



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CRIMINAL CASE NO. 18 OF 2017.**

**REPUBLIC.....PROSECUTOR**

**VERSUS.**

**MNW.....ACCUSED**

**JUDGMENT.**

The accused MNW was charged with offence of *Murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya*. Particulars of the Offence being; *On the 26<sup>th</sup> day of March, 2017 in Webuye West within Bungoma County, Murdered* FWW.

case for the Prosecution is that on 2.3.2017 Pw1 Grace Wangila Monaki was at her house at 3p.m. when she heard a person screaming “mama nakufa” (mother I am dying). She ran to where the person was screaming with her daughter Sharon on arrival she found the deceased FW who had burnt injuries on the face. The deceased told her the wife (accused) had poured hot water on him she administered first and motor cycle rider came and took him to hospital. Pw2 Dorcas Nekesa Mamoli was at her house when she heard a person screaming. She ran there and found the deceased who told him that he was lying on his bed when his wife the accused poured hot water on him. They made arrangements and he was taken to hospital. Pw4 BW the daughter of deceased and accused testified that she saw the mother pour hot water on deceased when he was asleep in bed. She in Cross Examination testified that deceased had beat the accused on that day. Pw6 Dr. Edward Vilembwa who performed the Post mortem found that the deceased had extensive facial burns with deep burns around the eye. Skin had peeled off around the face, and 18% 3<sup>rd</sup> degree burns in the head. He formed opinion that cause of death was due to 3<sup>rd</sup> degree burns.

The accused gave sworn evidence in her defence. She testified that the deceased was her husband. On 26.3.2017 while she was preparing lunch the deceased came with another woman. He left the woman in the sitting room and came to the kitchen. A quarrel ensued and he hit her. They started fighting and he fell on hot water. He stood up and went out. People came. He was taken to Hospital. She was arrested and charged in Webuye Cri. 129/2017 and when he died she was charged with present offence.

At the conclusion of the trial Mr. Anwar Counsel for the accused submitted in his written Submissions that for the prosecution to succeed in an offence of Murder, it must prove that deceased died; that the accused caused the death; that accused had malice aforethought when committing the offence. He submitted that the fact of death is not disputed; the cause of death is also not in contention. He submits that it is accused who caused the death as the only eye witness. Pw4 BW’s testimony was not credible. If the court were to find that it is accused who inflicted the injuries, no malice aforethought was established in this case. Counsel finally urged this court to dismiss the charges and acquit the accused.

Mr. Oimbo for the prosecutor submitted that the state has proved the fact and cause of death through prosecution witness’s evidence and corroborated by the accused in her defence evidence. Counsel for state further submitted that though the evidence of Pw4 who stated how the accused deliberately poured hot water on the deceased with aim of causing him grievous harm. Counsel for state, submitted that accused was positively identified and even during her testimony she admitted being at scene of crime. Finally Counsel urged the court to dismiss the accused defence and find the accused guilty as charged.

The accused was charged with the offence of Murder Contrary to Section 203 and read with Section 204 of the Penal Code.

In Lodwar High Court, *Republic Vs. Joseph Ekai Lomongin* [2018] eKLR this court stated that in an offence of murder the prosecution must establish the three ingredients of the offence;

- 1) The killing or fact of death of the deceased;**
- 2) existence of malice aforethought or mens rea and**
- 3) the unlawful act or omission on the part of the accused the actus rheus.**

**4) That it is the accused who inflicted the injury.**

The fact and cause of death was established by the evidence of Pw6 Dr. Edward Vilembwa who testified that he performed a Post mortem on body of the deceased and found he had extensive facial burns with deep burns around the eyes, skin had peeled off on the face, and on the head. He found opinion that cause of death was due to Cardio-pulmonary arrest due to 3<sup>rd</sup> degree burns.

The evidence by the prosecution is that it is accused who caused the death. The prosecution submits that identification of the accused as the one who caused death is not in dispute. Prosecution submits that even the in her defence admits to being present at the scene of Crime. Prosecution submits that evidence adduced placed the accused at the scene of the murder.

From the evidence the deceased died as a result of injuries sustained from hot water being poured on him. Pw4 BW the daughter of both accused and deceased who was aged 8 years testified that she saw the accused pour hot water on the deceased who was lying down on a bed. Upon cross – examination she testified that the deceased had beaten the accused the previous day. Pw1 Grace Wangila responded to screams and ran to the home of deceased. She found the deceased walking from his house to the road. She observed he had injuries and deceased told her accused had poured water on her. The deceased was then taken to hospital. Pw2 Dorcas Nekesa also responded to screams and went to where deceased was who informed him that hot water had been poured on him by the accused. Pw3 APC Peter Muthini went to the scene and found the deceased in pain screaming “Nisaidie” they looked for motor cycle riders who took him to hospital. The accused was at the scene and they arrested her.

The accused in her defence testified that she was at her house at 12.30p.m. preparing ugali when deceased came with another woman who sat in the sitting room. The deceased then came to where she was and told her not to look in his house. He then hit her with s stick. She held him and disarmed him of the stick. They then continued fighting and in the course of the struggle he fell on the hot water. He stood up and went out. At this time he appeared drunk. As a result of the screams, people came and she was arrested by police. The substance of her testimony is that she did not pour hot water on him but he fell on the hot water when they were struggling.

Pw4 BW who was the only witness in the house testified that accused did pour hot water on the deceased. When cross – examined by Mr. Anwar Counsel for accused she stated;

*“Accused boiled water with firewood. I saw her pour water on head. She poured water on his chest. My father beat her I did not record statement at police. Father used to beat accused severely.”*

Mr. Anwar submits that the court should not believe this witness. I do not think so. She was the eye witness and giving allowance for her age, she was consistent that it is accused who poured hot water on the deceased. Even under intense Cross - examination, this witness remained consistent. I therefore find her evidence credible on the issue that it is accused who poured hot water on the deceased.

The last issue is whether the prosecution has established malice aforethought as the part of the accused. Section 206 of Penal Code defines malice aforethought;

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

*(a) an intention to cause 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 the 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.*

The accused is an adult and knows that pouring hot water on a person would cause grievous harm as a nature consequence. She poured hot water on the deceased who sustained serious injuries from which he died. Having known the natural consequence of her act, I am satisfied that she had the necessary malice aforethought when she committed the offence.

After considering all the evidence I am satisfied that the deceased died as a result of accused pouring hot water on him and not that he fell on the boiling water as the accused contends. I am therefore satisfied that the prosecution has established its case beyond reasonable doubt. I find the accused guilty of the offence of murder Contrary to section 202 as read with Section 203 of the Penal Code and convict her accordingly.

**Dated and Delivered at BUNGOMA this 23<sup>rd</sup> day of October, 2019.**

**S.N. RIECHI**

**JUDGE.**