



**Republic v IAS & another (Criminal Case E008 of 2021)  
[2022] KEHC 11928 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11928 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E008 OF 2021**

**A ALI-ARONI, J  
JULY 28, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**IAS ..... 1<sup>ST</sup> ACCUSED**

**YAS ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Ibrahim Ahmed Shaurand Yusuf Ahmed Shaurwho are brothers, are facing a charge of murder of their neighbor IAH. It is alleged that on the October 25, 2021at about 6 pm at Bulla Mpya Location within Mandera East Sub-County of Mandera County the two jointly committed an act of murder.
2. The 1<sup>st</sup> accused age is given as being between 18 and 19 years a student in Form II. The 2<sup>nd</sup> accused is aged 16 years in Class 8. The deceased was also 16 years of age at the time of his death.
3. The accused persons pleaded not guilty to the charge and the prosecution called a total of 10 witnesses. After the close of the prosecution case, the court found the accused had a case to answer. They were placed on their defence and they chose to give sworn evidence in their defence.
4. Briefly the prosecution case is that the deceased and the 2<sup>nd</sup> accused were friends who placed football together. On the material day there had been a match and thereafter the deceased in the company of two friends PW1 &PW2 went to PW1’S home, where the deceased asked for tea and as the same was being prepared, the 2<sup>nd</sup> accused went for him, called him to join him through the window. The deceased joined the 2<sup>nd</sup> accused. Shortly thereafter the deceased was seen running from the home of the two accused persons burning. The two accused persons are said to have dazed the deceased with petrol and set him ablaze. The deceased ran towards the Nyumba Kumi chairman’s, PW3 who put of the fire, alerted the area chief who took the deceased to hospital. The deceased received second degree burns and succumbed to death following the injuries the following day.



5. For a charge of murder to be sustained three ingredients must be proved by the prosecution on whose shoulders lie the responsibility of proving the case beyond reasonable doubt.
6. Viscount Sankey L.C in the case of *H.L. (E) Woolmington v DPP* [1935] AC 462 pp 481 in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that holds good to-date in our jurisdiction and has been adopted with approval, that;
 

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
7. In this matter the prosecution must prove that indeed the deceased died and that he died from the action or omission of the accused persons and thirdly that the action or inaction were done with malice aforethought.
8. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the court gave the three elements of the offence of murder as follows;
  - a. That the death of the deceased occurred;
  - b. That the accused act which caused the death of the deceased; and
  - c. Malice aforethought.
9. Section 203 of the *Penal Code* sets the above ingredients. It states
 

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
10. PW1 IAN class seven student who lives in Bulla Mpya and known to the 2nd accused person and a neighbor and who was in the company of the deceased saw the deceased as he was burning. PW5 AAH a brother to the deceased testified that he visited his brother at Mandera Referral Hospital after receiving the burns, his brother died the next day. He also identified the body for postmortem examination.
11. PW8 Dr. Mohamed Ibrahim Girma of Mandera County Referral Hospital informed the court that on October 27, 2021 he conducted the postmortem on the body of the deceased IAH at 7 am. He made the following observations inter alia
 

External appearance  
Sustained second degree burns on the face, anterior trunk, posterior trunk, both upper and lower limbs. There was total body burn of 62%.

The witness classified the burn as severe. He formed the opinion that the cause of death was multiple failure of body organs as a result of the burn. He further informed the court that the skin being the largest body organ its function was compromised which may have affected other organs that become susceptible to function such as the kidney, liver, respiratory organs, cardio respiratory organs which may lead to death.



12. At cross examination the witnesses indicated that he did not do a full autopsy but did a clinical autopsy due to religious and cultural considerations. However, it was his opinion that in clinical autopsy the cause of death can be identified though postmortem would be more detailed. Further, he was of the view that in this case the cause of death was quite obvious.
13. From the evidence above there is no doubt that the deceased IAH died of the severe burns. the day after sustaining the same.
14. The court would next turn to consider how he sustained the severe burns that led to his death.  
PW1 in his evidence stated that on the material day the 25<sup>th</sup> of October 2021 while in the company of the deceased and one Abdiraziz while at the house of the witness, the deceased who had come from a football match said he had a headache and had asked for tea. The witness went to get tea and on return he found Yusuf the 2<sup>nd</sup> accused at the window and asking the deceased to go with him to pick some items. 10-15 minutes later when tea and food was ready they went to look for the deceased to go eat with them, when they came across someone burning, he saw the face of the person, it was his friend Ibrahim (deceased). On cross examination by the defence counsel the witness confirmed that he saw the 2<sup>nd</sup> accused at the window and the deceased also told him that he had been called by the 2<sup>nd</sup> accused.
15. PW2 AA a male child of 14 years informed the court that on the material day the 25<sup>th</sup> of October 2021 at 5:30 pm. they were PW1 IA and the deceased IA. They had prayers then went to PW1'S home when the deceased asked for tea which PW1 went to get for them. The 2<sup>nd</sup> accused YAS went to the window and called the deceased who left with him. 10 minutes later they heard noise and came out, they heard that someone had been burnt. They went to the scene which was the 2<sup>nd</sup> accused's home.  
On reaching the scene he saw the deceased burning and running from the gate of accused home. Other people ran following the deceased to Mzee Ahmed's house and as he neared he heard the deceased say Y called him and I burnt him.
16. PW1 in his evidence corroborated the evidence of PW2. On his part he stated that when food was ready they left with PW2 to look for the deceased who had left with the 2<sup>nd</sup> accused. He too heard someone had been burnt, he saw the person burning; it was the deceased.
17. PW3 Ahmed Ali Farah Chairman of Nyumba Kumi Committee informed the court that on the material day the October 25, 2021 while at home at 7 pm he heard people running, he also saw fire at his neighbours, AS. He left to go to the place as he was at his door that faces the place he with met the person burning. He asked his wife for a cloth which he wrapped round the boy burning. The boy called him Baba Ahmed and said he was dying; the boy fell; he then called the Area Chief for assistance. Before falling the witness said he asked the boy who had burnt him and the deceased said it was IYS.  
In cross examination he said he smelt petrol on the deceased whose clothes were burning.
18. PW4 Ahmed Abdullahi Birik Iftin the Area Chief informed the court that he received a call from PW3 about the incident and went to the scene where he found the deceased who had been burnt. He took the deceased to hospital. The deceased could speak. The deceased asked whether he was the Chief and while in hospital the deceased told him Yusuf, the 2<sup>nd</sup> accused called him and the 1<sup>st</sup> accused Ibrahim burnt him. At the point the witness called the OCS Manderu Police Station and on arrival the OCS sought to go to the scene which they did. They found the DCI and many other people at the scene. In cross examination, he said the deceased did not give reasons why he was burnt.
19. PW6 & PW7, NAS & UAS sisters to the accused persons did not witness the incident. They both confirmed that at around the time the incident occurred the 2<sup>nd</sup> accused was not home but the 1<sup>st</sup>



accused was around. They also confirmed that they witnessed smoke coming from the 1<sup>st</sup> accused room and many people gathered at the scene.

20. PW10 a police detective No. 8xxxx Jumba Gulani working with DCI Manderu received information regarding the incident. He was to be the investigator herein. He went to the scene of crime in the company of Corporal Nyagige, a police driver, Mwanja and on arrival they found a crowd. They learnt that a person had been burnt and had been rushed to Manderu Referral Hospital.

The scene of crime was a room around a compound of the accused persons. In the room was a mattress that burnt to ashes and a bicycle leaning on a wall and also burnt.

21. They left for the hospital where they found the deceased undergoing treatment. Present were family members of the deceased who included PW7 AAH. The deceased despite being burnt the entire body was able to speak to them. In the words of the witness

“In the conversation with the deceased he said he was burnt by kina S; the 1<sup>st</sup> and 2<sup>nd</sup> accused. He also said they burnt him as he was a witness in a phone case where 1<sup>st</sup> accused had taken the phone of PW1.”

22. The witness further stated on leaving hospital they recorded witness statements. And that while at the scene he had taken photographs of the scene and when in hospital he took pictures of the deceased while still alive. He produced the pictures as exhibits in the case.

23. From the evidence above the 2<sup>nd</sup> accused was last person seen with the deceased, who was later to be seen running from the home of the two accused persons as he burnt.

24. No one witnessed the cause of the fire. There are the words spoken by the deceased to several people, PW3 the Chairman of Nyumba Kumi, PW4 the Area Chief, PW7 brother to the deceased and PW10 the investigating officer. The deceased corroborated the evidence of PW1 & PW2 that Y the 2<sup>nd</sup> accused went for him. In his own words the deceased said that the 1<sup>st</sup> accused burnt him.

25. It is therefore the words of the deceased against the words of the accused and since there were no eye witnesses the court will consider if there was any other form of evidence placed; circumstantial evidence. Indeed, it has been said that circumstantial evidence is the best evidence as it can inform the court of circumstances surrounding a case.

26. In the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR the Court of Appeal considered circumstantial evidence and had this to say;

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Hewart, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that is circumstantial.”



27. In the old case of *Abanga alias Onyango v Republic* Cr. Appeal No. 32 of 1990 the court had this say on the subject

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

28. From the facts of the case the deceased left with the 2<sup>nd</sup> accused. He was seen burning and running from the home of the accused persons. The siblings to the accused persons confirm that the 1<sup>st</sup> accused was at home about that time. They also confirm that the 1<sup>st</sup> accused room was smoking. The police and in particular PW10 went into the room. He confirms there was a mattress burnt to ashes and a bicycle leaning on the wall burnt. The photographs produced in evidence by PW10 are a testimony to this.

29. PW3 the chairman of Nyumba Kumi Committee witnessed the deceased coming from the home of the accused persons burning, he helped put off the fire, the deceased he said was smelling petrol.

30. The deceased spoke to several people the day he was injured and confirmed that the 2<sup>nd</sup> accused went for him while the 1<sup>st</sup> accused burnt him. These pieces of evidence by the deceased have been corroborated by the circumstantial evidence surrounding the scene of crime.

31. From the circumstantial evidence, the 2<sup>nd</sup> accused lured or laid a trap upon the deceased leading him to the scene of crime, the room of the 1<sup>st</sup> accused where flammable substance was poured on him, could be petrol as testified by PW3 and the deceased was set on fire which explains why the mattress and the bicycle caught fire and when the screams and smoke attracted neighbours and two accused left the scene.

32. There is evidence of PW1 and PW2 that the 2<sup>nd</sup> accused went for the deceased. The two boys were known to the accused and the deceased. There is no reason why they would lie. They struck the court as trustful witnesses. Further the 2<sup>nd</sup> accused was last person seen with the deceased. The last seen theory is applicable in cases based on circumstantial evidence comes into play.

In the Nigeria case of *Moses Jua v The State* [2007] (PELR – CA/11 42/2006) the court stated;

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”

33. The accused persons in their defence denied knowledge of the incident. The 1<sup>st</sup> accused stated that he returned home at 9 pm, that he had been in a nearby Bulla. He alleged to have been framed. He also said he did not know the accused.



The 2<sup>nd</sup> accused stated on his part that he had attended Duksi and tuition and returned home at 8 pm and found the door locked. He knew the deceased and PW1 but said he did not call the deceased on the material day.

34. The accused each introduced an alibi; they were far from home; the scene of crime at the time of the incident.

In *Ganzi & 2 others v Republic* [2005] 1KLR at 52 the court stated;

“where the defence of alibi is raised for the first time in the appellant’s defence and not when he pleaded to the charge the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.”

35. As to the third ingredient of malice aforethought, both the deceased and PW1 alluded to an altercation between the 1<sup>st</sup> accused and PW1 as the 1<sup>st</sup> accused had taken PW1’S phone which the deceased knew of and was accused of siding with the PW1.

The above does not seem to be a serious issue that would have led to the fatal injuries inflicted upon the deceased.

However, the above is not the only criterial of ascertaining the intention of a party in a murder.

In *Republic v Tubere* [1945] 12 EACA 63 where the court held as follows

“Malice aforethought in a murder case may be the nature of the weapon used, the manner in which it is used, the part of the body injured by it, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.”

36. The accused person were accomplices who lured and set the deceased on fire. They then fled the scene of crime. The fact that they poured an inflammable liquid on the deceased in a room left him burning is clear indication that they wanted to cause him severe injuries which indeed they succeeded. Their motive is very obvious.
37. Based on the evidence, analysis above and the law the court has formed the opinion that the prosecution placed before court circumstantial evidence that proves beyond all reasonable doubt, which evidence when pierced together form a chain so complete that it unerringly points to the two accused persons as having been accomplices who lured the deceased to his death trap where they set him on fire and left the scene. They knew the consequences hence their disappearance.
38. The court further finds the alibi the defence attempted to introduce to be too weak against the cogent and credible evidence led by the prosecution.
39. And therefore the court finds the two accused persons to have been the ones who caused the death of the deceased.

The two accused persons IAS and YAS are consequently convicted of the offence of murder as charged.

**DATED, DELIVERED AND SIGNED IN GARISSA THIS 28<sup>TH</sup> DAY OF JULY, 2022**

**ALI-ARONI**

**JUDGE**

