



REPUBLIC OF KENYA



**Republic v Khasia (Criminal Case 57 of 2020)
[2023] KEHC 24232 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 57 OF 2020**

DK KEMEL, J

OCTOBER 27, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

COSTAS SHIUNZA KHASIA ACCUSED

JUDGMENT

1. The accused herein Costas Shiunza Khasia faces a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the 22nd day of September, 2020 at Mwibanda village, Maraka sub-location in Bungoma County, he murdered Gifty Indangasi.
2. The accused pleaded not guilty to the charge and the trial commenced with the prosecution calling nine witnesses in support of its case.
3. Henry Mulongo Nyongesa (PW 1) testified that on the material date he was relaxing in his house when he heard a loud bang. He rushed outside and spotted the accused herein running away from his house and heading in the direction of Nzoia. He tried to enquire from him about the cause of the blast but he kept on running away. He saw smoke billowing from accused's house and he rushed there where he found his wife Jane Rose and a neighbour and they all tried to break into the burning house. He managed to storm into the said burning house and rescued the deceased herein and with the help of neighbours, rushed him to Webuye District hospital. He added that accused's wife had earlier left him following some disagreement and that he had remained with the deceased.

On cross examination, he testified that the accused did not give reasons as to why he was running away from his burning house and that he did not know the cause of the fire.

4. Jacob Wekesa Kusesi (PW 2) testified that on 15th day of September, 2020 the accused and his wife had quarreled and that the following day his wife and one child left for her parents' home and that one week thereafter (22/9/2020) at around 10.00 am, he heard an explosion from accused's house. He rushed



there and met a neighbour who had rescued a child from the burning house. He assisted in ferrying the injured child to Webuye District Hospital for treatment. He learnt later that the child passed on while receiving treatment at Moi Teaching and Referral hospital. He added that the accused had been his neighbour. On cross examination, he stated that he had seen the accused running from the burning house and jumping over a fence.

5. Eunice Naliaka Kwoba (PW 3) testified that she was going in search of firewood when she heard an explosion from accused's house and suddenly his house started burning with a huge smoke billowing. She saw the accused running away from the burning house. She joined one of her neighbours in breaking the door to the burning house and managed to rescue the deceased who had suffered severe burns and who was rushed to hospital. On cross examination, she stated that she did not know the cause of the fire.
6. Isaac Kagunda Kahonge (PW 4) testified that he was the accused's employer and who had worked for him for about six years. He stated that on 17/9/2020, accused had informed him that his wife and one child had deserted him over some disagreement and that he wanted permission to pursue his wife. He gave him permission and on the 22/9/2020, he gave him 500/= to go and purchase petrol for a certain vehicle which he wanted to use to ferry animal feeds. He later received a report that accused's house had got burnt. He rushed there and found accused's bicycle outside the burnt house and he learnt that the police had recovered the petrol purchase receipt from one of the accused's coat pockets.
On cross examination, he stated that the accused had tried to commit suicide.
7. Silvia Mboga Shiunza (PW 5) testified that she was the mother of the deceased, then aged six years old. She stated that prior to the incident, the accused had assaulted her forcing her to go back to her parent's home for medication with one child leaving the deceased behind. She stated that the accused had followed her there and attempted to take the child but failed. She later learnt that the accused had torched the house burning the child in the process. She remained with the child in hospital for one week before he died.
8. No 222481 Sgt. Protus Nyongesa (PW 6) based at Nzoia police post, testified that the accused presented himself to the police post and claimed to have committed an offence of killing somebody as he had torched a certain house due to some disagreement with his wife. He visited the scene and found accused's bicycle parked outside the burning house and on checking his coat which was hanged on the bicycle, he recovered a fuel purchase receipt dated 22/9/2020 which was confirmed by his employer.
On cross examination, he stated that he did not see the container used to carry the fuel and that he was aware of rules regarding obtaining a confession despite having received the claim from the accused that he had presented himself to the police for having killed somebody.
9. No 68022 Cpl Simeon Koech (PW 7) testified that on 6/10/2020, he witnessed the post mortem examination of the deceased's body.
10. No 66538 Cpl. Elisha Yego (PW 8) testified that the accused was escorted to Webuye police station and who had sustained burns on the chest, hands, face and legs and who was escorted to Webuye District Hospital. He added that the deceased was also admitted there as he had suffered severe burns and who was later transferred to Moi Teaching and Referral hospital. He visited the scene and had photographs taken. He produced two photographs, certificate and a fuel purchase receipt on behalf of the scenes of crime officer whom he was familiar with him and his handwriting and could not be reached to produce the same. He stated that the accused was charged upon discharge from hospital.

On cross examination, he stated that some of the accused's neighbours saw him torching his house. He also stated that he did not recover a suicide note from the scene and that the fire could have been



due to an accident. On re-examination, he maintained that the accused had planned for the demise of the deceased as he could have rescued the child from the burning house and finally that not all suicide victims leave suicide notes behind.

11. Dr Wekesa Nalianya (PW 9) testified that he conducted a post mortem examination on the body of the deceased herein on 6/10/2020 and noted that the deceased had burns all over the body which he estimated at 55% of the body. On dissecting the body, he noticed fluid on the thorax cavity as well as the abdominal cavity and that the internal organs were white in colour. He formed the opinion that the cause of death was severe anaemia due to burns. He produced the post mortem report as exhibit. On cross examination, he stated that he could not make a distinction as to whether the burns were due to natural causes or inflicted by someone else.
12. At the close of the prosecution's case, the accused was put on his defence and he elected to give a sworn statement. His testimony was that on 22/9/2020, he woke up at about 6.30 am and reported to his employer's home where he had been employed to herd cattle. That he was sent by his employer to buy petrol from Webuye town while delivering milk. That he bought the petrol as directed and passed by his house to prepare breakfast.
13. He stated that he lit the stove before he was called by a lady who wanted some firewood from his wife who had gone away leaving him with his son. That as he engaged the lady, he heard a loud blast and saw smoke from his house. He rushed to the house to rescue the deceased. That he rescued him and carried to his neighbor whom he requested to assist in taking the child to hospital.
14. That the deceased was received at the hospital and attended to while he was directed to a nearby police station. He reported the incident and was later arrested. That the deceased was taken to hospital and later succumbed to the injuries. He denied killing the deceased insisting that the fire incident was accidental.

On cross examination, he stated that the deceased was aged 7 years and had not gone to school because of Covid-19. That his wife had gone to Kakamega over a disagreement. He stated that he did not know how the container bearing petrol disappeared from his bicycle. He stated that the front door to the house had been locked by the landlord and did not normally use that door. That he did not come back to pick up the deceased after the accident. He denied that the house was locked from both sides.
15. The parties herein filed and exchanged their submissions.

Analysis and determination.

16. Section 203 of the *Penal Code* provides;

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
17. Consequently, the ingredients to be established by the prosecution in order to secure a conviction are; there was death; the death was caused unlawfully, there was malice aforethought and that the accused directly or indirectly participated in the commission of the alleged offence.
18. As regards the fact of death, the pathologist (PW 9) stated that he formed the opinion that the cause of death was severe anaemia due to burns. The said pathologist stated that the deceased had suffered 55% of the body due to burns.
19. As regards the unlawful nature of the death, it is not in dispute that all homicides are deemed unlawful unless authorized by law. I find the death of the deceased herein had not been sanctioned by any law or otherwise and hence the unlawful nature of the incident was proved.



20. As regards the issue of malice aforethought, the same is defined in section 206 of the [Penal Code](#) as follows:
- a. An intention to cause death or to do grievous harm to any person whether such person is the person eventually killed or not.
 - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.
 - c. An intention to commit a felony.
 - d. An intention to facilitate the circumstances.
21. The circumstances prevailing at the time of the incident as reported by the witnesses who first arrived at the scene leave no doubt that there was an element of malice aforethought because they found the door to the burning house had been securely locked by the accused who was seen fleeing from the burning house yet fully aware of the presence of the deceased inside the house. The witnesses stated that they had to forcefully break the door so as to rescue the deceased who was then already overwhelmed by the fire and smoke.
22. On the issue of the participation of the accused in the unlawful act, there is evidence that the accused had bought petrol which he took to his house instead of delivering the same to his employer. There is also evidence that the accused was fleeing the scene without raising alarm to the neighbours and also locking the door leaving no doubt about his participation in the crime. The accused, having come out of the burning house, was expected to assist the deceased to come out but not to abandon him by running away. I find this ingredient was established by the prosecution.
23. In his defence, the accused stated that the fire incident was accidental and had nothing to do with his intention to cause death. He alleged that his wife had deserted him and that he was taking care of his son alone.
24. From his evidence and taken in light of my finding that the accused fled the scene after setting the house ablaze, it was incumbent upon the accused to show that indeed the fire was accidental. I have also found as a fact that the accused intentionally locked the door so that the deceased could not leave the house.
25. My analysis of the matter is that the evidence taken as whole points to the fact that the accused's defence taken in light of the finding of facts should fail for the reason that the same is a mere sham and constitutes denial. The accused did not show and or adduce evidence showing active steps he took to rescue the deceased from the house. To the contrary, the accused upon setting the house on fire locked both doors and then took off in the direction of Nzoia police post while leaving behind the hapless deceased to save himself.
26. It is my finding therefore that the defence tendered by the accused is not sufficient to exonerate him from blame. The defence failed to impeach the prosecution's witnesses' version of the matter which was cogent, consistent and was not shaken on cross examination. I find that the prosecution proved its case against the accused beyond any reasonable doubt.
27. For the foregoing reasons, I hereby find the accused herein Costas Shiunza Khasia guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) and proceed to convict him accordingly.



DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER 2023.

D. KEMEI

JUDGE

In the presence of;

Costas Shiunza Khasia Accused

Mechi for Accused

Miss Mwaniki for prosecution

Kizito Court Assistant

