



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO 19 OF 2012

FORMERLY NYERI HC CRIMINAL CASE NO 52 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

P M M.....ACCUSED

J U D G M E N T

1. The Accused in this case, **P M M**, is charged with *murder* contrary to **section 203** as read with **section 204** of the *Penal Code*. It is alleged in the information dated 10/11/2009 that in the night of 23rd and 24th July 2009 in Murang'a West District within Central Province, he murdered one **L N**.
2. On 26/11/2009 the Accused pleaded not guilty to the charge. Eventually the file was transferred to this court.
3. The Accused's trial commenced on 08/04/2013 before my predecessor, *Ngaah, J* who took the testimonies of eight prosecution witnesses. I took the testimonies of the remaining two prosecution witnesses, as well as the Accused's defence which he gave under oath. He did not call any other witness.
4. The Accused's trial has taken an unacceptably long period of time; mainly due to non-availability of prosecution witnesses. On 24/06/2016 the court granted him bail, but he was apparently not able to meet its terms and remained in custody.
5. It is not in dispute that the Deceased was the Accused's customary law wife with whom she had lived for about a year before her death. Her three children (not fathered by the Accused) lived with them. These children included PW2 (**C W**) who was about 13 years old when she testified on 08/04/2013. That means that at the time of the incident the subject of these proceedings on 24/7/2009 PW2 was about nine (9) years old. Her testimony was not under oath.
6. It was also established by the postmortem report (*Exhibit P2*) produced in evidence by a police officer (PW10: **PC Isaiah Jilo**) under **section 77** of the *Evidence Act, Cap 80* that the Deceased died from complication associated with severe burns (2nd and 3rd degree) she had received in her face, trunk, upper limbs and left lower limb. That complication was *septicaemia*. It would appear that the Deceased had other injuries that could not have contributed to her death.
7. The Deceased received the burns that caused her death while at her home on the evening of 23rd July 2009. It is the prosecution case (through the testimonies of PW1 (**G M W** – Deceased's father), PW2 (Deceased's daughter) and PW3 (**R N M** – Deceased's mother) that these burns were caused by the Accused after he tied up the Deceased's limbs, doused her in kerosene from a tin lamp and lit her.
8. The prosecution called no direct independent evidence. Its case is founded upon circumstantial evidence and an alleged dying declaration by the Deceased.
9. The circumstantial evidence was to the effect that the Accused frequently abused the Deceased physically until he finally burned her. The evidence of physical abuse was in the testimony of PW2, who said that she witnessed the beatings, and also in the testimonies of PW1 and PW3 to whom PW2 reported the beatings. In the view of PW1 these beatings were so frequent and bad that at one point he decided to go and get the Deceased and her children to come back to her maiden home (PW1's and PW3's home). He did so with the assistance of an elder (PW4: **Zachariah Mwangi Maingi**) and the local Chief (PW8: **Thomas Maina Kirubi**). But only three days after she was taken to her maiden home, the Deceased returned to the Accused's home, apparently voluntarily. There was evidence that there had been similar previous incidents where the Deceased would go back to her parent's home after quarreling with the Accused, but shortly thereafter she would go back to the Accused apparently after reconciling.
10. The Deceased's dying declaration was allegedly given to PW1 and PW3. It is not clear from their testimonies whether they were

together or whether the Deceased talked to them separately. The dying declaration was allegedly that the Accused had tied the Deceased's limbs, doused her in kerosene and lit her up. He then locked her in the house after telling her that he would come back only when she was near death.

11. This dying declaration was allegedly given while the Deceased was undergoing treatment at Kenyatta National Hospital. The available evidence was that she was there for about three (3) weeks or so after she was referred from Murang'a District Hospital. There is no doubt that she was in a bad way and was probably in the Burn Unit at the hospital under intensive care.

12. There is absolutely no evidence of the time when the dying declaration was given in relation to the period when the Deceased was in the hospital. Was it at the beginning, or in the middle or towards the end? What time of day was it? What day was it? There is no evidence whether there were any other persons present – doctors, nurses, etc.

13. There is also no evidence at all of the Deceased's physical and mental state when she allegedly made the declaration. Was she in great pain? Was she sedated? Her burns involved the face, *inter alia*. Was that face covered in bandages when she allegedly made the declaration? Evidence relating to these issues could easily have been given by the doctor or doctors and nurses attending the Deceased.

14. There is also evidence of a number of opportunities when the Deceased would have spoken up and said who caused her burns, or how they were caused. She did not.

15. Against the prosecution case as laid out by PW1, PW2 and PW3 there is the Accused's defence given under oath. That defence is that when he came home in the evening of the material day he found the Deceased on fire in the house. The fire had apparently come from a tin lamp which he saw overturned on the floor. He put out the fire using a blanket. He then went out and called his mother (PW7: **J W M**), his brother (PW6: **D K M**) and his niece (PW9: **J W W** and others to come and help. Eventually he and others took the Deceased to Murang'a District Hospital; afterwards he escorted her by ambulance to Kenyatta National Hospital. He denied that he had doused the Deceased in kerosene and burned her. It was his case that the Deceased burned herself either accidentally or deliberately.

16. The evidence alone of physical abuse of the Deceased by the Accused does not irresistibly point to his guilt in respect to her catching fire and sustaining the injuries that caused her death. There was evidence of reconciliation between the two whenever there were such fights, and the Deceased apparently went back to the Accused voluntarily. Not all abusive husbands eventually kill or maim their wives.

17. Dying declarations must always be approached with circumspection. The court ought to be satisfied in the first place that, as a matter of fact, the deceased said the words he or she is said to have stated that amount to a dying declaration. In the present case there was not sufficient evidence of the circumstances in which the Deceased is alleged to have made her declaration. There is serious doubt that in fact she told PW1 and PW3 the words that she allegedly did.

18. The Accused faces a very serious charge. The prosecution's burden of establishing beyond reasonable doubt all the ingredients of murder has not been discharged. The Accused is entitled to acquittal, and he is hereby acquitted. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL 2018.

H P G WAWERU

JUDGE