



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 57 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JANE CHEBET.....ACCUSED

JUDGMENT

[1] The accused person herein, **Jane Chebet**, was arraigned before the Court on **25 July 2012** on allegations that she had committed the offence of murder, thereby contravening the provisions of **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of the charge were that, on the **25th day of June 2012** at Kapsesengin Village in Kamobo Location in the Nandi County, she murdered **Simion Kimutai Chepkwony**. She denied those allegations and was represented herein by **Mr. Miyianda**, Advocate.

[2] The evidence presented by the Prosecution in proof of its allegations was to the effect that the deceased got burnt in his house at Kapsesengin Village in Kamobo Location in Nandi County on the night of **25 June 2012**. He was taken to hospital where he died one week later. There was no eye witness to the fire incident. Thus, the area chief, **Mr. Benjamin Luley (PW1)** told the Court that at about 7.45 a.m. he received a telephone call from one **Michael Kipkoech Lagat** that the house of one **Chepkwony** (the deceased herein) had been burnt in the night; that **Chepkwony** had been burnt and was admitted at **Kapsabet District Hospital**; and that the deceased had quarreled with his wife over vegetable seedlings shortly before the incident, and had beaten her and chased after her while armed with two pangas. **PW1** further told the Court that, upon receiving the report, he proceeded to **Kapsabet District Hospital** to visit the deceased and was introduced to the accused herein. That he arrested her and took her to **Kapsabet Police Station**. He confirmed that **Chepkwony** was burnt all over his body. He later got to learn that the had died while undergoing treatment at **Kapsabet District Hospital**.

[3] **Michael Kipkoech Langat** testified as **PW3** herein. His evidence was that he was at his home sleeping on the night of **25 June 2012** when he heard noises. He however never went to the scene. That in the morning, his 7-year-old nephew, one **Kipkemboi**, woke him up and told him that the house of **Simeon Kimutai** had been burnt down. He then went to the scene and found the grass-thatched roof had been completely burnt and had caved in; and that there was a crowd of people gathered at the scene, who included **Jane Chepng'etich (PW2)** and **Moses Biwott (PW4)**. It was then that he called the area chief (**PW1**), after which he accompanied **PW1** to the hospital where they found the accused person nursing the deceased. He confirmed that **PW1** then took the accused to the Police Station; and that the deceased died four days later. He further confirmed that he sold land to the deceased and that his home was only 200 meters away from the scene of the crime.

[4] **Moses Kipsaina Biwott (PW4)** told the Court that he was sleeping in his house on the night of **25 June 2013** at about 10.00 p.m. when he heard some screams; and that on coming out of his house, he got to know that it was the accused person who was screaming to the effect that the son of his father had been burnt inside the house, with reference to the deceased, whose house was only 100 metres away. By the time he went to the scene, the deceased's house was already burnt and the fire was huge. He was joined by **Joseph Ondari** and **Charles Kibiwott**. They then heard the voice of the deceased calling out from the water tap area, saying he had been burnt and needed help. They immediately responded and took the deceased to **Kapsabet District Hospital**, along with the accused.

[5] One of the other neighbours of the deceased, **Jane Cheng'etich (PW2)** testified that at about 7.00 p.m. the accused went to her house and told her that her husband had annoyed her and that he did not know that she could burn him in the house. Her evidence was that the deceased's house was only 100 metres away from hers; and that shortly after the accused left her house, she heard some noises outside and on going out she saw the deceased chasing the accused while armed with 2 pangas; whereupon she intervened and asked the deceased to leave the accused alone. She further stated that the deceased then went back to his house and she went into her house and slept. When she woke up the following morning at 7.00 a.m. she got to learn that the deceased's house had been burnt down; and on going to the scene, she learnt from neighbours that the deceased had been burnt and had been taken to hospital. She confirmed that the deceased later died after about one week from the date of the incident.

[6] **Moses Kipkorir Chepkwony (PW5)** is one of the brothers of the deceased. His evidence was that on **28 June 2013** while at home in **Kobujoi**, Aldai Constituency in Nandi County, he was engaged in the process of making arrangements for the burial of their father when he received information that his brother, **Simeon** had been burnt on **25 June 2013** and had been taken to **Kabsabet Hospital**. He too confirmed

that the deceased died after one week of his admission in hospital. He was then asked to be present for purposes of the postmortem examination, which he did alongside his other brother, **Wilson Chepkwony**. He further told the Court that, to his knowledge, the deceased was married to one **Alice Chepkwony** and had sired children with her; and that the accused was not introduced to them by the deceased. He added that the deceased had bought land away from the family and therefore he did not know the details about his life as at the time of his demise.

[7] **PC Jackson Ingolo, PW6**, who testified on **17 December 2018**, told the Court that, he was, at the material time attached to **DCI Kapsabet**, when the chief of Kamobo Location, **Benjamin Lulei (PW1)** went to his office accompanied by **Michael Kipkoech (PW3)** and the accused person, **Jane Chebet**, to report that on **25 June 2012**, the deceased got burnt in his house, and had been taken to **Kapsabet District Hospital** for treatment. He further testified that, upon being instructed to take over the investigations, he visited the victim who was admitted in Ward 7 at **Kapsabet District Hospital** and found him in critical condition and arrested the accused for the offence of attempted murder. He then re-visited the deceased and found him awake. He accordingly thus stated that he recorded his statement; which the deceased was unable to sign because his whole body, including his hands, had been burnt.

[8] **PW6** further told the Court that after interviewing the deceased in hospital before his death, he visited the scene and confirmed that the deceased's semi-permanent house had been completely burnt down. He thereafter arranged for postmortem to be conducted on the body of the deceased by **Dr. Ismail. PW6** produced the Postmortem Form as the **Prosecution's Exhibit No. 1** herein. He similarly produced a piece of burnt timber that he collected from the scene as well as a rough sketch plan he drew at the scene. They were marked **Prosecution's Exhibit 2 and 3**, respectively.

[9] On his part, the accused told the Court that the deceased returned home drunk on **24 July 2012** with some vegetable seedlings which he instructed her to plant. The following day, he picked a quarrel with her over her choice of the place in which she had planted the seedlings and beat her for it. She explained that in the ensuing struggle, she managed to escape and could see the deceased chasing her while armed with two pangas. She then ran to the house of one of her closest neighbours, **Jane Chepng'etich (PW2)** for refuge, but **PW2** would have none of it out of fear that the deceased could harm her. It was therefore her evidence that she ran towards the stream and crossed to the opposite ridge from where she saw her house ablaze. She then ran back to the scene screaming to alert the neighbours; and that some neighbours came out and rescued the deceased from the inferno. He was then taken to **Kapsabet District Hospital** for treatment and she was there nursing him when she was arrested.

[10] The accused denied that she uttered any words to **Jane Chepng'etich (PW2)** to the effect that the deceased did not know what she was capable of doing or that she would burn their house. She, in particular, denied having set their house on fire with the intention of murdering the deceased. She concluded that if she had bad intentions, she would not have seen to it that the deceased was taken to hospital, or taken care of him there.

[11] **Section 203** of the **Penal Code, Chapter 63** of the **Laws of Kenya**, pursuant to which the Accused was charged provides that any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show are: the fact of death; that the death was caused by the Accused by an unlawful act; and malice aforethought on the part of the Accused Person. This was succinctly stated in **Republic vs. Andrew Omwenga [2009] eKLR**, thus:

"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

(a) The death of the deceased and the cause of that death.

(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."

[12] There is also no dispute that the cause of death of the deceased was multi-organ failure due to the 80% burns that the deceased sustained. It is also not in dispute that the deceased sustained the burns when his house was set ablaze; a manifestly unlawful act on the part of the perpetrator. Accordingly, the only issues for determination are whether the Prosecution has proved beyond reasonable doubt that the unlawful act was committed by the accused; and whether she did it with malice aforethought. And **Section 206** of the **Penal Code** provides that:

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.

[13] From the evidence herein, there is no direct evidence linking the accused to the fire incident. What the Prosecution relied on is pure

circumstantial evidence in respect of which it was held in **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135**, by the Court of Appeal for Eastern Africa thus:

“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 reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

[14] The accused denied the contention by **PW2** that he had uttered threats of any kind to harm the deceased; and indeed, it was the evidence of **PW2** that after she turned the accused away that night, she ran away, while the deceased went back to his house. Thus, the contention by the accused that she crossed the stream to the neighbouring ridge from where she saw her house on fire and returned to the scene to seek help is totally uncontroverted and ties in with the evidence of **PW4** that the accused went to the rescue of the deceased and drew the attention of their neighbours to the incident.

[15] The accused also mentioned that there was a tin lamp locally known as “koroboi” placed on a stool next to the bed when the deceased returned home. The contention of the accused was that the deceased was drunk. This was assertion was not displaced by the Prosecution. Thus, the Prosecution did not rule out the possibility that the incident was purely accidental. In the premises, it is my finding that the accused’s version of events has cast reasonable doubts and offered a plausible explanation which was not explained away by Prosecution. I would, as required by the law, resolve those doubts in the accused’s favour and find her not guilty of murder and acquit her thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2019

OLGA SEWE

JUDGE