



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 23 OF 2019

MICHAEL WANGAI NGIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 202 of 2017 – L Mutai, CM)

J U D G M E N T

1. The Appellant herein, **MICHAEL WANGAI NGIMA**, was convicted after trial of *manslaughter* contrary to **sections 202 and 205** of the **Penal Code**. It was alleged in the particulars of the offence that on 24/12/2016 at Karioko Market, Kieni East Sub-County in Nyeri County, by illegal connection of electricity, he unlawfully caused the death of one **EDITH MUKIRI GIKUNDA**. On 17/04/2019 he was sentenced to five (5) years imprisonment. He has appealed against both conviction and sentence.

2. The conviction is challenged upon the main ground that there was no proof beyond reasonable doubt that it was the Appellant who had made the illegal connection of electricity that led to the death of the Deceased.

3. Learned prosecution counsel did not support the conviction.

4. I have read through the record of the trial court in order to evaluate on my own the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

5. The evidence led by the prosecution disclosed as follows –

(a) The incident occurred at a posho mill in Naromoru area which was run by the Appellant. The Appellant sated under oath that he had rented the posho mill from someone else. He did not run the posho mill himself; he had an employee for that purpose.

(b) The Appellant himself ran a matatu business in Kawangware in Nairobi. He drove his own matatu in the area and went to Naromoru only occasionally. He testified and called witnesses to the fact that on the day of the incident, 24/12/2016, he was actually operating his matatu in Kawangware.

(c) The posho mill was housed in a room which had a window. That window had a wire-mesh (see the testimony of PW1 WINFRED NTINYARI).

(d) The Deceased was electrocuted when she supported herself on the wire-mesh as she was in the process of passing by the room on the outside with her friends/relatives. She supported herself apparently because it was muddy and slippery just outside the room.

(e) It turned out (see the testimony of PW5, PAUL NGUNJIRI NGUMI, a **Kenya Power** Security/Safety Officer) that the wire-mesh on the window had been energized by live electricity from a socket. There was a cable from the socket that touched the wire-mesh.

6. It appeared that the window wire-mesh had been energized either deliberately by a malicious person or negligently by a careless person. The question obviously was, who had done this? This was the unlawful act (illegal connection of electricity) that had led directly to the death of the Deceased.

7. It was therefore imperative that the prosecution do lead evidence to show that it was the Appellant himself who had made that illegal connection, or having become aware of it, had allowed it to stand. It was not enough that he was the “owner” of the posho mill as he was not running it personally himself; he had an employee for that purpose. There was no evidence that he was even at the posho mill when the incident occurred. On the contrary, he testified under oath and called witnesses to the fact, that he was then at his regular place of work in

Kawangware in Nairobi where he operated a matatu.

8. Occupier's liability in the civil law of negligence can never be equated with criminal liability. Without proof beyond reasonable doubt that it was the Appellant who had made the illegal electric connection, or that he was well-aware of it and did nothing as the owner of the posho mill to remove it, or have it removed, the offence was not proved beyond reasonable doubt. The conviction is unsafe and cannot be allowed to stand. Learned prosecution counsel properly conceded the appeal.

9. In the result this appeal is allowed in its entirety. The conviction is hereby quashed and the sentence meted out to the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 21ST DAY OF APRIL 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 22ND DAY OF APRIL 2021