewitched the deceased son of Ng’oletukei.

In the premises, I hereby convict the 1st, 4th, 6th, 7th, 8th and 9th accused persons of assault contrary to section 250 of the Penal Code.

Furthermore, I hereby acquit the 2nd, 3rd, and 5th accused. They are hereby ordered set free unless held on other lawful warrants.

In passing it is important to point out that a literal interpretation of the provisions of section 200 (3) as read with section 201 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, may lead to a conclusion that the case ought to have been tried only by two judges (Githinji & Sitati, JJ). It is also important to bear in mind that magisterial courts in exercise of their criminal jurisdiction are not clothed with inherent powers. See *Stanley Munga Githunguri v Republic (1986) KLR 1*. It is for this reason that in a criminal trial held by a magistrate court, only two magistrates may try an accused namely the first and the succeeding magistrate; for a trial of an accused cannot in law be conducted by a succession of magistrates due to lack of inherent jurisdiction in those magisterial courts. The trial of an accused in the High Court may be conducted by more than two judges like in the instant case; because the High Court is vested with inherent powers. Inherent powers are a reservoir of powers to be used where there is a lacuna or some ambiguity in the law. It is also used to prevent an abuse of the court process.

It is of historical interest to note that the Independence Constitution of 1963 in section 64 (4) allowed a puisne judge who had been appointed as a judge of appeal to continue to exercise the functions of the puisne judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being appointed. See also the decision of the High court (Nyamu, JA, Wendo & Anyara Emukule, JJ) in *Jesse Kamau & 25 Others v Attorney General (2010) e-KLR*. The procedure facilitated quick disposal of cases and also promoted a fair trial in that the trial court had the advantage of hearing and seeing the witnesses and therefore was in a position to assess the demeanour of witnesses. The repeal of the foregoing provision was unfortunate.

It is equally important to point out that the acquittal of the accused in trials held in the High Court is authorized by section 322 (1) of the Criminal Procedure Code and not section 215 of the Criminal Procedure Code as submitted by both counsel for the accused persons. Section 215 of the Criminal Procedure Code that was relied upon by both counsel only authorizes acquittals in the magisterial courts and is therefore inapplicable in the instant case.

Judgement dated, signed and delivered in open court at Kapenguria this 5th day of May 2021.

J M BWONWONG'A

JUDGE

In the presence of

Mr. Juma, court assistant

Mr Makori for the Republic

Messrs Chebet Ngetich Fancy for the 1st, 2nd, 4th, 5th, and 6th accused

Messrs Chebet holding brief for Messrs Chebii Cherop for the 3rd, 7th, 8th and 9th accused.



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