



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO.002 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN PAMBA EKISA.....ACCUSED

J U D G M E N T

[1] The accused, **Benjamin Pamba Ekisa**, is charged with murder, contrary to s.203 read with s.204 of the Penal Code, in that, on the 5th January 2020 at Olepito village Teso South – Busia County, jointly with others not before court murdered Maximus Barasa Emodo.

[2] The case for the prosecution was that on the material night at about 2.00a.m. the deceased and his family were in their house when suddenly a fire erupted and engulfed the entire house which was made of corrugated iron sheets. **Mitchel Aura (PW 1)** and **Jane Dinda Barasa (PW 2)**, managed to escape from inside the burning house and raise alarm. The deceased was trapped inside the house but managed to move or being moved outside the house with burn injuries.

[3] **Stephen Osikuku Barasa (PW 3)**, a brother to the deceased, lived in his house nearby. He was asleep at the material time when he was awakened by a distress alarm and saw the house of the deceased on fire. He rushed there and found the deceased lying outside the house with burns all over his body. He also noted that some other occupants of the house had body burns but not as serious as those of the deceased.

[4] **Stephen (PW 3)** and others took the deceased to a nearby hospital from where he was referred to Busia Referral hospital and ultimately to Kakamega Referral hospital where he passed away while undergoing treatment. It was suspected that the house had been set on fire with the usage of petroleum fuel.

A son of the deceased, **Duncan Opiyo Baraza (PW 4)** lived in the compound of the deceased in a different house. He was also awakened by screams outside his house and on moving out found his father's house on fire. He at the same time saw two intruders escaping through the compound's fence.

[5] With the help of other relatives and villagers, **Duncan (PW 4)** managed to put the fire off. His father and siblings were outside the house with burn injuries. The father due to the serious nature of his injuries was taken to hospital but died while undergoing treatment at Kakamega Referral hospital.

Dr. Okeku George Roy (PW 5), carried out the necessary postmortem on the body of the deceased and compiled a report (P.Ex 1) indicating that the cause of death was suffocation due to inhalational burns.

[6] After the matter was reported to the police, necessary investigations were carried out by **P.C Kenneth Kikwai (PW 6)**, who visited the scene and recovered a partly burnt yellowish jerrycan and a white jerrycan containing liquid (P.Ex 2). This was forwarded to the Government Analyst for necessary analysis and a report compiled (P.Ex 3). The report indicated that the liquid was petrol, a highly flammable petroleum product.

[7] On completion of the investigations, P.C Kikwai (**PW 6**) preferred the present charge against the accused as he was the person suspected of having set the house of the deceased on fire during the material night.

The accused denied the charge and contended in his defence that he was asleep at his home on the material night and on the following day at about 6.00a.m he heard that the deceased had been killed. He proceeded to the scene and was told that the deceased had been taken to hospital.

[8] The accused further contended that he bore no grudge against the deceased who lived 700 metres from his home, but acknowledged that

he was involved in a land dispute with the deceased, a matter which is in the Environment and Land Court at Busia and is yet to be finalized. Otherwise, he lived with the deceased well although he (**accused**) was working in Nairobi. He also contended that he was implicated with the offence without reason but on a shocking allegation that he had planned the death of the deceased after a short message (**sms**) was found on his sons's mobile phone.

[9] The accused's wife, **Fridah Hellela (DW1)**, indicated that the accused arrived home from Nairobi on 5th January 2020 at about 6.00a.m. and that they remained there during the day and night, but on the following morning they heard that the deceased had been burnt while inside his house which had been set on fire. She contended that the accused could not have set the house on fire as alleged as she was with him at home on the material night and time.

[10] All the evidence foregoing clearly shows that the death of the deceased as a result of injuries sustained in a fire that razed his house was not disputed. Indeed, the postmortem report specified suffocation due to inhalational burns as the actual cause of death. Also not disputed was the fact that the fire was not accidental but a result of a criminal act of deliberately setting a house on fire with the intention of destroying it along with its occupants.

[11] The death of the deceased as a result of the fire was the ultimate outcome of the criminal acts of arson and murder with a clear motive to kill the deceased and/or his family members and destroy his home.

The evidence by the prosecution implied that all these was sparked off by an existing land dispute between the families of the deceased and the accused.

[12] Be that as it may, the issue which fell for determination by this court was whether the deliberate setting on fire the house of the deceased occasioning him fatal injury and/or suffocation was an act undertaken by the accused either alone or with others. The presence of a jerrycan containing petrol at the scene of the offence was a pointer to the criminal nature of the act.

The accused's defence was a denial and a contention that he was not at the material scene of the offence at the time it was committed. He was then asleep in his nearby house as confirmed by his wife (**DW 1**).

[13] It was therefore incumbent upon the prosecution to pave by necessary evidence and beyond reasonable doubt that the accused was actually seen and positively identified at the scene of the offence at the ungodly hours of 2.00a.m. either immediately before the offence or during the offence or immediately after the offence.

The burden of proof in criminal cases always lies with the prosecution. An accused person bears no burden to prove his innocence.

[14] With regard to the alleged identification of the accused as the person criminally responsible for setting the house of the deceased on fire and hence, the death of the deceased the evidence material to the fact was that of the son of the deceased Duncan (**PW 4**). He was the sole identifying witness. Michel (**PW 1**) and Jane (**PW 2**) were also victims of the fire but at a lesser degree. None of them saw the arsonist and were therefore not in any position to identify the accused as the culprit.

[15] The evidence of the deceased's brother, Stephen (**PW 3**) suggested that he did not see the offender or offenders when he arrived at the scene. Other than what he was told by Duncan (**PW 4**) regarding the presence of the accused at the scene, he was not in a position to state and prove that the accused was the culprit or one of the culprits.

[16] The offence occurred in the hours of darkness thereby providing unfavourable conditions for positive identification of the culprit or culprits. It was therefore expected that the prosecution through the sole identification witness (**PW 4**) would show and demonstrate how and in what manner it was possible to identify the accused as one of the alleged two culprits in such difficult circumstances.

[17] The law on identification is well settled such that the evidence relating to identification of a suspect at the scene of the offence must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from possibility of error. (see, **Francis Kariuki Njiru Vs. Re (2001) eKLR 174**).

[18] Such caution must especially be applied to the evidence of a single identifying witness. This case falls within this category of cases as Duncan (**DW 4**) was the only identifying witness availed by the prosecution. His evidence was direct and it actually provided the fodder for the arraignment of the accused with the present offence.

The importance of caution in accepting the evidence of a single witness was clearly stated in **Kiilu & Another Rep (2005) 1KLR 114**

Thus:- "subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error".

[19] In this case, the identifying evidence of Duncan (**PW 4**) did not meet the aforementioned legal threshold for reasons that he failed to state how and in what manner he was able to identify the accused at a scene of crime engulfed in darkness. He also failed to provide credible evidence of the source of light which enabled him to identify the accused and its intensity. A spotlight from a mobile phone was clearly inadequate in providing sufficient light for identification of a suspect in distressful circumstances.

[20] Another omission by Duncan (**PW 4**) was his failure to also provide credible or any evidence in relation to proximity between himself and the suspects at the time of the offence for a holding that he was very close to the suspect as to be able to positively identify him.

It would therefore follow that the alleged identification of the accused by Duncan (**PW4**) was suspect, unreliable and clearly not free from the possibility of error or mistake for a safe finding by this court that the accused was indeed positively identified as the person or among the persons who set the house of the deceased on fire and caused his death.

[21] The prosecution burden of proof was not discharged against the accused. He is accordingly found **not guilty** as charged and is acquitted forthwith.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 19TH DAY OF OCTOBER 2021]