



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 3 OF 2016**

**ANDREW LUYOGA SUKUNWA.....ACCUSED**

**-VERSUS-**

**REPUBLIC.....PROSECUTION**

**JUDGMENT**

The accused person **Andrew Luvoga Sukunwa** is charged with three counts of murder according to the information dated 30<sup>th</sup> March 2016.

It is alleged that on the 15<sup>th</sup> March 2016 at Mathari area within Nyeri County, he murdered

On count I:-

Rosemary Waihuini Wambui.

On count II:-

Esther Wanjira Wambui.

On count III:-

Christine Wangui Wambui.

The accused took plea on 20<sup>th</sup> March 2016 and pleaded not guilty to all three counts.

The prosecution called 12 witnesses to prove their case. At the close of the case, the accused was placed on his defence where he testified on oath. He did not call any witness.

The case for the prosecution: Horror story

According to the prosecution this horrendous story began innocently on about 2015 when the accused and his wife PW8 Josephine Wangeci parted ways as 'husband and wife'. They had cohabited together in various places and had 2 children- aged 3 years and 2 years respectively. According to Josephine, the two had a troubled relationship which was at times violent with the accused threatening to kill her prompted her to leave him. Together with her children she took refuge with her cousin PW11 Sister Mary Philipa Wangechi, in an undisclosed location in Baricho. Sister also found her a job.

According to Sr. Mary Philipa Wangeci, Josephine went to her in January 2016 and reported the death threats to her. She told she had also reported the issue to another person by the name Hellen at Caritas. She rang that Hellen who confirmed that PW8 had reported to her. She then asked for the accused person's number. She was given, she rang the accused and requested him to go to her office so that they would discuss the issue. The accused person reportedly told her on phone that it was PW8 who was in the wrong. However, never went to her office for the discussion but instead went around one of the convents looking for his wife. Someone at the convent rang her and she spoke to him. She told him to look for his wife at her parent's home. She also told him she would follow up the case with the chief when schools closed.

On 15<sup>th</sup> March 2016, she was rang by a fellow sister who told her that her uncle's home had been razed to the ground. That is when she recalled what her uncle the father to PW8 had told her that the accused had taken PW8 out of college and wanted to live with her by force

that there was a time he threatened to kill himself in his home so that he could be buried there. She also stated that the PW8 father's dying statement was that he would never accept /recognize the accused as his son in law.

According to the prosecution, when accused person did not find his wife, he rang her on 14<sup>th</sup> March 2016 and told her he would do something that would make her cry.

On 15<sup>th</sup> March 2016 she received the call that her parents' home had been set on fire and her three nieces, children of her sister PW3 Catherine Wambui had been burnt to death. She immediately suspected her husband the accused person.

According to PW5 Rose Wambugu Elijah, PW6 Richard Maina Mjagala and PW7 Priscilla Waruguru they were neighbours to the home of the deceased when they saw smoke coming from that direction. They each rushed there to see what was happening.

According to PW5 she got home about 3:15 pm on the material date from hospital. Her child was unwell. She called PW9, a doctor but who was working on the road near her house to check on the child. As they were talking outside her gate, they saw smoke from the neighbors compound. When it increased he sent one of the casuals he was working with, one Mjagala PW6 to go and check as she turned to go to her house she heard someone say it was the neighbour's house on fire. She told PW9 to run and check on the children, while she began to scream for help. She hurried there but the fire was so fierce you could not get stand near the fence leave alone access the homestead. She was just screaming wondering where the children were. The fire brigade was called but it arrived without any water and had to return to fetch water from the river twice.

When the fire was finally put out, she saw burnt chickens, a puppy in one corner and there were remains of three children two of whom were holding each other. She could see that the children were in a room where there was a bed. These are children she knew. She used to plait the elder ones hair.

To her the fire appeared to have burnt from inside and the kitchen caught fire later.

On cross-examination she said the children had been left on their own by their grandmother. That the grandmother said she had left them outside shelling maize.

According to PW6, he was working on the road with the others when he went to fetch drinking water from his house for his colleagues. Then he heard PW9 ask about the smoke. He rushed to where it was coming from. He was the first one to reach the scene. He said- he could hear the children screaming from inside the house for help. The door was latched and there was a padlock. He kicked the door but the flames came out fiercely. He went round the other side looking for a way to access the house. He could still hear the children crying for help but at some point they stopped. He could tell that the cries were from the bedroom. He tried to use a hose pipe from his home to put out the fire but it was not long enough to reach the place. By the time the fire brigade came, ¾ of the three roomed house was gone.

He said when he arrived the fire was burning the left side of the house where the children were but spread to the other side of the house. He said when the fire was put out it appeared as if the children were under the bed.

On cross examination he said he saw the burnt padlock still on its latch at the scene after the fire was put out. He was sure the police saw the padlock. He said he did not know what caused the fire. That the grandmother to the children said she had left them alone and gone to the market.

PW7's testimony was that she saw smoke at 3:30pm. She went to the scene which was her neighbour's house. She found PW5 screaming for help. She saw the fire was being put off, and saw the police retrieve the bodies..

PW3 was the mother to the children. She said they were aged 5, 3 ½, and 1 ½. She had been staying with her children and her mother at home but on 10<sup>th</sup> March 2016 she got a job as a maid in Meru. After 5 days she asked for permission to go see her children whom she was missing. That was on 15<sup>th</sup> March 2016.

On 16<sup>th</sup> March 2016 while she was in a matatu at 7:00am. She heard on the radio that some three children had been burnt at Mathari in Nyeri. She was shocked but she had no phone and could not call home. She decided to call as soon as she reached the stage. She rang her mother. Someone else responded on her mother's phone and told her that she was needed at home. She realized at once that the three were her children.

On reaching King'ong'o she took a boda boda. The boda boda person took her to the home. She found that it was completely burnt. She began to scream. The boda boda rider in an act of sympathy did not leave immediately. People, including her mother came from the neighboring houses and were all lying to her that her children were ok.

It is only later that evening that she was told that the accused, her sister's former husband was the suspect. She was told that he had come to the home looking for his wife. In her testimony she stated that she could not understand the relationship between Accused and her sister's marriage and her three children. She appears to have been convinced that it was the accused who, because of his difference with her sister gone and set her mother's house ablaze, killing her children. You could hear the agony in her voice expressing incredulity that while she had nothing to do with their marital problems, her three children were dead, her sisters and the accused's children were alive. Her theory was the accused had set their house on fire to hit at his mother in law whom he suspected was the one hiding his wife.

On cross-examination she told the court that she had left for Meru in March 2016 and her sister had left the accused in January 2016. She also said that what she said about the accused she was told by one MamaMuriithi. She said one Richard did not tell her he had seen the accused lock up the children and set the house on fire.

PW4 Nancy Wahito testified that she did not know the accused before but described him as a son in law of the family of Mary Mugatha. She told the court how she met 'Andrew,' either on 13<sup>th</sup> or 15<sup>th</sup> March 2016 at 3:00pm at Mary Mugatha's gate. She identified him in the dock.

She said that he was coming from the Mugatha's home, and he escorted her for a while outside the gate. She asked him what he was doing there while the owners of the home were absent. He told her and in her own words:

*"children are goats and he was going to lock them up"*

She said *"he was carrying a jerrican that had petrol. I could smell petrol. We parted, then I went to the shops and he went back to the home. He told me that if the grandmother was not at home she would come to cry. ... I did not do anything because I was not suspicious of anything... Later I met a woman from the neighbourhood... the home had been burnt. ... the jerrican the accused had was yellow in colour... 3 ½ litres... I know Andrew. He used to come to that home and I am their neighbour".*

On cross-examination this witness told the court that she met the accused person coming from the home. That there was no one else in the home except for the children who had been left outside. She said they walked with Andrew to the main road- Kamuyu/Mathari Road that it was more than 100m from the deceased's gate. She said there were other three homesteads on each side of Mugatha's home Magumu's Kaigi's and others. That he told her he was going to lock up the children – that he uttered the words *"ni kazi ya bure, watoto ni mbuzi"*. She said he did not appear to be angry- that it is when he turned that she saw the jerrican strapped to his back, under his clothes that she only saw it because his clothes pulled up. That the jerrican was inside his shirt- held up by his belt at the waist, and he was holding his jacket tightly. That it was only because his belt became loose that she saw the jerrican. Her statement was read to her and she had said she smelt the petrol. She denied that saying that when they were walking she had not smelt petrol. She said she did not imagine he was up to any mischief despite what he had told her because he was an in-law of that family. She did not tell anyone else what he had told her. She did not know whether the houses at Mary Mugatha's were locked because she never went there. She saw the children were outside and on their own. Pw9, Alexander Mwai Mburu at the material was working as a medical officer at Mathari Hospital. On 15<sup>th</sup> March 2016 he and others including PW 6, were working on the road leading to their homes, when PW 5 called him to go check on her child who was unwell. As they were talking at her gate, about 80 to 100m away, he saw a saw a young man enter the compound of the deceased home and leave. It was about 2:40pm. He said the person he saw enter the homestead was a stranger whom he described as dark, not tall, not short, and in a striped shirt. When he saw smoke he thought someone was burning rubbish near the fence. Then one of the casuals he was working with said it was the neighbour's house that was on fire. They all rushed there as PW5 raised alarm. He and PW5,6 and 7 were the first ones at the scene. The gate was not closed. The house had a wooden door. It was locked with a padlock on a latch. He said that he did not hear a sound in the house but one of the other persons said he could hear a child crying. The fire was too hot they could not do anything. He left and called the ambulance.

He said the home of the deceased was approximately 30meters away from his but the person he saw was 80-100m away. He said he knew members of that family- three girls and a brother who is insane who was normally at the market begging. He saw him after the fire was put off.

He saw the bodies being removed.

He also said that the family of the deceased had one son who was mentally ill.

On cross-examination he said that he was not with the casuals when he saw the person enter the homestead., but that PW5 also saw the person. He reiterated it was a dark medium sized person like the accused in a striped shirt who was not familiar to him. That from 100m away he could not tell the exact colors of the stripes but he was in trousers that is why he assumed he was a man. He said he arrived with the others and did not hear any sounds from the house. PW10, an aunt to the children –Esther Wanjira told the court that her mother Mary Mungai rang her between 3-4 pm on 15<sup>th</sup> March 2016 and told her that she had left the children outside the house but upon return found the three children, goats and dog all burnt.

She came home the following day. The first person she suspected was accused person who she said did not burn his children but burnt the children of her sister. According to her the accused and his sister had marital problems. They would go to her for reconciliation and she would refer them to their mother.

PW12 No.72539 PC Ferdinard Kazungu was the Investigating officer. He told the court that he was informed by the OCS to attend a scene of Arson in Mathari. Upon arrival he found that a house had burnt down and there were remains of three children- burnt beyond recognition. He called scenes of crime personnel who came and took photos.

It is while at the scene that he met PW4 Nancy Wahito who told him that she met the accused person who told him he was going to check on his mother in law- Mary that he asked her whether the said Mary was in the house and she said she did not know. That she told him that the accused had jerrican of petrol and threatened to burn everything plus the children.

He also said he spoke to the said Mary – the grandmother to the children who told him that she and the accused had a bad relationship because the accused was blaming her for the break up between him and her daughter that the accused had even threatened to kill her.

He also spoke to the witness he referred to as D5. He said *" I spoke to her. She told me that she saw a person enter the homestead three times before the home was burnt, [and] this was after Nancy had spoken with the accused".*

He spoke to the former wife of the accused one Josephine who told him that accused person had threatened her severally with death and that he even burnt her phone. He said from her statement he learnt about the nature of the accused person. He said the burnt phone was an exhibit in this case but was not produced in court. .

He testified that the accused later took himself to the police station alleging that there were people who were threatening to kill him. That upon interrogation by one PC Mgandi had admitted burning the house. That when he spoke to him he denied the same.

He placed accused in cells, Later, he visited the scene and collected soil for forensic examination to know whether petrol had been used to set the house on fire. This soil was sent to the government chemist for forensic tests. He presented accused to hospital for mental examination on 22<sup>nd</sup> March 2016. The report was produced by Dr. Mwenda PW1 the accused was found fit to plead.

The Postmortem on the bodies of the children was conducted on 23<sup>rd</sup> March 2016 by Dr. Obiero Okoth but report produced in court by Dr. Gor Goody Kiritmumar PW2. He described the remains external and internal appearances as having deep and generalized burns with heat fractures and amputation of limbs. Cause of death was determined to be shock and asphyxia due to dry burns.

Pw12 testified that by 18<sup>th</sup> March his investigations were complete and relying on the evidence of D3 and D5 he charged accused with the three murders.

When he arrived at the scene it had not been secured and there were very many people there. He said he believed Nancy who told him she saw accused with a Jerrican of petrol and he threatened to burn the place down. She also told him that when the fire started the accused was at the scene. He was certain that the fire was started with petrol- that he forgot to ask her the colour of the said jerry can. He did not recover the jerrican. He said the mother of the children was in Meru but did not know the date she had left for Meru- he said accused was working as a security guard for Kenya Power but was not on duty on the material date.

On cross-examination he reiterated that he believed what PW4 told him about the accused person.. He denied any knowledge of the fact that the father in law to accused had expressed his disregard for accused as a son in law on his death bed. That the grandmother to the children had left them in the home on their own as she went to hospital and there was no adult to take care of the three children.

He said D5 told him that he saw a person a man enter the compound thrice. He said he established from the former wife of accused that he was a violent person. He said he visited the house of the accused when they were looking for him but could not tell when that was and they found no one in the house. He said accused took himself to the police station on 17<sup>th</sup> March 2016, two days after the fire. He conceded that PC Mgandi did not record a statement, and no confession was recorded from the accused. That he did not visit the accused's work place. He did not have the results on the soil tests, and hence he had no evidence that the fire was started with petrol. He denied that the children did not cause the fire.

Upon the close of the case for the state the accused was put on his defence. He testified on oath. He told the court that at the material time he was employed as a guard by Maxwell Security. His station was Kenya Power offices at Diana Centre.

He explained his whereabouts on 15<sup>th</sup> March 2016 – that he went and worked at a construction Site at Ngangarithi. He left work at 3:30pm and went home to 'Transformer'. He left for his guard duties where he reported at 5:30pm. He handed over to his colleague at 6:30am on 16<sup>th</sup> March 2016.

He went home, had tea and slept – while sleeping he heard what he described as a serious fracas in his house- some people had entered, they were beating him and telling him he would know why upon arrival 'mbele'- the word used to connote – police station. He managed to run away to the police station where he reported the case- they beat him so badly that at the trial he still carried the scars of the beating and a deformed left ear.

Upon receiving his report the OB officer told him to wait. It is later on that some officers came and told him accused that he had killed some people. He denied any knowledge about the murder.

He told the court that he knew PW4 as having been a neighbour of the deceased children – and in 2015 he was fixing water pipes and unfortunately the trenches were dug too close to her gate and she got very angry with him almost hitting him with a jembe. He said he had no grudges with his wife except the usual disagreements. He said he never eloped with her but took her in presence of elders.

In cross-examination by counsel for the state, he conceded that he was married to Josephine, that Catherine was his sister in law and that the children were his nieces and he knew them. He knew that home and had been there before but not of the day of the murder.

He also conceded that he knew PW4 and thereby had a grudge. He denied having been with her on the material date. He conceded that he had been called by his wife but she did not tell him where she was. He denied that he was angered by the problems he had with his wife to the extent of setting the mother in law's house on fire.

Upon the close of the case for prosecution, each party made oral submissions.

Ms. Mwai for the accused person submitted that the case for prosecution was purely circumstantial that may be it was the accused person who had committed the offence- she argued that the law is clear – circumstantial evidence must be so tight that the only conclusion is that it is the accused who committed the offence.

That the evidence of PW4 could not be believed – that she met accused, who issued a threat saying that the grandmother of the children would cry, was carrying petrol – yet did absolutely nothing.

The accused's ex-wife PW8 had long standing disagreement with the husband.

PW9 and could not tell who the person he saw entering the compound as he was a stranger. She also pointed out the contradictions between the evidence of PW9 and PW4 with regard to the clothes the accused is alleged to have been wearing. One said a striped shirt – the other a striped T-shirt.

He could not tell whether it was a woman/a man. She put out the possibility that 3 little children were left on their own – no evidence that the combustibles in the home had been locked up they could have played with fire.

She argued that the accused's defence was credible. That the police failed to verify his alibi. Further that it was his wife who had rang him, that he took himself to the police station for protection and that there was no evidence that the fire was caused by petrol/anything else.

Mr. Magoma in response argued that the case was indeed based on circumstantial evidence but it was strong enough because according to the prosecution prior to the fire, and after the fire the accused was seen at the scene- that he testified he was not on duty on the material date. He seemed to imply that the accused had quarreled with the mother of the deceased children which was factually incorrect- that the accused's act of taking himself to the police station was evidence of his guilt.

I have carefully considered the evidence before me and the rival submissions. The issues to be determined are;

1. Whether the prosecution has proved their case beyond a reasonable doubt to warrant a finding of guilt by establishing ingredients of the offence of murder. S.203 of the Penal Code defines murder as where:-

*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

The prosecution must establish:-

- i) The fact of death.
- ii) That death was caused by the act/omission of the accused person.
- iii) That there was malice aforethought on the part of the accused as defined by s.206 of the Penal Code which states: -

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*(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 intent 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.*

## **Fact of Death**

The case for the prosecution is that the three children were burnt to death beyond recognition, in the fire that burnt down their grand - mother's house. The witnesses told the court that it was the police who were able to tell which of the burnt remains were the children. The pathologist indicated that what he recorded as age and sex of the children was from information given. The forensics did not go further than that so the presumption was that the remains found in that house were those of the three little girls.

## **Unlawful Act or Omission on the part of Accused or the *actus reus***

In the case of **Joseph Kimani Njau V Republic [2014] eKLR** the Court of Appeal stated:-

***“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard.***

It is also common ground that nobody saw the accused person set the house on fire. The investigating officer told the court he charged him on the strength of the evidence of PW4 and PW9 whom he claimed placed him at the scene, PW4 who saw accused with petrol and heard accused threaten to kill the children, and PW7 his former wife whose evidence he said demonstrated the violent nature of the accused, PW11 who alleged a grudge between the accused and the PW7's parents for hiding her from him.

PW8 did not identify the person he saw as the accused person. He said it was a total stranger. His testimony the PW5 also saw the person was not corroborated by PW5. He could not say whether the person he saw was male or female

**PW4's** testimony did not ring true. First she said she did not know the accused before. Then she said she knew him as an in law of the deceased family, and even mentioned him by name. Then she said when she met accused he *'was carrying a jerry can of petrol. I could smell the petrol'* then in the same breath that he had concealed the jerrican of petrol on his back under his T- shirt and jacket, and she only saw it by chance when he turned round, and his trouser belt loosened. Her statement said *'when he turned I saw a jerrican behind his back. It had the smell of petrol'* .She said it was the 3 ½ litre jerrican but did not say how she saw that, yet it was concealed.

It was her testimony that she was an immediate neighbour of the deceased's family. Is it plausible that she would meet the accused with a jerry can of petrol, that he would tell her he was going to lock up the children, burn the whole place down to make their grandmother cry, then knowing that the grandmother had left the children on their own at home, she would casually watch him go back to the homestead., got to the market, chat with her friends, tell no one about it only to come and say it in court? It is highly unlikely and that is why her story is incredible.

Her story that accused threatened to set the whole place and the children on fire was not corroborated by her statement. Secondly her allegation that the accused was carrying petrol which is what he used to set the place on fire was not verified. PW12 the Investigating officer said he took soil away for forensic examination to confirm that petrol was used to start the fire as alleged by PW 4 but he had no report from the Government analyst to confirm the same. He did not explain why that report was not produced.

The I.O also said he visited the house of the accused. No evidence was tendered as to whether the clothes he was allegedly wearing on the material date which PW4 would have identified were found to be examined for traces of petrol confirm PW4's testimony that the accused was carrying the petrol in a jerry can tucked under his clothes. There was no evidence that any investigations were carried out by conducting search from his house, to recover the clothes described by this witness as the ones accused wore on the material day for evidence. Neither was there evidence of any investigations as to whether accused had bought petrol in a jerrican meeting the PW4's description, on the material date.

There were other homesteads nearby. No investigations were carried out to see whether anyone had seen the accused leaving the homestead after the fire. PW5, 6 and 9 were on the road but none of them saw him.

The police made no effort to investigate the case to place the accused at the scene.

The I.O relied on unreliable evidence in an attempt to place the accused at the scene of crime.

It was also alleged that the door to the house was padlocked. That when the fire was put out the padlock was lying there still attached to the latch. This was crucial evidence. Who had padlocked the house? Was it the grandmother to the children or the accused person or any other person? This was not investigated to find out the source of the padlock to connect the accused to it. Neither was the exhibit was produced to support the evidence that the door was locked from outside.

Hence no concrete evidence was produced to show that the accused person was actually the person who set the house on fire.

### **Mens rea of malice aforethought**

Mr. Magoma's submission on this was that the accused had quarreled with the mother of the three children. That was not true. There was no bad blood between the accused person and the mother of the three children.

It was not denied that there were disagreements between the accused person and his ex-wife. She said under cross examination that her husband did not have any grudge with her mother or her sister. She said that she could not say with any certainty that he was the one. What she knew was that it was being said that he was the one. It was for the prosecution to establish that this would be a basis for the accused person to kill his three nieces yet he had no grudge with their mother. Allegation of grudges between him and his parents in law were all hearsay. The allegations from the investigating officer that he threatened his mother in law with death is also hearsay as she did not testify neither was the statement she is alleged to have recorded put to the accused person.

The I.O testified he had evidence of accused's alleged violent temper. This was not proved as even the phone he is alleged to have burnt in anger was not produced in evidence. Neither was any evidence produced to support the allegations that threats made to his had been reported to the local chief.

### **Circumstantial evidence**

The tenor of the evidence from the relatives of the deceased was that no one else could have committed this crime because it is only the accused who had reason to. But, from an analysis of the evidence it is evident that there were gaps in the case for the prosecution. The fact that the children were left on their own and there was no adult to take care of them, and no evidence that flammables of whatever type had been locked away puts an open window to the possibility of another cause of the fire.

The evidence of PW9 is that there could have been another person who entered the home at the time he saw smoke. The fire appeared to be near the fence. Could it have started outside? It is also PW9 who introduced the deceased's uncle whom he described as insane and who was at the scene when the fire was being put out.

The I.O even introduced the personal, guilt aspect testifying that the accused had taken himself to the police station, that he had confessed to the police officer at the OB desk, a PC Mgandi of having committed the crime, only to recant later. This PC Mgandi neither recorded a statement nor did he testify.

This was clearly a fishing expedition on the part of the I.O. No confession statement was produced in court. The accused person denied the charges. In his statement of defence he explained where he was on the material date and what he was doing. He told the court the reason why he went to the police station, evidence which was supported by his PW7 that 'people were saying 'that he had committed the offence. The investigating officer himself told the court that he never made any effort to verify the accused person's alibi.

So even the circumstantial evidence was not tight enough.

I am fortified in this by the rendition by Justice Ibrahim SCJ in **Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR** citing from the Court of Appeal in **Ahmed Abolfathi Mohammed & Another Vs. Republic (2018)eKLR** stated that with regard to circumstantial evidence-

*“The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”*

In that case, (though the judgment was overturned by Supreme Court 3:2) – the Court of Appeal analyzed the law relating to circumstantial evidence-

*“However it is altruism that the guilt of an accused person can be proved by either direct evidence or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstance or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence”.*

The Judges went on to cite from **Republic vs. Taylor Weaver & Danovan [1928] CR. App R.21** where Lord Heward CJ rendered himself thus;

*“It has been said that evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation to say that evidence is circumstantial”.*

But for circumstantial evidence to form the basis of a conviction it must answer to a certain description-

*“Unerringly point to the accused person, and to no other person as the perpetrator”*

The court cited with approval **Abanga alias Onyango vs. Republic CR.App No.32/1990** from which I gather guidance:

*“It is settled law that when a case rests entirely on circumstantial evidence. Such evidence must satisfy three tests:*

- i) The circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established,*
- ii) those circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused,*
- iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.*

**See also Sawe vs. Republic, GMI vs .Republic CR. App No.308/2011**

The court also restated the principle that the prosecution must in addition to the three tests- *establish that there are no other co-existing circumstance which would weaken or destroy the inference of guilt.* For this the court cited from **Dhalay Singh vs. Republic CR.APP No.10/1997**

*“For our part we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt then the case has not been proved beyond a reasonable doubt and an accused is entitled to an acquittal”.*

The questions lingering in the air as to the possibility of any other person including the children starting the fire were not dealt with by the prosecution.

### **The Court of Public Opinion**

This fact of the death of three innocent children in the fire that gutted their grandmother's house in the afternoon of 15<sup>th</sup> March 2016 leaves one with outrage and wanting to get who did it and to deal with him or her. The family of the three girls was deeply wounded by their loss and as with all criminal cases, closure for the victims is hard to come by for lack of appropriate systems. Cries of 'Justice for so and so' are not un heard in such a case with the public set in a frenzy to get a conviction at any cost, putting pressure on the courts.

I found refuge in the words of Ibrahim SCJ In the Ahmed case above where he stated this:

### **D. The Law vis-à-vis Public Interest and Opinion**

[106] Lastly, I would like to address an issue that came to the fore in the cause of the hearing and determination of this matter. This is the place of public interest, opinion and perception in judicial decision making. It is a fact that this country has been a victim to several terrorist attacks, with the recent one being the ‘Dussit Hotel Complex Attack’. As a result, the public interest and awareness in matters concerning terrorism has increased. Any alleged association of individuals with acts of terrorism is a matter that the public really frowns upon. Hence as expected, this matter attracted a lot of public interest and media coverage. To the public, the fact that the Respondents were Iranians charged with acts of terrorism was enough to have them convicted and sentenced. But how should the courts deal with public interest when deciding matters before them?

[107] Courts are required to strike a balance between the public’s interest and expectations on one hand, and the constitutional principles applicable within the criminal justice system on the other, the most fundamental principles being the presumption of innocence until proven guilty and the Rule of Law. The public’s perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal. Addressing this balancing dilemma, Sachs J in his concurring opinion in the Constitutional Court of South Africa case of *S v Coetzee and others*, (CCT50/95) [1997] ZACC 2, stated thus:

**“[220] Much was made during argument of the importance of combatting corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.” (emphasis mine)**

The onus to prove the guilt of the accused person beyond a reasonable doubt always lay with the prosecution. The case was not investigated as police picked the nearest suspect. Except for the fact of death of the three children the prosecution failed to prove that the accused is the one who locked up the children in the house, doused it petrol and set it on fire. They failed to prove mens rea, and even the chain of circumstantial evidence had gaping holes.

Consequently, the accused person gets the benefit of doubt. I enter a verdict of ‘Not guilty’ and acquit him accordingly.

**Dated, delivered and signed in open court at Nyeri this 30<sup>th</sup> April 2019.**

**Mumbua T Matheka**

**Judge**

Court Assistant: Juliet

Ms.Macharia Holding brief for Ms.Mwai

Mr.Gitonga Holding brief for Mr.Magoma for prosecution

Accused

**Judge**