



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL (MURDER) CASE NO.81 OF 2015

REPUBLIC..... PROSECUTOR

VERSUS

SARAH MUTINDA KATIKU..... ACCUSED

JUDGEMENT

1. The accused herein **SARAH MUTINDA KATIKU** is charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code Act. It is alleged that on the 31st Day of October, 2015, at Ngwata Area, Mlolongo Township in Athi River Sub-County within Machakos County murdered **MWANJALA MWASI**. The accused denied the charges and the case proceeded to trial.
2. The accused person was represented by J. Kamanda Advocate whilst the State was represented by Mr Machogu.
3. The prosecution called a total of nine (9) witnesses in support of its case. **Pw1** was **Margaret Mutheni Mutuku** who testified that on 31.10.2015 she heard the deceased calling her and when she went outside she saw the deceased on fire and saw the accused leaving the house of the deceased. She later took the deceased to hospital but he died the following day.
4. **Pw2** was **Bernice Mwangeli Mutuku** who testified that she had been a house girl of the deceased and was then staying with Pw1, her sister. It was her testimony that on 31.10.2015 she found the deceased with the accused in the house whilst she was preparing supper and she left and later found fire burning in the house of the deceased. She told the court that she saw the accused running from the burning house and when she opened the door, the deceased came out while engulfed in flames. She later heard that the deceased died on 1.11.2015.
5. **Pw3** was **Alice Akinyi** who testified that on 31.10.2015 she heard noises from the house of the deceased and she went there with a bucket of water whereupon the deceased later informed her that he had been burnt by a lady called Mutindi. She told the court that she later learnt that the deceased had died. On cross examination she told the court that the deceased in response to questions from the members of the public who had gathered informed them that the accused had burnt him.
6. **Pw4** was **Mwanjala Mariota** who told the court that on 31.10.2015 she received a call that her father, the deceased had been burnt and that she went to the scene whereupon on the way to Machakos Hospital the deceased informed her that one Sarah Mutindi had burnt him. She stated that on 3.11.2015 she attended the post mortem and identified the deceased's body.
7. **PW5** was **Virginia Mutia Mwijala** who testified that on 31.10.2015 she received a call that her father, the deceased had been burnt and she went to the scene whereupon on the way to Machakos Hospital the deceased informed her that one Sarah Mutindi had gone to his house and demanded for kerosene, cash and cooking oil and he had informed her that he did not have which led to an altercation whereupon the deceased slapped her forcing her to go to the kitchen took the stove and throw it at him. She told the court that the deceased died on 1.11.2015 and on 3.11.2015 she attended the post mortem and recorded a statement.
8. **Pw6** was **Pc Keen Ekal** of Mlolongo Police station who told the court that he was based at Machakos police station on 18.10.2015 when the accused came and reported that she had been quarrelling with her husband and in the process touched a burning stove that caused her burns. He later established that she had thrown a burning stove at the deceased. On cross-examination, he testified that the accused made the report on 31.10.2015.
9. **Pw7**, **Cpl James Olago** of scenes of crime informed the court that he received images that he was requested to print and he tendered the photographs of the scene under section 78 of the Evidence Act. He confirmed that he had supervised the processing of the said photographs which he produced as exhibits 1A----H.
10. **Pw8** was **Sgt Richard Nyakundi**, the investigating officer who told the court that on 1.11.2015 he confirmed that on 31.10.2015 a report was made that the deceased had been burnt by the accused and that he went to the scene where he established that the accused was the

suspect. He told the court that he went to the accused's house on 2.11.2015 and who informed him that she and the deceased had an altercation and that they had tumbled over a burning stove. However, he established that the accused had hurled a burning stove at the deceased and that the accused had made a report to the police and had concealed information as to what had happened. He produced a partially burnt skirt, treatment card and a dismantled green stove as exhibits.

11. **Pw9** was **Dr Bernard Midia** who conducted an autopsy on the body of the deceased. His examination revealed that the deceased had 80% burns on his body and he formed the opinion that the deceased died due to complications that arose from 82% second degree burns.

12. The court vide ruling delivered on 28.10.2019 found that a prima facie case had been established against the accused person who was placed on her defence.

13. The accused testified in her defence without calling any witnesses. She denied the charges and testified that the deceased used to be her lover but they lived separately. She testified that on 31.10.2015 she visited the deceased at his home and arrived at 5 pm when the house girl (Pw2) arrived to perform culinary duties using a stove that she duly lit. She told the court that a disagreement ensued between her and the deceased over the hiring of Pw2 as a housemaid which the deceased claimed had been necessitated by the accused's refusal to wash his clothes. She testified that the deceased picked the burning stove and attempted to throw it at her and that she dodged it but the stove slipped from his hands and blew as it had paraffin and resultantly burnt him. She told the court that she also got burnt on the right leg and right hand. She told the court that she came out of the house and the deceased followed her and who was taken to hospital while she went to the police station to report the incident. She stated that she visited St Margaret Hospital for treatment as evidenced by the treatment card Exh4 and that on 10.11.15 she was admitted at Machakos Hospital. She testified that on 1.11.2015 she was detained in the police cells and later was charged with the offence that she vehemently denied committing. On cross examination, she testified that she was not annoyed at the presence of Pw2 at the house and she denied throwing a burning stove at the deceased.

14. Directions were taken that the parties file submissions and which are duly on record. Learned counsel for the accused in appreciating the case of **Sawe v R (2003) KLR** submitted that various circumstances had been presented to infer the guilt of the accused; that the prosecution had not demonstrated ill motive by the accused towards the deceased. It was pointed out that there was an altercation between the deceased and the accused and that they had tumbled over a burning stove. It was pointed out that the accused suffered burns hence an indication that there was commotion in the house. The court was urged to acquit the accused.

15. The state in response submitted that the testimony of Pw1 and Pw2 placed the accused at the deceased's house and that the accused was the last person seen with the deceased. It was submitted that there was a disagreement with the two and as a result the accused threw a stove at the deceased. On the element of malice aforethought, it was submitted that the accused knew that in throwing the stove she would inflict injury on the deceased. It was submitted that the accused was seen by Pw1 and Pw2 fleeing from the house of the deceased. According to counsel, the prosecution had proved beyond reasonable doubt that the accused committed the offence and the court was urged to convict her.

16. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

17. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove beyond reasonable doubt that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

18. The post-mortem report on the examination of the body of the deceased as tendered by Pw9 has not been objected to nor controverted. Dr. Midia formed the opinion that the cause of death was cardiac arrest due to complications brought about by 82 % second degree burns. This ingredient of the offence was duly proved by the prosecution.

19. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

20. The deceased in this case was found to have died from cardiac arrest due complications that arose from 82% second degree burns. Counsel for the prosecution submitted that there was no evidence that pointed to the accused as the person who burnt the deceased. It was upon the prosecution to ensure that the allegation that the accused burnt deceased was backed by supporting evidence. At this stage, I find it safe to presume that the death was unlawful.

21. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

22. None of the prosecution witnesses gave direct evidence as to witnessing the attack on the deceased. However, there is certainty as to what

caused the death. Given the nature of injuries suffered by the deceased that resulted in his death as indicated in the post mortem report, it can safely be inferred that death was the desired outcome of whoever the assailant was.

23. There was no direct evidence in form of eye witness accounts linking the accused to the crime and there was no available circumstantial evidence that the accused had an opportunity to harm the deceased. What is clear is that the accused and the deceased were in the same room. However, I am not satisfied that the evidence of the prosecution and more specifically Pw2 identified the actions of the accused though it seemingly suggested that the accused was seen with the deceased, and it was suspected from the account of Pw3 that the accused had thrown a stove at him; a fact that the accused vehemently denied. The accused in her evidence stated that she and the deceased had an altercation leading to the two tumbling over a burning stove as a result of which both sustained burns.

24. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that: -

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”

25. The prosecution case suggests that the accused was the one who had an opportunity to kill the deceased because she was seen with the deceased. The accused testified that the accused in the process of attempting to throw the stove at her, the same slipped and it blew up because of the presence of paraffin that is a well-known combustible substance. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. There are treatment notes that the accused has tendered to establish that she indeed got burnt and this further complicates the version of events hence the need to have a believable version of what exactly ensued.

26. I have considered the injuries occasioned to the deceased. The post mortem report indicated that the deceased was burnt and from the evidence on record, one cannot say that it was the accused who occasioned the injuries, neither can one say that the accused was involved in occasioning the injuries. Evidence that the accused threw the stove at the deceased is not corroborated as Pw2 who was at the scene did not come out clear as to what happened. The rest of the evidence seems to be mere suspicion.

27. Because the evidence on record is too scanty and not sufficient to point towards guilt of the accused, this creates some doubt in the prosecution case as regards identification of the accused as the perpetrator. It is trite law that if doubt is created in the prosecution case then the same ought to be resolved in favour of the accused. Both accused and the deceased sustained burns in the process of the altercation. The investigating officer confirmed that the accused rushed to the police station to report the incident. It could be possible that after the stove exploded everyone it was then like “every one for himself and God for us all.” Under those circumstances, it becomes difficult to determine whether there was malice aforethought on the part of the accused. The circumstance warrant giving the accused the benefit of doubt.

28. Accordingly, therefore, I find that the availed eye witness account and the circumstantial evidence elicited from the testimony of the witnesses has not established the offence of murder against the accused beyond reasonable doubt. She is accordingly acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. She is hereby ordered to be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 28th day of October, 2020.

D. K. Kemei

Judge