



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 96 OF 2010

REPUBLICPROSECUTOR

VERSUS

BONIFACE LITUNYA OWENDO.....ACCUSED

JUDGMENT

1. The accused **Boniface Litunya Owendo** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged in the particulars that on 19th November 2010 at Njiru Estate in Nairobi East District within Nairobi, the accused murdered **Mueni Syombua Munuve**.

2. The prosecution called a total of ten (10) witnesses. It emerged from the prosecution evidence that the accused and deceased were cohabiting in a single room accommodation in a plot in Njiru. It was the prosecution case that the accused doused the wife with paraffin and set her ablaze, as a result of which she suffered severe burns leading to her death. **Rose Anyanzwa (PW1)**, the step-mother to the accused confirmed that the accused and the deceased were living together as husband and wife. She learnt about the incident from neighbours. She visited the deceased in hospital and later learnt that the deceased had died. **Nahashon Karobia Wang'ombe (PW2)**, who was the landlord of the residence where the accused and the deceased lived, testified that he learnt about the incident from one of the tenants. He inspected the house and found pieces of burnt clothes and smoke on the wall.

3. **Lilian Chepngetich, (PW6)** who was the immediate neighbour of the accused and the deceased, testified that on the material date, she heard the deceased screaming. Shortly thereafter, she saw the deceased being kicked out of the house by the accused, while on fire. The accused took the deceased to hospital. On the way, they were intercepted by Administration Police Officers, **No. 86007975 Cpl. Protus Mauso (PW4)** and **No.93049679 Cpl Fred Githure, (PW5)** who were on their way to the crime scene having been informed by a member of the public that the accused was burning the deceased. **PW4** and **PW5** arrested the accused then and directed some members of the public to take the deceased to hospital. The deceased was admitted to Kenyatta National Hospital and passed on while undergoing treatment. Scene of crime officer **No 65323 Cpl. Shem Ondieki Mogaka (PW8)** took photographs of the body of the deceased.

4. **PW10, No. 38026 Cpl. Joseph Ochieng** assisted in the investigations that had been commenced by PC Mokaya who did not testify. **PW10** had the accused examined by the doctor, **Dr. Zephania Kamau (PW7)** who confirmed that the accused was mentally fit to stand trial. The police could not trace the family of the deceased and enlisted the services of a fingerprints expert to assist with her identification. **Edwin Owino Obaji (PW3)** of the National Registration Bureau undertook the analysis of the fingerprints but could not trace any matching fingerprints from the national database of registered

persons. A postmortem on the body of the deceased was carried out by Dr. Media. The report was produced in court by **Dr. Andrew Kanyi Gachie, (PW9)** a pathologist and forensic expert in place of Dr. Media who could not attend court.

The defence case

5. The accused gave an unsworn testimony in his defence and did not call any witness. He admitted the fact of marriage to the deceased. He testified that on the material day, the deceased got home late at 9.30 p.m. When he inquired from her as to why she had come home late, she retorted that it was indeed the accused who came home late, further inquiring from him about women who visited the accused. They had a quarrel over an accusation that he had extra-marital affairs. According to the accused, the deceased was drunk and she admitted to having gone to drink in the company of some women and a man. The accused said that he left for a nearby shop and shortly thereafter returned to the house.

6. The accused further said that he heard a scream and he rushed back to the house to find the deceased screaming, with her face burning. He removed her from the house as he tried to put out the flames. He poured water on her and eventually managed to put out the fire. He was arrested by Administration Police officers as he was taking his wife to hospital. He learnt of his wife's death while in custody. At the close of his unsworn statement, the accused denied killing the deceased, stating that she tried to throw the stove at him but he managed to catch it and hurled it back at her.

Submissions

7. Submissions were filed on behalf of the accused by his learned counsel, Mr. Anambo. He submitted that there was no direct evidence to show that the accused had set the deceased on fire, or that even if he had, that his actions were a premeditated. That there was a possibility that the incident was accidental since both the accused and the deceased were drunk. Counsel further submitted that the accused had been grossly provoked by the deceased and thus, the ingredients of the offence of murder had not been proved. He emphasized that the prosecution, besides failing to produce direct evidence to show the accused set the fire, did not present evidence to show the intent of malice on the part of the accused. He urged the court to acquit the accused, or in the alternative, should he be found culpable in any way, the charges to be reduced to manslaughter. In rejoinder to the oral submissions by the prosecution, Mr. Anambo added that the conduct of the accused was not consistent with a person who intended to murder the deceased since he proceeded to take her to hospital.

8. In its submissions, the prosecution maintained that the offence had been sufficiently proved. While recalling the evidence adduced, **Mr. Okeyo** for the prosecution submitted that the accused had appreciated that his act of throwing the lit stove to the deceased would cause her grievous harm or result in her death. He submitted that his action showed that he had the intention of causing her death as she would have been burnt or killed by the resulting fire. In further submissions, Counsel stated that the accused provoked the deceased by accusing her of engaging in extra-marital affairs.

The Law

9. For the offence of murder to be proved, the prosecution is expected to prove beyond reasonable doubt the following elements of the offence of murder as set out under **Section 203** of the Penal Code. These are, the unlawful death of the deceased that such death was caused by the accused; and, that in so acting, the accused had acted with malice aforethought.

Death and cause of death

10. It is not in dispute that the deceased died on 23rd November 2010. A death notification and burial permit (Exh. No. 4) were both exhibited in court. She had sustained burns on 19th November 2010 and was admitted to Kenyatta National Hospital where she died while undergoing treatment. A post-mortem that was conducted by Dr. Media on 3rd January 2011 on the partially decomposed body revealed that the

deceased had sustained 2nd and 3rd degrees burns over the face, neck, back, thigh region and buttocks, but there were no internal injuries. According to the post mortem report that was produced in court by **PW9, Dr. Gachie** the cause of death was complications of 37.5% burns of the 2nd and 3rd degrees. These burns were on the face, neck, anterior and posterior torso and left thigh region.

Whether the accused caused the unlawful death of the deceased.

11. The accused challenged the prosecution evidence on two-fronts: firstly, that there was no direct evidence to show that the accused had set the deceased on fire, and secondly, that even if that were the case, no evidence was produced to show that his actions had been premeditated.

12. It is true as seen from the prosecution evidence summarized above and as contended on behalf of the accused that no prosecution witness testified to have directly witnessed the accused setting the deceased ablaze. This case therefore rests on circumstantial evidence. Circumstantial evidence is nevertheless reliable evidence if properly evaluated. As stated in the case of **Mwangi vs. Republic [1983] KLR 522**:

“An offence of murder can be established by evidence tendered directly pointing it or by evidence of facts from which a reasonable person can draw the inference that murder has been committed.....” In **Rep. Vs. Kipkering arap Koske & Another, 16 EACA, 135** the predecessor Court of Appeal stated thus:-

(i) The circumstances 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 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.”

In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

13. The circumstances upon which the prosecution relied on to link the accused to the death of the deceased arise from what took place within the accused’s house and what the witnesses saw or heard. **PW1** who was the accused’s mother only learnt about the incident later. She heard from the accused’s neighbours that he had fought with his wife and that she was burnt. She went to see her in Kenyatta National Hospital. Their landlord’s agent one Nahashon testified as **PW2**. He told the court that one of the tenants (Mama Shiko) told him that Bonny (the accused) had burnt his wife in the house. He went and found pieces of burnt cloth, a burnt curtain and visible signs of smoke on the wall. He did not witness the incident. He was however aware that the accused and deceased used to fight as he had heard the same from the other tenants. All these evidence unless corroborated would be hearsay evidence.

14. The only witness who was present at the scene was one Lilian Chepng’etich (**PW6**). She told the court that she was within the plot and in her house cooking at about 9p.m. when she heard the deceased scream. She was aware that both the accused and deceased were inside their room. She was familiar with Mueni’s (deceased’s) voice. She checked and found their door and window locked. Shortly she saw the deceased being pushed out by the husband. He kicked her and her clothes were on fire. At that time the deceased was screaming “*Nisaidieni nakufa*” (help me, I am dying). One of the neighbours called the police.

15. From the account given by **PW6**, both the accused and the deceased were in the house when the

incident happened. She had first heard the deceased screaming. She stated in cross-examination that when she got out, the door of the house was closed, and both the accused and the deceased were inside the house. PW6 then saw the accused push the deceased outside and kick her; the deceased was already aflame. Considering the account given by PW6, I find the defence advanced by the accused unbelievable. Initially, the accused seemed to suggest in his defence that he was not in the house when the deceased got burnt. He had intimated that he was not in the house and only rushed back to find the deceased's face burning. Later in his defence, the accused stated that it was his wife who tried to hit him with a stove, but he managed to catch it and hurled it back at her. His defence was completely inconsistent.

16. According to **PW4**, and **PW5**, the accused stated that he had burnt his wife in the midst of a quarrel over money she had used to buy beer. PW4, stated that the accused had told them the he doused his wife in paraffin and set her on fire for taking his money to go and drink with other men. The two witnesses corroborated each other on this account. This statement was made when the police officers encountered the accused she was taking the deceased to the hospital.

17. However, I observe that the narration by the accused to the police (PW5 and PW4) when they encountered them on the way to the hospital and the statement given by the accused at the police station is in the nature of incriminating evidence. Indeed, the elaboration by PW4 that the accused had told them the he doused his wife in paraffin and set her on fire amounts to an admission of culpability on the part of the accused. As **Section 32 of the Evidence Act** states, a confession means '**any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence.**'. I observe however that no confessional statement was taken from the accused as stipulated by the Evidence Act and in conformity with the the Evidence Act (Out of Court Confessions) Rules. Thus, any statement that the accused may have made to the two administration officers admitting the offence, is therefore not admissible.

18. Both PW4 and PW5 however also testified that the deceased, who was badly burnt, was talking, albeit with difficulty, when they encountered the accused taking the deceased to hospital. PW5, who corroborated the account by PW4 elaborated further when he stated that added that the deceased was talking at the time saying that the accused had burnt her after accusing her of taking his money. This statement by the deceased in my view is admissible, under the Evidence Act. **Section 33** provides that:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

19. Taken cumulatively, the evidence considered above leads me to the conclusion that indeed the accused caused the burns on the deceased thereby leading to the death of the deceased. I have found no other co-existing circumstances which would weaken or destroy the inference of guilt. What PW6 saw and heard, the deceased clearly stated to PW4 & PW5 that she had been burnt by the accused while the accused himself admitted in his unworn defence that he had hurled a lit stove at her. I have no doubt in my mind that it is the accused and none else who caused the unlawful death of his wife the deceased.

Whether the accused acted with malice aforethought

20. In order to establish the offence of murder, the prosecution must prove that the accused acted with malice aforethought. **Section 206** of the Penal Code sets out the circumstances that demonstrate malice

forethought as follows:

“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) -

d) – ”

21. This provision of the law was interpreted by the Court of Appeal in *Nzuki v Republic* [1993] KLR 171 where it stated thus:

“Before an act can be murder, it must be aimed at someone and in addition, it must be act committed with of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is serious risk that the death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a result of those acts.’

22. In the present cases, the prosecution argued that by throwing the lit stove at the deceased, the accused appreciated that such an act would cause grievous harm or result in the death of the deceased, thus demonstrating that the accused had the necessary intent to cause the death. **PW7, Dr. Zephania Kamau** who examined the accused some days after the incident, observed that he had healing burns on the lower thigh of his left leg. PW6 was a neighbour of the accused and the deceased stated that he heard the deceased scream and when she got outside, she saw the accused push the deceased outside. The deceased was aflame. She suffered 2nd and 3rd degree burns leading to her death. The photographic evidence produced by PW8 showed horrifying images of the deceased’s badly charred body. In fact the hands had no visible flesh. Attempts to trace her fingerprints at the registration bureau bore no fruit as the fingerprints could not be effectively generated. PW3 testified that the fingerprints were not complete. The fingerprint forms [exhibit No. B(i) & (ii)] were returned with the remarks *“right hand palm burnt beyond recognition only bones left and left fore finger and little finger burnt beyond recognition, only bones left”*

23. I am convinced beyond reasonable doubt that the accused had intention to cause grievous bodily harm to the deceased causing her subsequent death. I am satisfied that the evidence does connect the accused to death of the deceased. Indeed, after the deceased was heard screaming, PW6 saw the accused kick the deceased who was already on fire. Furthermore, the extent of the injuries suffered by the deceased as captured in the photographic evidence showing gory images of the badly burnt body support the view that the accused had an intention to cause the death of or to do grievous harm to her.

24. This court was urged to consider that even if the accused were responsible for the death of the deceased, he did not possess the necessary *mens rea* for the offence of murder to be proved. Counsel for the accused also asked to consider that the death of the deceased was as a result of an accident and that the accused had been provoked by the deceased.

25. **Section 207** of the Penal Code provides for the defence of provocation thus:-

‘When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.’

26. In **Peter King’ori Mwangi & 2 others v Republic Criminal Case No. 66 of 2014 [2014] eKLR** the Court of Appeal interpreted the defence of provocation in the following terms:-

‘We start from the premise that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy (1949) 1 ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”

Inherent in this definition at common law is the requirement of two conditions to be satisfied for the defence to be made out, namely:-

§ The “subjective” condition that the accused was actually provoked so as to lose his self-control; and

§ The “objective” condition that a reasonable man would have done so”.

27. For the defence of provocation to stand however, it must be shown that the accused committed the act in the heat of passion caused by sudden provocation, which deprived him of self-control. In the present case, the accused indicated in his defence that they had quarreled on the material night after the deceased came home late. He indicated that the deceased retorted back and accused him of being involved in extra marital affairs. The accused also stated that the deceased was drunk. It appears that there was a quarrel between the accused and the deceased on the material night. **PW5**, testified that the accused had indicated at the time of arrest that he had burnt his wife in the midst of a quarrel over money she had used to buy beer. **PW4** also stated in his evidence that the deceased had indicated that the accused had burnt her after accusing her of taking his money.

28. Considered together the evidence above point to some existence of conflict between the accused and the deceased. This conflict did not seem to have started on the material night. According to **PW1**, the deceased had informed her that she was having domestic problems with the accused and that she was contemplating leaving him since both of them were drunkards and that the accused was constantly inquiring of her whereabouts.

29. The accused gave two differing accounts on what transpired on the material night before the alleged incidence. On one part, he stated that he had left the house and as he returned, he heard a scream and rushed to find the deceased burning on her face and tried to put out the fire. On another part, he stated that the deceased tried to hit him with a stove, but he managed to catch it and hurled it back at her. I dismissed this explanation earlier on the strength of **PW6**’s account that the accused and the deceased were together in the house at the time the deceased suffered burns. Nevertheless, I find that the evidence as adduced does not render the defence of provocation available to the accused. The accused may have been angry but it was continuing anger based on their on-going conflict arising from allegations of unfaithfulness and wastefulness. It could not have been sudden provocation.

30. The other issue raised by counsel for the deceased is that the incident was accidental since both the accused and the deceased were drunk at the time, thus the accused could not have possessed the necessary malice aforethought. Even if this defence was not advanced by the accused, the court is under a duty to

address itself to the issue once it emerges from the evidence. Generally, intoxication does not serve as a defence to any criminal charge, unless under the parameters provided for under **section 13** of the Penal Code which reads:

‘(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.’

31. The defence of intoxication was considered by the Court of Appeal in **John Kaberi Njoroge Vs. Republic, Criminal Appeal No. 186 of 1987**. It cited the case of **Michael Sheehan and George Alan Moore, (1957) 60 Cr. App.R. 308 at page 312** where Geoffrey Lane, L.J. observed: *“In cases where drunkenness and its possible effect upon the defendant’s mensrea is in issue,....the mere fact that the defendant’s mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless intent. The jury should merely be instructed to have regard to all the evidence including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.”*

32. The accused when raising a defence of intoxication must show that at the time of the alleged act, he did not know that his act was wrong or he did not know what he was doing. In this case, PW6 testified that when she heard the deceased screaming, she came out, and she saw the accused push the deceased outside, by which time the deceased was aflame. The accused poured water on the deceased and proceeded to take her to hospital, and even narrated to the police (PW4 and PW5) what had happened. This taken together with the defence advanced, is not in my view, consistent with the conduct of a person who did not know what he was doing, or that what he did was wrong. He may have been drunk as observed by PW4 but he definitely comprehended the incident. The totality of the evidence demonstrates that the accused knew what he was doing and that the defence of intoxication cannot be available to him. He may have been drunk but as stated by Geoffrey L.J., “a drunken intent is nevertheless intent.” The accused cannot evade responsibility for the heinous murder of his wife. Having considered and dismissed both the defence of provocation and intoxication aforesaid, I find and hold that the accused had the *mens rea* to kill the deceased.

33. As I sign off this judgment I observe that this case sadly demonstrates the fatal consequences of domestic violence. Domestic violence continues to be a problem in Kenya today, as evidenced by increasing number of reported cases and murder cases ending in our courts. Perpetration of domestic

violence does not however exonerate a person from criminal liability as the conduct in question is an offence under the law. Once the ingredients of murder are proven beyond reasonable doubt, as in this case, a conviction must follow notwithstanding the spousal relationship. It is time that the relevant institutions of government, non-state actors, community and religious organizations among others took up the challenge and urgently devise interventions aimed at stemming the unlawful loss of life in families through domestic violence.

34. In the final analysis, I find the accused guilty of the murder of his wife Mueni Syombua Munuve contrary to Section 203 as read with Section 204 of the Penal Code. He is accordingly convicted.

Judgment Dated, Signed and Delivered at Nairobi this 30th day of January, 2017

R. LAGAT-KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For the accused

.....: For the State