



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 44 OF 2016

REPUBLIC.....RESPONDENT

VERSUS

PAMELA INDIATSI ACHURA.....1ST ACCUSED

ESTHER AKINYI ANDATI.....2ND ACCUSED

JUDGEMENT

INTRODUCTION

1. Like a soap opera, the two accused persons were a sister and a girl friend of the father of the deceased, who had been married to the deceased's mother for a period of sixteen (16) years but like a 'successful' male Kenyan had an illicit relationship with the 2nd accused, what Kenyans have given the names "Mpango wa Kando" or "Sidedish" for a period of above three (3) years.
2. As at the time of the commission of the offence, the 2nd accused had given the father of the deceased the child a "son" born out of the aforesaid relationship, whom he gave to the 1st accused to take to his mother in his rural home as he was not man enough to take him to the house which he shared with the mother of the deceased together with their other children. The 1st accused, his sister and aunt to the deceased was at some stage in her life working with **PW1** at his business premises having separated with her husband, moving out of her matrimonial home in Kibra to stay with her other brother in Babadogo.
3. At some stage while working with **PW1** the 1st accused was caught with bolts and nuts stolen from the business leading to her suspension. This was one month before the incidence. The father of the deceased was thirty six (36) years old, the mother thirty two (32), the 1st accused thirty four (34) while the 2nd accused was thirty (30) years old, all at their prime age. The 2nd accused knew **PW1** through the 1st accused, his sister who was well aware that her brother was married with a family. It is the 1st accused who took the child of the 2nd accused and **PW1** to the village to be taken care of by their mother after the 2nd accused threw tantrum.

PROSECUTION CASE

4. On the material day 12th May 2016, **PW2 K.B.L.** a sister to the deceased had gone to school in the neighbourhood, while on break saw the 1st accused whom she knew as her aunt with someone she did not know outside their school when her teacher called her and said there were visitors who wanted to see her mother. The duo then told her that they will call her mother on phone. She stated that she thereafter saw the 1st accused burning the deceased, her younger brother.
5. **PW3 ELIZABETH WANJIRU MAINA** a neighbour met the accused persons while on her way to buy chapati who asked her for the direction to Mama Jeremiah's house and told her that the children of the said Mama Jeremiah were studying at Junior Academy which was opposite where she was buying chapati. At that point the lady they were looking for **PW5** came and greeted them. She noticed that one of the accused persons had a jerrican of about 5 liters in one hand. They then followed **PW5** to the plot and shortly thereafter she came out holding something burning and saying that the ladies had stolen from her, the two visitors also left the flat with the 1st accused saying that she had their debt. She noticed that the deceased had been burned.
6. **PW4 G W K** was a teacher of **PW5's** children. It was her evidence that she met the accused persons who asked her for the house of Mama Jeremiah whom she did not know. The boy who was selling chapati confirmed that he knew her and pointed to her gate which was

locked. She then went to school and called **PW2** to go and check on her mother. After ten minutes she heard an alarm and when she came out of the school saw **PW5** holding a burning child. She said it was the visitors who had burned her child.

7. **PW5 L.M.O.** the mother of the deceased had woken up as any loving mother and as they do it in Lucky Summer, found out that she did not have diapers, so she went to the kiosk to buy some as she wanted to go with the deceased into town. At the kiosk she met the accused persons; she had known the 1st accused as her sister-in-law for fourteen (14) years while the 2nd accused she was seeing for the first time. The 1st accused told her that she had come to see the child whom she had left in the room asleep.

8. She welcomed them to her house and went to the bedroom to get out the child for them, only for the two to follow her and poured the liquid they were carrying onto the baby, while saying that that they had looked for her for a long time as she had caused **PW1** not to marry the 2nd accused. They proceeded to attack her and in the struggle the deceased fell down, she then left the house to go seek assistance, only to come back and found her house on fire with the child burning. The good neighbours helped put off the fire and the child referred to Kenyatta National hospital from where he died. It was her evidence in cross-examination that three weeks before the incidence **PW1** had told her of the child from his extra marital relationship with the 2nd accused who she did not know. She stated that she did not attend the burial of the child since the family had threatened her as they wanted her to withdraw the case against the 1st accused their daughter.

9. **PW1 L.A.I.** the father of the deceased was called by **PW5** with information that there was fire in the house caused by the accused persons where she and the deceased were badly burned and referred to the hospital. He went to his house and confirmed that the fire had been put off using sand. He called the police to the scene before proceeding to Kenyatta National Hospital. He then called the accused persons both who denied being involved in the incidence. They went to the hospital but **PW1** declined to speak with them. He then took both to Ruaraka Police Station with a report but they were released. He thereafter received information on the death of the deceased.

10. The following day, he called the accused persons again to Ruaraka Police Station where his wife pointed them out as those who had attacked her and burned the deceased. It was his evidence that the 2nd accused was his girlfriend until the month of January 2016 when she left for him the child they had sired together as she insisted that she wanted to live with him and could not live with the child alone. It was his evidence that the 2nd accused had known the cellphone number of his wife and she would call her as bold "*Mpango wa Kando*" sometime do. He confirmed under cross-examination that at the time of the incidence the 1st accused had not visited his new home. He stated that he was not out to marry the 2nd accused but used to support her and the child by paying rent and subsistence allowance. For him she was just a sex object while she wanted them to live together.

11. **PW6 HENRY KIPTOO SANG** a government analyst testified that the substance used to burn the deceased was diesel. **PW7 C.I. EVANS CHEA** received the report of the fire and rushed to the scene. He then recorded statements from witnesses. He later on re-arrested the accused persons who had been brought to the station by **PW1**. On 25/2/2016 he attended post-mortem examination on the body of the deceased. It was his evidence that the kiosk attendant and the teacher had seen the accused persons before they entered into the house of **PW1** and **PW5**. They were later on identified at the station.

12. It was his evidence that the 1st accused had been dismissed by her brother from his place of work and there was a relationship between **PW1** and the 2nd accused which would have provided the motive. **PW8 DR. BERNARD MIDIA** examined the body of the deceased who had 73% total burn surface and classified as second degree burns. On the head there was extensive subgaleal haematoma and linear non displaced fracture of the parietal bone. He formed the opinion that the cause of death was complications of 73% total surface area second degree burns and head injury.

DEFENCE CASE

13. When put on their defence the 1st accused stated on oath that on 12/5/2016 she was on duty at Kileleshwa as a house help when she received a phone call from **PW1** her brother, with information of the incidence and that his wife had told him that together with the 2nd accused they were at their house. She sought leave from her employer and went to Kenyatta National Hospital where **PW5** declined to talk to her. They then proceeded to Ruaraka Police Station and were told to go back home. On 13/5/2016 they went back to Ruaraka Police Station where they met with **PW7** and **PW5** who said she was in her house the previous day. They were locked up in the cell until the following day, when **PW2** and **PW4** identified them. It was her evidence that the relationship between her and **PW5** was cordial until she heard that she had taken the child of the 2nd accused home which made her unhappy.

14. In cross-examination she confirmed that she knew the 2nd accused who had a child with her brother and that there was no need to tell **PW5** about the child as that **PW1** had told her that **PW5** was not happy with her.

15. The 2nd accused testified that on 12/5/2016 at 3.00 p.m. she was at her place of work at Lang'ata when she received a telephone call from **PW1** on the fire incidence, and that **PW5** had told him that she had caused the fire, he requested her to go to Kenyatta National hospital where the child was admitted. She did not know **PW5** before then who declined to talk to them and recount what she had told **PW1**. She then accompanied **PW1** to Ruaraka to report. On their way out **PW1** allegedly told her that since he told **PW5** that they had a child, they began having issues in their marriage and that he had met **PW5** having sex with a man in their matrimonial home, he therefore suspected the wife of the said man. It was her evidence that her conduct in going to the hospital and to the police station indicated that she was innocent.

16. She stated further that the prosecution witnesses did not know her and that she only met with them at the police station. She only knew the 1st accused through **PW1** on 6/4/2016 when she went to shave the hair of their child as per the customs and to take the child to Butere. In cross-examination she stated that she did not care about the relationship between **PW1** and **PW5** since she had her own life to live. She considered the mother of **PW1** her mother-in-law since they had a child together. She stated that **PW1** continued to visit her in remand custody as proof that he did not consider them guilty.

SUBMISSIONS

17. At the close of the defence case, the accused persons filed written submissions which they highlighted in court while the State through Mr. Okeyo made oral submissions. It was submitted by Mrs. Nyamongo for the accused persons that the testimonies of **PW1, PW2, PW3, PW4** and **PW5** on physical appearances of the accused persons were contradictory. It was submitted that their identification was not beyond reasonable doubt. It was submitted that their identification by **PW3** and **PW4** at the police station was not proper and that the testimony of **PW2** was not truthful. It was contended that the motive for the crime had not been proved by the prosecution. Further it was stated that the case was not properly investigated.

18. On behalf of the prosecution Mr. Okeyo submitted that the two accused persons were placed at the scene by **PW2, PW3** and **PW5** who saw them on the material day. He submitted that the main issue for determination is whether the two accused persons were actuated with malice. He submitted that the relationship between the two accused persons and **PW1** was not well. It was submitted that **PW2** knew the 1st accused as her aunt and **PW3** and **PW4** were with the accused persons for some time and had opportunity to see and hear them talk so their identification was not mistaken.

ANALYSIS AND DETERMINATION

19. To sustain a conviction on an information of murder, the prosecution is under both evidential and legal duty to prove beyond reasonable doubt the following ingredients of the offence:-

- a) *The fact and the cause of death.*
- b) *That the death was caused by an unlawful act of omission or commission on the part of the accused person.*
- c) *That the unlawful act was committed with malice aforethought as defined in Section 206 of the Penal code.*

20. In this cause, the fact and cause of death of the deceased was not disputed. Both the accused persons confirmed that they went to Kenyatta National Hospital where the deceased had been referred and that **PW1** later on informed them that he had died. **PW1** the father identified his body to the doctor for purposes of post-mortem examination which was done by **PW9 DR. BERNARD MIDIA** who established through his examination that the cause of death was complications from 73% total surface and second degree burns and head injuries. It therefore follows that the first ingredient of the offence was proved beyond reasonable doubt.

21. On whether the said death was caused by unlawful act of commission on the part of the accused persons, the evidence which connects them with the offence is that of **PW5** the mother of the deceased, who stated that she met with them at the kiosk. She knew the 1st accused as her sister-in-law while the 2nd accused she did not know. She welcomed them into her house only for the duo to turn against her, pouring inflammable liquid on her, descending upon her with kicks and blows, causing her to drop the baby down as she ran to seek help only for them to set the baby ablaze. As she attempted to rescue the child she too caught fire.

22. **PW2** a child of tender age and a sister to the deceased was called by **PW4** her teacher after the accused persons had inquired of her mother at the kiosk of **PW3**. She knew the 1st accused as her aunt. This evidence was corroborated by that of **PW1** whose evidence was that they had moved into a new house which was not known to the 1st accused. **PW3** corroborated the evidence of **PW5** that she met the accused persons at her kiosk, where she had gone to buy diapers which she did not have. She was clear in her evidence that one of the accused persons was carrying a can, both followed **PW5** into her flat and the gate thereto closed, only for her to come out shortly holding something burning. The injuries sustained by the deceased as per the post-mortem report is consistent with the evidence of **PW5**. **PW4** was the first person to respond to **PW5** who told her that the child was burned by the visitors who had asked her for Mama Jeremiah. She is also the one who called **PW2** from school to go and assist the accused persons access their gate.

23. I find the evidence of **PW2, PW3** and **PW4** credible and trustworthy putting the accused persons at the scene of murder. Whereas their identification by the said witnesses at the police station was not proper, I am satisfied that they were properly identified and placed at the scene. **PW3** and **PW4** did not know both at the time of the commission of the offence and there is no evidence that they were intimate friends with **PW5** so as to make up a story against them.

24. The accused persons' defence when weighed against the prosecution witnesses' account which placed them at the scene, to the effect that they responded to the call by **PW1** to go to the hospital and to accompany him to the police station showing that they were innocent does not hold much ground. Whatever the design they had in mind when they visited the house of **PW1** and **PW5** was evil in nature.

25. The final question for determination is whether the accused persons had motive and therefore proving malice aforethought:- There is evidence on record that the 2nd accused and **PW1** had a relationship out of which a son was born. There is evidence tendered by **PW1** that the 2nd accused wanted them to live together which was not possible since he was already married to **PW5**. There is evidence that the 2nd accused took the said child to **PW1**'s place of work who then gave the child to the 1st accused to take to his parent at home, which she did without mentioning the same to **PW5**. It was **PW5**'s evidence that when the accused persons attacked her they told her that she was the one who had stood between the 2nd accused and **PW1**'s desired marriage and they therefore had to deal with her.

26. By carrying an inflammable substance and using the same to set the deceased ablaze, it thereby shows that the accused persons had intention to cause either death or grievous harm and they indeed succeeded in so doing. In the case of **TUBERE S/O OCHEN v REPUBLIC [1945] EACA 63** it was held that malice aforethought can be inferred from the circumstances in which the offence was committed such as:-

a) *The nature of the weapon used against the deceased.*

b) *The part of the body targeted by the attacker whether vulnerable or not.*

c) *The manner in which the lethal weapon was used, whether in furtherance to cause grievous harm the assailant used the weapon repeatedly.*

d) *The conduct of the accused before, during and after the attack on the deceased.*

27. I have taken into account the circumstantial evidence that the attack on the deceased and **PW5** took place soon after the 2nd accused had given her child to **PW1** who was taken by the 1st accused to their rural home and soon after **PW1** had terminated the services of the 1st accused at his place of work and has come to the conclusion that both accused persons had common intention which is to cause the death of either **PW5** or the deceased in revenge mission and that they succeeded in their mission.

28. Common intention is defined in **Section 21** of the **Penal Code** in the following terms:-

“When two or more persons form a common intention to prosecute an unlawful purpose and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

29. The Court of Appeal in the case of **NJOROGE v REPUBLIC [1983] KLR 197** had this to say on common intention:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abutted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common assault ... The common intention may be inferred from their presence than action and the omission of either of them to disassociate himself from the assault.”

30. The ingredients of common intention were set out in the case of **EUNICE MUSENYA NDUI v REPUBLIC [2011] eKLR** as follows:-

1) *There must be two or more persons*

2) *They must form a common intention*

3) *The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.*

4) *An offence must be committed in the process.*

5) *The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.*

31. From the evidence on record, it is clear that both accused persons were put at the scene. One of them was seen carrying a jerrican whose content turned out to be diesel. The burned part of the jerrican was collected from the house of **PW5** whose testimony was that she was attacked by both accused persons. The 2nd accused through the evidence of **PW1** wanted to live with him having sired a child together. The 1st accused services at **PW1**'s business premises had been terminated. She had very low regard of **PW5** to the extent that when **PW1** gave her the child, she did not see the need of informing her of the said development. I am therefore satisfied that the prosecution through evidence proved common intention on the part of the accused persons thereby making both culpable of the offence.

32. The fact that **PW1** confirmed to visit the accused persons at the remand prison does not go to show that they are innocent. Whereas the 2nd accused person has in her evidence pointed out to unknown wife of a Kikuyu man who allegedly had an affair with **PW5**, this was not put to either **PW1** or **PW5** in cross-examination and the only view that remains at the close of the case herein is that pointing to the guilt of the accused persons.

33. I am therefore satisfied that based upon evidence tendered on record, the prosecution proved beyond reasonable doubt all the elements of the offence of murder and accordingly find both accused persons guilty of murder contrary to **Section 203** of the **Penal Code** and convict them accordingly.

Dated, delivered and signed at Nairobi this 25th day of June, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mrs. Nyamongo for the accused

Accused present

Court assistant - Karwitha