



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 2 OF 2012

[FORMERLY NYERI HCCR NO. 14 OF 2010]

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MWANGI WATHITHI.....ACCUSED

JUDGMENT

1. Early in the morning of 8th April 2010, witnesses saw a plume of smoke rising from the house of Margaret Wambui Kamau (hereafter *the deceased*). They found her lifeless body on the floor next to her bed. It was covered in a heap of burning clothes.
2. The accused was her farm-hand and the primary suspect. The Republic brought *information* to the High Court charging him with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
3. The particulars are that on 8th April 2010 at Kamahuha Trading Centre in Murang'a South District, jointly with others not before court, he murdered the deceased.
4. He pleaded *not guilty*. The prosecution called eight witnesses. The first was the area assistant chief, Beatrice Wangui Wanyoike (PW1). She was alerted about the fire by Ann Nyambura (PW5). The latter had tried to knock at the gate of the deceased without success. PW1 requested APC Langat (PW2) and sergeant Hassan to visit the scene. She also went there after about thirty minutes.
5. When she and police officers entered the house, they found the body lying on its back. The heap of clothes was burning the upper part of the body. The witness said that the accused was not in the compound; and, that the house of the accused which was in the same compound had also been on fire. She said that only the deceased and the accused lived in the homestead.
6. Like I said, PW2 was APC Titus Langat. He was one of the first responders. The house of the deceased and that of the accused were on fire. The main gate was open but the rear door to the house of the deceased was locked. There was smoke coming from the house. He and members of the public broke the door and entered house. He said there was a lot of smoke in the bedroom. They found the deceased on the floor covered by some smouldering clothes.
7. This version was largely corroborated by PW3, Eunice Wangechi. She was attracted by screams emanating from the scene. The witness said that two days later, on 10th April 2010, at 7.00 a.m., she got a telephone call from the accused. She knew his voice but pretended not to know the caller. The accused told her that he was at his home. When she asked him how he escaped the fire, he replied that he was not there when the incident happened. The witness reported the matter to the police
8. PW4 was Monica Mwiwaki. She is also a neighbor of the deceased. She testified that on the evening of 7th April 2010, she went to the deceased's house to get some milk. She found the accused outside the house. When she left, the accused had returned to his quarters. She was woken by a knock at 6.00 a.m. the following morning by a neighbor who informed her that the house of the deceased was on fire. By the time she got there, the fire was being put out. She did not see the accused again until 28th May 2010 when he was escorted to the scene by police officers.
9. Like I stated, PW5 was Ann Nyambura. She had known the accused for about three years because he used to deliver milk to her hotel at Kamahuha. On 8th April 2010 at about 06:30 hours she was at the hotel waiting for the milk. It was not delivered. Her neighbour, Nduku, informed her of the smoke billowing from the deceased's compound. They went there, a distance of about 50 metres. They summoned a number of people before venturing inside. They started putting out the fires in the houses of the deceased and that of the accused. She said the accused had delivered milk to her premises the previous night. She did not see him on the morning of the fire.

10. PW6 was Dr. Peter Ndegwa. He conducted the post mortem examination on 10th April 2010 at Bishop Okoye Funeral Home. The body was identified by the deceased's brother, Paul Kiuru (PW7). The pathologist concluded that the death was caused by asphyxiation "*due to smothering*". He testified that the deceased may also have been sexually assaulted. The burns were significant but not the cause of death. He produced the post mortem form (exhibit 1).

11. The last witness was Police Inspector John Njeru (PW8). He said that the accused was employed as a *shamba boy* by the deceased. He disappeared after the murder until 11th May 2010 when he was arrested after a tip-off at Kabati. After interrogation, he implicated three other people. The three were arrested but the state later terminated the charges.

12. The witness produced a number of exhibits including the immunization card for the accused and his partly burnt picture (exhibits 2 & 3). There was also data from Safaricom 0725****42 [*particulars withheld*] belonging to accused, a report from the Government Analyst dated 10th June 2010 and a sketch plan of the scene (exhibits 4, 5 & 6).

13. When the accused was placed on his defence, he raised an *alibi*. He said that he left the deceased's house for his annual leave on 7th April 2010 at 5:15 p.m. He claimed that when he was arrested, he was unaware of his employer's death. He testified on oath as follows-

On 7/4/2010 I was working for Margaret Wambui Kamau as a farmhand. I was employed from 13/1/2008. On the evening on 7/4/2010 I went for an off after work. It was actually my leave. I used to take leave in past years. On that date, I did all my duties including milking. I left the homestead at 5.15 p.m. I was proceeding for leave for 45 days.

I was arrested on 11/5/2010 at Kabati Shopping Centre. I did not know my employer had died. I had not received any summons to the charge. I had no disagreement or conflict with the deceased. I did not kill the deceased.

14. Upon cross examination, he conceded that only he and the deceased lived in the compound; and, that when he went on leave, he did not leave any other worker behind. He also conceded that he had no witnesses to back up his claim that he had travelled to his rural home.

15. Learned counsel for the accused filed written submissions dated 1st December 2021 with authorities annexed.

16. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

17. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

18. There is no doubt about the death of the deceased. Doubt is completely erased by the post mortem report (Exhibit 1). In the opinion of the pathologist, death resulted from asphyxiation "*due to smothering*".

19. From that evidence, I find that the death was unlawful. The next question then is whether the Republic has proved beyond reasonable doubt that the accused, *of malice aforethought*, killed the deceased.

20. There was no eye witness. The prosecution's case is built upon *circumstantial* evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused "*incapable of explanation upon any other reasonable hypothesis than that of his guilt*". **R v Kipkering arap Koske & another** 16 EACA 135 (1949). See also **Sawe v Republic** [2003] KLR 364, **Mutua v Republic**, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, **Republic v Richard Itweka Wahiti**, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.

21. I find that there are a number of *incriminating* pieces of evidence: The first piece of evidence is that *only* the deceased and accused lived in the compound. From the evidence and the sketch plan, the accused's quarters were adjacent and only separated by a wall. He freely conceded in cross examination that when when he "went on leave", he did not leave any other worker behind.

22. But then there is the *alibi* set up by the accused. The *alibi* was raised well after the close of the prosecution's case. But it did *not* shift the burden of proof to the accused. See **Republic v Johnson** [1961] 3 ALL E.R. 969, **Saidi Mwakawanga v Republic** [1963] E.A. 6.

23. I am also alive that the legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. I have thus *weighed* the *alibi* against the evidence of key prosecution witnesses. Did the accused take an off or go on leave at 5:15 p.m. on 7th April 2010 as he claimed?

24. I did not believe that he took an off or went on leave at that hour. Even his shifty demeanour as he testified betrayed him. I am fortified in that finding because the accused delivered milk to PW5 on the evening of 7th April 2010. He was also seen in the compound of the deceased by PW4 on the same night. If he were to be believed, he left for his annual leave in the middle of the night before the fire razed his house and almost consumed that of the deceased. I have reached the inevitable conclusion that the *alibi* is unbelievable and a mere sham.

25. Thirdly, the deceased did not die from the fire. According to the pathologist, the burns were significant but not the cause of death: the cause was asphyxiation "*due to smothering*". The body had pressure marks on lower and upper lips; bruises in vaginal wall. In cross examination, the pathologist explained further that "*the death was caused by blocking the nostrils. Smoke had no contribution*". The fire was thus a smoke screen.

26. Fourthly, the accused disappeared from the *locus in quo* for one month and was only arrested in Kabati on 11th May 2010. He testified that on the day he was arrested he was unaware that the deceased had died. He was lying because two days after the incident, on 10th April 2010, at 7.00 a.m., he called PW3. When she asked him how he escaped from the fire, he replied that he was not there when the incident happened. If he had no disagreement with the deceased or did not assault her or cause the fire, he would have at the very least returned to find out what happened to the deceased or the things he left behind in his house. Why did he go into hiding for that long?

27. For all those reasons, I find that the conduct of the accused is inconsistent with his plea of innocence. By smothering the deceased on her nostrils and blocking her airways, he *knew or ought to have known* that it was likely to cause grievous harm or death. He thus had *malice aforethought* as defined in section 206 (b) of the **Penal Code**. The deceased died from asphyxiation as a direct consequence of his conduct.

28. The entire corpus of circumstantial evidence points *irresistibly and exclusively* to the guilt of the accused. I find *no* defence or hypothesis that exonerates him.

29. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. The accused, *of malice aforethought* caused the death of the deceased by an *unlawful* act. I accordingly enter a finding of *guilty*. The accused is hereby *convicted*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 25TH DAY OF JANUARY 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

The accused.

Ms R. Kimani for the accused.

Ms. A. Otieno for the Republic.

Ms. Susan Waiganjo, Court Assistant.