



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Pepela (Criminal Case 14 of 2020)  
[2022] KEHC 10629 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 14 OF 2020**

**SN RIECHI, J**

**MAY 24, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MELAB NEKESA PEPELA ..... ACCUSED**

**JUDGMENT**

1. The accused Melab Nekesa Pepela is charged with offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that Melab Nekesa Pepela on the 12<sup>th</sup> day of February 2020 at Savana village Ndivisi location within Bungoma Sub County in Bungoma County murdered Michael Barasa Wanyonyi.
3. The case for the prosecution is that the deceased Michael Barasa Wanyonyi was the son of Susan Nafula Walengo and Eliud Wanyonyi Wamalwa. Eliud Wanyonyi Wamalwa has two wives, Susan who is the younger wife and the accused Melab Nekesa Pepela who is the elder wife. On 12.2.2020 at 6 a.m. Susan (PW2) the mother of the deceased went to buy milk at 6 a.m. when she met the accused who had a jerry can and they passed each other. She then saw smoke from her house. She ran there and on reaching near the house saw accused from her (Susan's) house going to her house. She had left the child in the bedroom. She ran and picked the child and saw he had burns on the head and abdomen. She screamed. Accused came and asked what the problem was. She suspected it was accused ho set fire to her house because accused had earlier burnt her husband's clothes. They took the child to hospital where he was admitted to 3 weeks and died.
4. On being cross-examined by Mr. Nabibia for accused, she stated she was not present when the fire started burning nor did she see the accused set the house on fire. She confirmed the fire started in the bed room and only affected the beddings as the house was not burnt.



5. PW1 Cleopas Wekesa Mungango on 12.2.2020 at around 6.50 a.m met accused who was carrying jerrycan and later saw Susan the mother of deceased saying her house was on fire. The mother Susan PW3 went into the house and came out with the child who had burns. The child was taken to hospital. He later received information that the child died. He confirmed on cross-examination that he did not see accused set fire to the house.

PW3 Ruth Musindi was with Susan (PW2) the mother of the deceased when she saw smoke in her house. She (Susan) ran there. Later the witness learnt that Susan's child had been burnt. PW4 Eliud Wanyonyi Wamalwa the father of the deceased and husband to both Susan and accused was ploughing in his farm when he heard screams from his home. He ran there and found Susan (PW2) carrying the deceased who had burns. They took the child to Misikhu hospital and later to Eldoret where he died. On cross-examination he stated he was about 100 meters away and did not know if it was accused who set the house on fire.

6. PW5 No. 233811 PC Evans Matete the Investigating officer was assigned the file by DCIO. He went to Misikhu police station where the murder had been reported. He recorded statements and photographs of the scene were taken. He arrested the accused and caused her to be charged with present offence.

PW6 Dr. David Chomba performed the post mortem on the body of the deceased and found he had 42% burns on the body mainly on the head, hands and legs. He assessed the cause of death as due to multiple organ failure due to burns.

7. The accused upon being put on her defence gave sworn evidence. She testified that on 12.2.2020 she was in her house preparing meal for her children at 7.30 a.m. when she heard her co-wife Susan screaming. She went there and met Susan and her husband Eliud. Susan started abusing her. She saw Susan was carrying child. She went to her home. Later village elder and nyumba kumi officials came and took her to Susan's house. They brought out a mattress and clothes which were burnt. They took her to police. She stated she did not set fire to the house and that these charges are a fabrication by Susan who wanted her to leave Eliud for her.

8. Mr. Nabibia for accused filed written submissions. He submitted that there were inconsistencies in the prosecution witnesses testimony, that no fire expert was called to state how the fire was started and that the prosecution evidences is all premised on suspicion.

The accused is charged with the offence of murder contrary to Section 203 of the [Penal Code](#). Section 203 Provides:

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

9. The elements of the offence of murder which the prosecution must prove beyond reasonable doubts are:
- a. The death of the deceased.
  - b. The unlawful cause of death
  - c. That in causing death the accused committed it with malice aforethought.
  - d. That there is direct or circumstantial evidence placing the accused at the scene of the crime.
10. The fact and cause of death is not contested. Even accused in her evidence admits that the child died as a result of burns. PW6 Dr. David Chomba who performed the post-mortem on body of deceased testified that the deceased had 42% burns mainly on head, hands and legs. The lungs had petcol –



K- Pneumonia leading to renal failure. He formed opinion that cause of death was due to multiple organ failure due to burns. The cause and fact of death was therefore established by the evidence of the witnesses.

11. From the evidence of both the prosecution and the defence, the child was aged 6 months at time of death. The child was according to PW2 Susan the mother in the bed where she had left him. The house is mud walled and iron roofed. Having left the child, and gone out she saw smoke from her house and on running there she found there was fire and she went to the bedroom and picked the child whom she noticed had severe burns. Who set the fire to the beddings of the deceased?

12. PW1 Cleopas Wekesa testified in cross-examination that he did not see accused set fire to the house. PW2 Susan Nafula the mother of deceased when cross-examined by Nabibia on this issued stated:

“I met accused first. I took a short time. My house has sitting room and bed-room. We were using sitting room for cooking too. I was using charcoal. I recorded my statement at the police station. I did not mention about Cleopas in the statement. I was not present when the house started burning. I did not see accused set the house on fire. I met her when she was coming from direction of my house.”

PW4 Eliud Wanyama Wamalwa the father of the deceased and husband to accused on cross-examination stated:

“I did not go to the house when I heard screams. I was ploughing on a farm about 100 meters from the house. I don’t know if accused set fire to the house.”

13. PW5 P.C Evans Matete the Investigating officer on being cross-examined by Nabibia for the accused on this issue stated:

“Cleopas Mulongo told me he saw accused entering and leaving the house and smoke billowing from the house. He did not see her in the act of setting fire to the house. Cooking was being done in the sitting room not in the bed-room. The initial report was that the person who set the house on fire was unknown. The person was known to the witnesses. There was bad-blood between mother of deceased and accused as they would not greet each other. I did not call for fire officers. The fire was not accidental but intentional.”

14. From the evidence of these witnesses none of them saw the accused set fire to the beddings where the deceased child was lying. The investigating officer PW9 based his arrest on information by Cleopas (PW1) that he saw accused enter the house. When Cleopas testified in court, he confirmed he did not see accused setting fire to the house. He actually in his evidence did not mention that he saw accused enter the house.

15. The upshot of the evidence is therefore that none saw accused set fire to the beddings where deceased was. The accused’s explanation in her defence is that she also saw the smoke from her co-wife’s house and ran there and on arrival she was abused by Susan the mother of the child.

16. Though the prosecution sought to prove that it is accused who set fire to the beddings where the child was lying, no evidence either direct or circumstantial was tendered to prove that. Indeed, all the prosecution witnesses confirmed in their evidence that they did not see accused do so. No circumstantial evidence was adduced from which this court would draw an inference that it is accused and no other who set the beddings on fire.

17. After considering all the evidence, I find the prosecution has not proved its case beyond reasonable doubt against accused. I therefore find the accused Melab Nekesa Pepela not guilty of the offence of



murder Contrary to Section 203 as read with Section 204 of the *Penal Code* and acquit her accordingly.  
I hereby direct that the accused Melab Nekesa Pepela be set at liberty unless otherwise lawfully detained.

**DATED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF MAY, 2022**

**S.N RIECHI**

**JUDGE**

