



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CRIMINAL CASE NO. 21 OF 2019.

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS NYONGESA.....ACCUSED

J U D G M E N T

The accused **COLLINS NYONGESA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are on the 14th day of February, 2018 at Kisioyi village in Bumula Sub-County within Bungoma County murdered MITCHELLE NEKESA.

The prosecution case is that on 13.2.2018 PW 1 Millicent Nekesa Barasa the mother of the deceased child Mitchele Nekesa was asleep in her one roomed house with the child. While there accused came at 5.30 am and knocked the door which opened and he entered the house with the intention of raping her. She escaped and called the mother who came and found the accused in the house. The mother called the clan elder who came and accused left.

At 12 am on the same day accused he came she was asleep when accused again came and hit the window and entered the house. Suddenly she saw fire in the house. she tried to run out with the child and both sustained burns. She and the child were taken to hospital where she was treated but the child died while undergoing treatment. On being cross-examined by Wekesa counsel for accused, the witness stated that the accused is a neighbour whom she has known since childhood. The witness stated that she recognized the accused by voice when he came the 2nd time.

PW 2 Violet Nangila testified that on 13.2.2018 at 5.30 am she was asleep when she heard her daughter **MILLICENT** screaming. She went to her house and saw accused under the bed. She called her husband who called a clan elder and other people. They removed the accused from where he was and he went away. At 12 pm he came and warned them that they will see because they had assaulted him. That night at 12 am she saw fire at the house of Millicent. She ran there and saw Millicent on fire. The child came out and both were taken to hospital where the child died.

On being cross-examined the witness stated that the accused is not related to them. She testified that she saw accused set the house on fire and run away.

PW 3 MARK BARASA WAMWOMA the father of Millicent testified on how accused was found in the house of Millicent. He called the clan elder and other people who came and accused was released. Later in the day he came and threatened them. At night the house of Millicent was set on fire. People came and Millicent and the child were taken to hospital where she died. In cross examination he stated that he did not see the accused that night.

PW 7 NO.66519 CPC. PHILIP BOEN the investigating officer testified that Millicent (PW 1) reported to the station that accused had set the house on fire. He proceeded to the scene where he took photographs of the scene which were produced as Exhibit. At the scene he was shown accused's house who is a neighbour to them.

PW 8 DR. HARUN OMBONGI who performed the post mortem on body of deceased. He found she had 75% burns and upper air ways obstructed. He formed opinion that the cause of death was due to pulmonary arrest due to burns.

PW 10 CPL. JOHANA TANUI produced the photographs taken at the scene as Exhibit 1 A – C.

Upon being placed on his defence the accused gave sworn evidence. He testified that he knows Millicent who is his cousin as her father is his uncle. On 13.2.2018 he woke up at 5 am and went to the construction site where he works. He did not see Millicent on that day. On the night of 13th – 14th accused stated, he was in his house and did not hear of anything. The next day while passing near Millicent's home he was informed that her house had been burnt and died. In the evening he went there and was informed a child had been burnt. He denies setting the fire.

On being cross-examined by Thuo for the state, he stated that Millicent was his cousin and that they had no grudge and never threatened them.

Mr. WEKESA for the accused filed written submissions. (counsel submitted that the information as presented in court is defective on account of being vague. He submitted that the particulars of the offence are not clearly provided and are scanty in nature and therefore inadmissible. Counsel further submits that ingredients of the offence of murder have not been proved; he submitted that none of the prosecution witnesses linked the accused to the fire and that the prosecution evidence was merely hearsay.

The accused was charged with the offence of murder. The information filed in respect of the accused and presented to court was in the following terms.

Murder contrary to Section 203 as read with Section 204 of the Penal Code. On the 14th day of February, 2018 at Kisioyi village in Bumula sub-County within Bungoma County murdered MITCHELLE NEKESA. On the 14th day of February, 2018 at Kisioyi village in Bumula Sub-County within Bungoma County murdered Michelle Nekesa.

Section 134 of the Criminal Procedure Code provisions on drafting of charges it provides,

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

In the case of Sigilani vs Republic, (2004) 2 KLR, 480 it was held that: “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law: The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

From the information mentioned above, the offence is stated to be murder, the Section of the law creating the offence as section 203 as read with Section 204 of the Penal Code. The particulars indicated include the date, and place of the offence and the name of the deceased is clearly indicated. I find that the information contains the offence, the particulars of the offence which are sufficient for the accused to understand the case he is facing and enable him to make and prepare for his defence. I do not find the information vague or bad in law.

The accused is charged with offence of murder C/S 203 of the Penal Code. Section 203 provides.

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder”

Pursuant to Section 203 the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or commission of the accused. Secondly, that in killing the deceased the accused did so actuated by either express or implied malice aforethought. Thirdly, it is incumbent upon the prosecution to place the accused at the scene of the murder.

Section 206 defines malice aforethought is deemed to be established by evidence when any of the following circumstances are proved by evidence adduced against any accused.

- a) **An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.**
- b) **Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.**
- c) **An intention to commit a felony.**
- d) **An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

That the deceased died due to the injuries sustained from the 75% burns is not confessed. Indeed PW 7 Dr. Haron Ombongi confirmed both the fact of death and cause of death:

Who set fire to the house where Millicent and the deceased were?

PW 1 Millicent Nekesa testified that while asleep the accused hit the window which opened and he then poured petrol into the house and lit the fire and ran away. She was able to recognize him by his voice as it was dark.

PW 2 Violet Nangila responded to screams and on coming out saw the house on fire. She stated in cross examination that she saw accused set the house on fire by pouring petrol and lighting a match box. She saw him running away. PW 3 Mark Barasa testified that he did not see the accused that night. PW 5 Gaudencia Nafula Makokha confirmed in cross examination that she did not know who set the house on fire.

The issue to determine in this case is whether the prosecution has proved beyond reasonable doubt that it is accused who committed the unlawful act of setting fire to the house as a result of which the deceased sustained injuries from which he died.

As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller –vs- Minister of Pensions* (1947) 2 ALL ER 372 – 373 time Lord Denning, states;

“ That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability, Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubtful but nothing short of that will suffice.”

On whether it is accused who set fire to the house PW 1 Millicent testified.

“In the evening at 12 am the accused came and called me. I was with my child. He hit the window which caved in. He then poured petrol into the house. I was with my child Michele. There was then fire. In the house I tried to save the child. I ran out with the child who was on fire. I screamed. My mother came. We took the child to hospital. The child died at the hospital. I also got burnt on the left hand (court sees scars). When the accused set fire to the house he ran away. I had no relationship with him. I did not have any grudge with him. He is my neighbor. It was petrol in a bottle. It was dark. I recognized his voice. He has been our neighbor since he was born.

From the evidence in court, she recognized the accused’s voice and admit that it was dark.

PW 2 Violet Nangila the mother of Millicent (PW 2) stated on being cross-examined by Wekesa stated,

I know accused. We stay in same area. His village is different. We are not related. We had no previous grudge. On 13/2/2018 Millicent was asleep in her house with her child the deceased. I don’t know why accused had gone to Millicent house. I saw him set the fire; using petrol and match box. I saw him running away.

I was outside. He was wearing red- T-shirt and black trousers. We did not salvage anything from the house. The child came from the house when still on fire. The accused is a motor cycle rider. He stays at Kanduyi since he was born.

Those are the two witnesses who testified as to how the house was set on fire. PW 1 Millicent’s evidence was that she recognized the voice of accused. Therefore her identification of the accused as the person who burnt the house was through voice recognition.

While evidence of identification by voice is receivable and admissible and can carry as much weight as visual identification it must meet the set perimeters for it to be found credible. The court must be careful before entertaining the evidence adduced to show unless the same has been shown.

- 1. That it was the accused persons voice.**
- 2. That the witness was familiar with it and recognized it.**
- 3. That the words spoken by the accused are stated by the witness.**
- 4. That the conditions obtaining at the time it was made was such that there was no mistake to that which was said and who said it. -**

These condition would include the state of noise environment when words were uttered; the frequency, and the length of the conversation”

Millicent in her evidence stated that accused called her and she recognized his voice. While it is true and is even admitted by accused that Millicent knows him, and therefore she know his voice. The court must be satisfied that the conditions were such that they were from possibility of error.

In Choge –vs- Republic 1985 KLR 1 the court held;

Evidence of voice identification is receivable and admissible in evidence and it can depending on the circumstances carry as much weight as visual recognition. In receiving such evidence carry would be necessary to ensure that it was the accused persons voice that the witness was familiar with it and recognized it and that the conditions of obtaining at the time it was made were such that there was no mistake in

testifying to that which was said and who had said it. **In the interior case it was not safe that Okumu's identification of the 1st appellants voice was free from all possibility of error.**"

In Karani –vs- Republic (1985) KLR 200 the court of appeal on page 293 held;

"Identification by voice nearly always amounts to identification by recognition yet, here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and there were conditions in existence favouring safe identification."

In determining whether to accept the voice identification as a basis for a finding of guilt, the court must consider not only the duration the witness has known the accused but also the extent of their interaction in terms of conversations prior to determine whether the witness adequately recognized the accused's voice. The court will also consider the words uttered by the accused to determine whether they were sufficient to enable the witness to correctly recognize the voice of the accused.

In this case PW 1 Millicent did not state the words uttered by the accused. She only stated that she heard accused call her and then the window was hit and broke. She was in the house while the person was outside. She testified that she only recognized the voice. She did not in her evidence state what the accused is alleged to have said. Whether it was one word or a sentence from which she would recognize his voice. In the circumstance I find that the conditions for voice recognition were not free from error.

PW 2 Violet Nangila the mother of Millicent testified that she heard Millicent screaming and came out. She saw the house was on fire and Millicent was outside. She then stated that she saw accused set fire to the house using petrol and a match box. She then saw him running away. She said he was wearing a red-T-Shirt and black long trouser. Her evidence therefore is that of visual identification by recognition. On visual identification there are several decision by courts on what factors it should consider the have been obtaining before it accepts the evidence of visual identification. These include the nature and intensity of light, the witnesses position in respect to the accused and duration of observation.

In MAITANYI –VS-REPUBLIC (1986) KLR 198.

" The strange fact is that many witnesses do not properly identify another person even in daylight' It is at least essential to ascertain the nature of light available. What sort of light, its position relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are uncommon because they were not inquired into"

Violet testified that she came out of her house when she heard her daughter Millicent screaming. On coming out she saw the house was already on fire and that PW 1 Millicent was outside. She however testified how she saw accused set light the fire using a match box and petrol. It is not possible that she would have seen the accused yet when she came out, she found the house already on fire. Her evidence that she saw accused set the house on fire and then run away cannot in my view be true.

Upon considering all the evidence. I am not satisfied that the evidence by the prosecution has established that it was accused who set fire to the house. The evidence of PW 1 Millicent and PW 2 Violet Nangila that it is accused who set fire to the house it was not obtained on conditions which were free from error. It s therefore cannot form a basis for finding of the guilt of the accused.

I therefore find that the prosecution has not proved a charge of murder C/S 203 as read with section 204 of the Penal Code against accused. I find Collins Nyongesa not guilty of the offence of murder and acquit him under section 215 of the Penal Code.

Accused Collins Nyongesa be set at liberty unless otherwise lawfully detained.

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

S.N. RIECH.

J U D G E.