



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 20 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

POLYCARP ONYANGO YOGO 1ST ACCUSED

MARGARET LICHA YOGO 2ND ACCUSED

JUDGMENT

1. At the time of his death **DERICKSON OTIENO ONYANGO** (“the deceased”) was about 12 years old. His father, **POLYCARP ONYANGO YOGO**, who is the 1st accused, passed away in the course of the trial while the 2nd accused, **MARGARET LICHA YOGO**, is his grandmother. On 7th May 2014, this court was informed that they had murdered the deceased on 27th March 2014 at East Kachieng Sub-location, Ndhiwa District of Homa Bay County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The accused pleaded not guilty. The prosecution called marshalled seven witnesses while the 2nd accused (hereinafter “the accused” unless the context denotes otherwise) elected to make an unsworn statement.
2. The circumstances leading to the deceased death were narrated by S O O (PW 2) who gave unsworn testimony after a voire dire examination. He testified that he knew both accused and the deceased since they were close neighbours. He recalled that on 27th March 2014, he and the deceased went to look for firewood after school hours. The 1st accused sent some boys call the deceased but they told the boys to go away. Thereafter they started playing football whereupon the 1st accused came for the deceased. The deceased tried to run away but the 1st accused caught him and they left together. PW 2 stopped playing and began to watch what was happening.
3. PW 2 told the court that the 1st accused took the deceased back to the homestead and started accusing him of stealing the 2nd accused’s jaggery. The 1st accused started beating the deceased and tied him to a tree. In the meantime, the 2nd accused came out of her house holding a yellow container of paraffin which she poured on the deceased. PW 2 further recalled that the 2nd accused went back to her house and came back with matches which she gave to the 1st accused who lit a match stick and threw it at the deceased.
4. PW 2 further testified that the deceased started burning but when the rope he was tied with burnt;

- he became free and started running towards PW 2's home. PW 2 and other boys who were with him followed and helped put off the fire. The deceased collapsed thereafter and the 1st accused came and took him home. PW 2 noted that the deceased's abdomen and back had been burnt.
5. The deceased's mother, Susan Aoko Omogi (PW 1) was not at home when the incident took place but was later informed that night that her son had been beaten and set on fire by his father and grandmother on suspicion that he had stolen his grandmother's jaggery. She went to see him at Homa Bay District Hospital very early in the morning on the next day. She recalled that the deceased had burn injuries on his front side, arms and back.
 6. PW 1 further testified that on 30th March 2014, at about 7.00am, police officers from Ndhiwa came to hospital and recorded the deceased's statement. The deceased was later referred to and admitted at Jaramogi Oginga Odinga Hospital where he died while undergoing treatment. PW 1 identified the deceased body when the postmortem was conducted on 8th May 2014.
 7. Corporal William Kapkoris (PW 3) testified that on 28th March 2014 at about 7.30 am, he was instructed by his Commanding Officer to collect the 1st and 2nd accused, who were suspected of assaulting the deceased, from Homa Bay Police Station. He proceeded there and escorted them to Ndhiwa Police Station. He also visited the deceased, who had been admitted at Homa Bay District Hospital. He found him in the ward suffering from burns on the chest, stomach, both hands and legs. He recalled that the deceased was talking and was being cared for by PW 1. He returned to the Hospital on 30th March 2014 and recorded the deceased's statement.
 8. On 1st April 2013, PW 3 issued a P3 form which was filled by a clinical officer, Michael Ochola (PW 6) who examined the deceased on the same day. He observed that the deceased was looking sick and pale as a result of loss of blood and was being treated with intravenous fluids, anti-biotics and pain killers. He noted that the deceased had sustained 54% superficial burns on the anterior aspect of the trunk and on the left and right hand. PW 6 estimated the degree on injury as grievous harm.
 9. As the initial investigating officer, PW 3 stated that he had charged the accused with assault at the Ndhiwa Law Courts. After the examination by PW 6, he applied to amend the charges against the accused to causing grievous harm. When PW 1 informed him that the deceased had died on 4th May 2014 at Jaramogi Odinga Oginga Memorial Hospital, Kisumu, he handed over the matter to PC Peter Mbugua (PW 4).
 10. PW 4 took over the investigation from PW 3 and proceeded to Kisumu, confirmed that the deceased had died and organised for a post-mortem to be conducted by Dr Brenda Misore on 8th May 2014. He also took the 2nd accused to Dr Oduor of Homa Bay District Hospital for mental assessment on 12th May 2014. In his report produced by Dr. David Onyango Nyawade (PW 5) under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, Dr Oduor found the 2nd accused mentally fit to stand trial.
 11. The post mortem form was prepared by Dr Brenda Misore was produced by Dr Eddy Odhiambo Owuor (PW 7) under **section 77** of the *Evidence Act*. He confirmed that he knew Dr Misore, having worked with her and that he was familiar with her handwriting and signature. According to the report, the deceased had burns on the upper torso above the waist line and septic burn wounds estimated at 58%. Dr Misore concluded that the deceased died as a result of cardiovascular collapse due to septic shock and compartment syndrome as a result of 58% burn wounds.
 12. The accused elected to make an unsworn statement in her defence. She stated that on the material day, she went to market as usual and when she returned she found that her son, the 1st accused, has assaulted her grandson. She was annoyed at what had happened. She recalled that a village elder came to her home at about 8.00pm and told them to take the deceased to Homa Bay District

Hospital. She did so and returned to Ndhiwa. She stated that thereafter she did not get to see him and does not even know what happened to him.

13. In order to secure a conviction for the offence of murder under **section 203** of the **Penal Code**, the prosecution must prove beyond reasonable doubt (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 (c) that the accused had the malice aforethought as defined under **section 206** of the **Penal Code**.
14. As regards the fact and cause of death, the collective testimony of the prosecution witnesses is that the deceased suffered severe burns on his upper abdomen and hands which resulted in his admission to hospital on 27th March 2014 and subsequent death on 4th May 2014. Counsel for the accused suggested in cross-examination of PW 6 and PW 7 that deceased's death could have been caused by infection resulting from lack of appropriate medical care given the length of time that had elapsed between the time he was injured to the time he died. I reject this line of argument as it is clear that the direct and proximate cause of the death was the 58% burns inflicted on the deceased. Without the burns, the deceased would not have suffered infection leading to his death. I therefore find and hold that the deceased died and that he died as a result of the infection resulting from the burns inflicted on him.
15. In order to implicate the 2nd accused, the prosecution relied on the direct testimony of PW 2 and the statement made by the deceased to PW 3. PW 2 gave direct testimony on how the accused provided the paraffin and matches to the 1st accused who ignited the flame. Under cross-examination he stated that it is the 2nd accused who poured paraffin on the deceased while it is the 1st accused who struck the match that lit the fire.
16. The statement made by the deceased to PW 3 falls within the definition of a dying declaration which is admissible under the provisions of **section 33(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. Such a statement must however be received with the necessary caution and circumspection although it is not a requirement of law that it must be corroborated to support the conviction (see **Choge v Republic [1985] KLR 1** and **Pius Jasunga s/o Akumu v R [1954] 21 EACA 331**).
17. According to the statement taken by PW 3 the deceased stated as follows;

I do remember very well on the 27th day of March 2014 at around 4.00pm, while on his way home from school and arrived home and his grandmother got hold of him alleging that I took jaggery "sukari nguru" and took him to the father who also struggled and tied me to on a tree with a rope near the house and started beating me The grandmother brought paraffin with match box and she set fire on me and ran to her house. The father came and stepped on my neck as I tried to untie myself and the fire caught my father (sic) trouser and put off the fire and the rope got untied and one Steve assisted me in putting (sic) off the fire.
18. PW 1 was present when the statement was being taken recalled that the deceased stated that it is the accused who went into the house, collected paraffin and poured it on him and lit the match that started the fire. I accept the statement made by the deceased as he had no reason to lie about what transpired on the material day. What he told PW 3 is consistent with the testimony of PW 2 in material respects and is corroborated by the fact that he sustained serious burns which the deceased sustained.
19. The accused denied that she had anything to do with what had befallen the deceased. Her unsworn statement, when weighed against the testimony of PW 2 and the deceased's dying declaration leaves no doubt that the 2nd accused acted in concert with the 1st accused to inflict injuries on the deceased.

20. Although testimony of PW 2 and that of the deceased's dying declaration were inconsistent in certain respects particularly as to who struck the match, I do not think the inconsistency is material to that the finding against the accused. In any case, I am inclined to believe the statement of the deceased as it relates to exactly what he saw and perceived on that fateful evening. On the other hand, PW 2 was a bit far from the scene and may have missed the details of the event. In this regard, the Court of Appeal in **Philip Nzaka Watu v Republic CA MSA Criminal Appeal No. 29 of 2015 [2016]eKLR**, adopted the dictum in **Dickson Elia Nsamba Shapwata & Another v Republic, CR. APP. NO. 92 OF 2007 (UR)** where the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows;

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

21. What is clear and common ground is that the accused brought and drenched the deceased in paraffin. She committed the unlawful act that led to the deceased death. She **must** have known that by pouring paraffin on the deceased and setting him alight, in circumstances where the deceased had been restrained on a tree while being beaten would lead to his death or at the very least result in grievous harm to the deceased. Having no regard to these possibilities the 2nd accused, in effect, "*fanned the flames*" that resulted in his death. I am therefore satisfied that the prosecution proved malice aforethought as defined by **section 206(b)** of the **Penal Code**.

22. I therefore find the accused **MARGARET LICHA YOGO** guilty of the murder of **DERICKSON OTIENO ONYANGO** and I convict her accordingly.

DATED and SIGNED at KISUMU this 24th day of June 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 27th day of June 2016

H.A. OMONDI

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the 2nd accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.