



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 58 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

EMMANUEL SIMIYU WEPUKHULU.....ACCUSED

J U D G M E N T

1. The accused 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 was that **on the 26th day of November 2014 in Trans Nzoia County MJO**.
2. The accused denied the charge. The prosecution called several witnesses whose evidence can be summarised as hereunder.
3. **PW1 AMO** is the father to the deceased. He testified that on the material day he was in his place of work when he was informed of the fire incident. He went home and found that the house had been burned. He said that the accused was a boyfriend to his daughter and had stayed at some point together for a period of 6 months.
4. After confirming that his house had been burned, he went to the hospital to check his admitted child who apparently died a day thereafter.
5. He further stated that the accused assaulted his other child L which necessitated him being taken to hospital. He identified the P3 form which showed the extent of the injuries suffered.
6. **PW2 LM** a minor gave unsworn testimony. He said that on the material day at around 7.00 pm he was home with the rest of his siblings including A and the deceased. He said that he saw the accused coming out of the house and the same caught fire immediately. They screamed and people came and put off the fire. He saw the deceased removed from the house.
7. The following day the accused came and took him with a promise that he would take him to the hospital where the deceased was. He instead took him to his house and assaulted him. He however managed to escape through the window. He was taken to the hospital by his father PW1.
8. **PW3 SA** testified that the accused was his boyfriend who had even impregnated her. She however learned that he was not a good person as he smoked bhang and had threatened him. She said that she was at home on the material evening that the house got fire. She managed to save her child but not the deceased who was sleeping in another room. She had just completed preparing supper. She said that PW1 saw the accused entering the house before the fire started.
9. **PW4 Dr Okumu Moses** from the Kitale County Referral hospital produced the postmortem form on behalf of Dr. Odhiambo who conducted the postmortem exercise. The said doctor was however not conclusive on the cause of death save that it could be complication resulting from the burns he encountered.
10. **PW5 John Koima** a clinical officer produced the P3 form in respect to PW2 who allegedly had been assaulted by the accused. He said that the probable cause of the multiple injuries on his body was blunt object.
11. **PW6 Dennis Wanyonyi Mabonga** a boda boda rider stated that in the evening of 26th November 2014 at around 7.00 pm he saw the accused within the vicinity of the scene as he went to his mother's place. The accused was standing next to the toilet on the plot belonging to the deceased parents. He went inside his house and after a while he heard a thud and screams from the neighbour. He saw fire from the deceased house and after struggling he saw PW3 removing the child from the burning house. He also saw the deceased standing inside the house but the fire was too much but they succeeded in pulling the deceased from the house and was rushed to the hospital. He said that the fire was started at the door as there was no fire in the kitchen.
12. When put on his defence the accused gave unsworn evidence denying the charge. He explained how he was arrested on 28th November

2014 while in his house by the village elder and the chief. He was taken to Kitale Police Station where he was incarcerated for 2 weeks and later charged. He admits that the deceased was his brother in law. He denied generally the evidence as adduced by the prosecution witnesses.

Analysis and Determination.

13. The court has carefully read the proceedings as well as heard the witnesses during trial. The court has equally heard the evidence of the prosecution witnesses.

14. Save for PW2 and PW6 there was no other witness who saw the accused at the scene. There was no witness who saw the accused set the house ablaze.

15. The evidence of PW1 the minor was however unsworn. consequently the same ought to be corroborated. The big issue which the court has been unable to find is why was PW2 alone able to see the accused and not her elder sister A (PW3) who was the girlfriend to the accused.

16. His evidence suggested that they went outside with A that evening around 7.00 PM. A as well testified that after cooking supper they left the house and went to the Kipanda (stall) to await their parents to come. If this was the case at what point did PW2 see the accused?

17. PW3 stated as follows;

“ On 26/11/2014 I was in the house preparing supper. We were 4 of us, my sister, and my two brothers Quinta, Aloo , Laban Odhiambo and myself. We went outside but before reaching the gate, we heard screams”

18. It appears to me, that there was no point when PW2 and Pw3 separated. The assaulting of PW2 by the accused the following day is not disputed. I am however unable to link the two in terms of attempting to silence PW2. This assault was not disputed by the accused. To link the same to the arson appears too remote.

19. PW6 stated that he saw the accused that evening. It appears from the answers he gave during cross-examination that it was not unusual to see the accused at the area at that time as they are all neighbours.

20. The sum total of my findings is that the evidence so far presented is not watertight enough to convict the accused. There was mere suspicion that since he was seen at the area by PW2 and PW6 and based on his bad relationship with PW1 family, he was probably the cause of the fire incident. Unfortunately, there was no other direct evidence. Even if one was to believe PW2, the incident took place around 7.00 pm and it was acknowledged by PW6 that it was relatively dark.

21. The nature of evidence required in such capital cases as in all criminal cases must be beyond a shadow of doubt. I find that there is a shadow of doubt herein. It will not be in the interest of justice to convict the accused. The direct and circumstantial evidence is too weak in my view.

22. Consequently the accused is hereby set free under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held.

Orders accordingly.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/19

In the presence of:

Mr. kakoi for the Respondent

Abari for Bundi for Accused

Court Assistant – Kirong

Judgment read in open court.