



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL CASE NO. 16 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KENNEDY OOKO OLOO.....ACCUSED**

**J U D G M E N T**

The accused **KENNEDY OOKO OLOO** is charged with the offence of Murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code** Cap 63 Laws of Kenya.

Particulars of the offence are that on the 3<sup>rd</sup> day of April, 2017 at Marell Estate in Bungoma South Sub – County within Bungoma County murdered **JANEROSE ISABEL AMOYA**.

The case for the prosecution is that the accused was the husband of the deceased **JANE ROSE ISABEL AMOYA**. They were staying in a one roomed house together with **ROSE ADHIAMBO (PW 6)** the sister of the deceased. On 3/4/2017 at 8:00 pm Rose was in the house with the deceased when accused came and asked deceased why she had delayed in preparing supper. The deceased replied that she was around. The accused then aimed a fist on the deceased who evaded it. The accused then held the paraffin stove which was with fire and threw it at deceased. The deceased's clothes caught fire. She tried to put off the fire and called neighbours who took her to hospital where she was admitted. On 8<sup>th</sup> April 2017 the deceased died while undergoing treatment.

On being cross – examined by Mr Milimo for accused, this witness stated that the accused appeared drunk and they quarreled for about 2 minutes before he threw the paraffin stone at her. She denied that it is deceased who threw the stove at accused.

**PW 4 Anna Amonata** the mother of the deceased was informed that deceased had been burnt and had been taken to hospital. She went to the hospital and nursed her for 3 days and then she died. While at hospital deceased told her it is accused who threw a stove at her.

**PW 1 Dr Haron Ombongi** performed a post mortem on the body of the deceased. He found that she had 2<sup>nd</sup> degree burns and almost 60% to the surface area was burnt; with major vessels involved. He formed opinion that the cause of death was due to cardio-pulmonary arrest, secondary to 70% burns.

The accused gave sworn evidence in his defence. He testified that the deceased was his wife. On 3/4/2017 at 8 pm he left his place of work and went to his house. On arrival he found his wife the deceased was not present. He found her sister **Rose Adhiambo (PW 6)** in the house lying on the sofa. He saw that the stove was on and food was on it. He then heard a person open the gate. It was deceased. She entered and appeared drunk. He asked her about Kshs. 1,500/= he had left in the house. She told him she had used it. She then told him one day she will burn him. She removed the food from the stove and held it and wanted to throw it at him. The stove then exploded on her. He informed neighbours who took her to hospital. She was burnt on the chest and thighs. She later died from the burns the burns she sustained.

Mr Millimo for accused filed written submissions. He submitted that the death of the deceased was confirmed by production of the post – mortem report, on whether the accused committed the unlawful act that caused the death of the deceased, Counsel submitted that the evidence of **PW 6** who was at the scene is riddled with contradiction and inconsistent and she cannot be trusted and her evidence cannot be the truth.

On whether the accused had malice aforethought Counsel submitted there was no evidence that was led or tendered to show that there existed any previous quarrels or incidents that would have shown that the accused could ever had harbored plan to kill the deceased; there was no evidence that any threat(s) had ever been issued upon the deceased by the accused. He thus submitted that no malice aforethought was ever proved in this case.

The accused is charged of the offence of Murder contrary to **Section 203** of the **Penal Code** “*which provides any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*”

To secure a conviction on the charge of murder, the prosecution has to prove three ingredients against an accused person. These ingredients are: -

**(a) Proof of the fact and cause of death of the deceased.**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence.**

**(c) Proof that the said unlawful act or omission was committed with malice aforethought.**

The fact and cause of death was confirmed by the evidence of **PW 1 DR HARUN OMBONGI** who performed a post – mortem on body of deceased. The cause of death was established to be cardio – pulmonary arrest due to 70% burns. Did the accused commit the unlawful act which caused the death of the deceased?

The deceased died as a result of burns sustained from the fire of the paraffin stove. Both **PW 6 ROSE ADHIAMBO** and the accused, who were the only people with the deceased in the house are in agreement that the deceased sustained injuries from the stove fire. The only point they are not in agreement with is how the deceased got into contact with the paraffin stove which had fire. PW 6 in her evidence testified it is accused who got hold of the stove and threw it at the deceased where upon it exploded and burnt her. The accused on his part testified that it was the deceased who got hold of the stove and aimed to throw it at him but it exploded on her.

From the evidence of **PW 6** and the accused, it is evident that there was a quarrel between the accused and the deceased; on the material night. There is also evidence that there was a burning stove in the house which caused the fire on the deceased. Though the accused states that it is deceased who had the stove which exploded on her, I find the **PW 6**’s evidence that it is accused who threw the stove on deceased thereby causing the fire which burnt not only the deceased but with whole house to be the truth.

From this evidence I am satisfied that the accused inflicted the injuries on the deceased in the course of a fight or quarrel over money, which the deceased had spent. This incident therefore occurred during the fight and I am satisfied that there was evidence of provocation. **Section 208** defines provocation as: -

*“Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self – control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”*

When it is established with a person under circumstances of provocation, the accused though charged for offence of murder would be guilty of manslaughter. **Section 207** of the **Penal Code** provides: -

*“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”*

I therefore find that the prosecution has proved as against the accused, **KENNEDY OOKO OLOO** the offence of **Manslaughter** Contrary to **Section 202** of the **Penal Code** and convict him accordingly.

**DATED AT BUNGOMA THIS 29TH DAY OF OCTOBER 2021.**

**S. N. RIECHI.**

**J U D G E**