



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL (MURDER) NO. 51 OF 2015

REPUBLICPROSECUTOR

VERSUS

SCHOLASTIC CHEBET KIRUIACCUSED

JUDGMENT

1. The accused, **Scholastica Chebet Kirui**, faces a charge of murder, contrary to S. 203 as read with S. 204 of the Penal Code. It is alleged that on the 10th September 2015, at Koisagati Village, Transmara East, Narok County, murdered John Kirui Alias Sang'ara.

2. It was the prosecution's case that the deceased was the husband of the accused and on the material date they were involved in a scuffle or brawl at their home where some villagers including relatives had gathered to consume traditional liquor. The brawl ended with the deceased chasing away his family and everybody else from his home. At about 9.00pm screams emanating from the home were heard by a neighbor and at about 10.00pm the deceased's house was on fire.

3. Neighbours rushed to the house but saw or found nobody there and by 1.00am to 2.00am, all the two houses in the compound had been razed down.

At daybreak, villagers and the deceased's family including his wife (accused) returned to the scene and while clearing the debris stumbled on the burnt dead body of the deceased.

The area chief was notified and so were the police. Police officers proceeded to the scene and removed the dead body to the mortuary.

4. Investigations commenced and in the process a post mortem was conducted on the body of the deceased. The necessary report (P.Ex 1) revealed that the deceased died from incineration. The accused was suspected of having set the houses of the deceased on fire thereby causing his death. She was arrested and charged with the present offence.

5. The case for the defence was that the deceased arrived home at about 6.00pm while intoxicated. He entered his house and came out with a stick which he used to attack the accused. He was restrained by his brothers who were at the scene but followed the accused to the back of the house where he continued assaulting her. She was rescued by his brothers but he re-entered his house and came out with a sword which he used to chase away everybody from the homestead. He remained alone even as his family including the accused and their children went to sleep at a neighbour's home.

6. At about 2.00am a daughter of the deceased arrived at the said neighbour's home and awakened the accused. She (daughter) informed the accused that their houses were on fire but nobody was at the scene.

They did not go to the scene immediately. They slept and proceeded there on the following morning after the accused had alerted her brother-in-law (PW 1) and the area chief. They found the houses already burnt to the ground. They made frantic efforts to trace the deceased but all in vain. However, while neighbours were clearing the debris they came across the burnt body of the deceased.

7. The accused was then instructed by the area chief to proceed to the police to record a statement but instead she was taken to Kilgoris Police Station where she was arrested before being arraigned in court for the present offence which she did not commit.

8. In his final submissions, the learned defence counsel, **MR. Momanyi**, stated that the accused was arraigned in court on mere suspicion as there was no witness who saw her torch their home. That, the investigations officer (PW 9) merely recorded the statements of the witnesses and handed over the matter to the police at Kilgoris, yet the officer who preferred the charge was not called to testify in court.

9. Learned defence counsel, further submitted that there was no good explanation as to why the accused was charged. That, the chief who was called to the scene never even testified in court. That, the evidence of PW 1 and PW 6 was not reliable as they were intoxicated at the material time and ran away from the scene when the deceased emerged from his house with a sword or panga (machete). That, PW 1 confirmed that the accused left the scene and went to the home of Mercy.

10. It was also submitted by the learned defence counsel that the accused was informed about the burning houses by her daughter (PW 8) and that neither direct nor circumstantial evidence existed against the accused whose defence should be believed as it gave an explanation of the events which unfolded on the material date.

The learned counsel urged this court to acquit the accused.

In response, the learned prosecution counsel, **MR. Otieno**, holding brief for **M/S Mbelete**, indicated that the prosecution was fully relying on the evidence on record.

11. Having considered the evidence in its totality as well as the oral submissions by the defence, it is apparent to this court that the basic issue for determination is whether the accused was identified as the person responsible for setting her family home on fire thereby causing the death of the deceased by incineration.

12. If indeed the houses were deliberately set on fire with the knowledge that the deceased was therein then, it would be obvious that the arsonist had the necessary intention to kill the deceased and would be guilty of murder rather than arson.

The prosecution case against the accused presupposed that she was the arsonist, yet the defence raised was a firm denial.

13. The obligation to prove the charge against the accused beyond reasonable doubt lay with the prosecution and this could be achieved by either direct or indirect evidence.

None of the nine (9) prosecution witnesses saw the accused in the act of setting the houses on fire. None of them was at the scene at the material time. **Wilson Cheruiyot (PW 1)** and **Paul Kipkemoi (PW 6)**, were earlier at the scene to take alcohol but left for their respective homes when the deceased emerged from his house with a sword or panga and chased them away including his wife. They returned to the scene on the following day after the houses had been set on fire and razed to the ground.

14. **Mercy Langat (PW 2)**, was at her home at 9.00pm when she heard screams coming from the deceased's homestead. She ignored the screams and went to bed only to be awakened at 11.00pm by a lady called Lillian Chepkurui who informed her that the deceased's home was on fire. The two proceeded there but found nobody although the houses were burning. They did not see the deceased or his wife (accused). Mercy (PW 2) returned to her house and slept.

15. **Mercy Chebet Kirui (PW 3)**, arrived at her home at 8.00pm and found the deceased's children sleeping there. They told her that they had gone there as their parents were fighting. Between 8.30pm and 9.00pm, their mother (accused) arrived at Mercy's home. They all slept there but at about 1.00am, a son of the deceased, **Victor Kipngeno Yegon (PW 5)**, arrived there from grazing the family donkeys. He left the place and went to sleep at the home of one Anne. He had earlier been at their home and found that it had been burnt to ashes.

16. **Phillip Kiptoo Kosgey (PW 7)**, was in his house asleep when his children awakened him at 10.00pm and told him that the deceased's home was on fire. He went there with other villagers and found that the houses had completely burnt down. He found nobody at the scene. He returned to his house at 11.00pm and slept.

17. A daughter of the deceased/accused, **Zewan Chepkemoi (PW 8)**, arrived home at 2.00am from a place she had gone to sell charcoal. She found the home already destroyed by fire but nobody was there. She went to the home of Mercy (PW 3) and found her mother and siblings there. She told her mother that their houses had completely burnt down. Her mother (accused) opined that their father (deceased) could have been responsible for burning the houses but was shocked by the incident.

18. **Josephine Cheron (PW 4)**, was sister to the deceased. She was at home on 11th September 2015, when she was informed by the accused that the deceased had burnt and destroyed their home. She (accused) wanted to know whether the deceased was at the home of Josephine (PW 4). She (PW 4) proceeded to the home of the deceased and found it destroyed by fire. She also learnt that the burnt body of the deceased was removed to the mortuary.

19. **C.IP Francis Gichuhi (PW 9)**, received the necessary report from a chief on the 11th September 2015. The chief by name Korir told him that a woman had set fire to her house in which her husband was believed to be in. He (PW 9) proceeded to the scene and saw the two burnt grass thatched houses. The burnt body of the deceased was found and removed to the mortuary. The suspect wife of the deceased (i.e the accused) had already been arrested. He (PW 9) arranged for a post mortem of the burnt body and later obtained the necessary report (P.Ex 1). He confirmed that he did not investigate the case as he was not the investigations officer.

20. From all the foregoing evidence it is clear that there was neither direct nor circumstantial evidence linking the accused to the burning of her homestead and causing the death of the deceased in the process.

The evidence by all the prosecution witnesses succeeded in confirming that the home of the deceased burnt to ashes while the deceased was in one of the houses. The evidence also confirmed that the deceased was alone at the time and that his family including the accused had at the time gone to sleep at a neighbour's house.

21. In fact, the prosecution evidence vindicated the accused thereby implying that she was arrested and charged without any good cause other than being suspected of having set their home on fire because she had earlier on the same day quarreled and fought with her husband (deceased).

The suspicion was cast upon her by her brother-in-law (PW 1) and a villager (PW 6) who had been drinking alcohol at her home together with the brother-in-law (PW 1). These two witnesses only witnessed the earlier brawl between her and her husband but knew nothing about how her home was set on fire thereby killing her husband.

22. The other person who cast suspicion on the accused was the Chief called Korir. He was not called to testify yet he allegedly told C.IP Gichuhi (PW 9) that the accused had set her home on fire while her husband was therein.

The failure to call the Chief as a witness for the prosecution was a fatal omission considering that he was the person who implicated the accused hitherto, on the basis of suspicion.

23. In criminal cases, suspicion however strong, cannot provide a basis for inferring guilt which must be legally proved by either direct and/or circumstantial evidence which is herein lacking quite prominently (see, **Sawe Vs. Republic (2003) KLR 369** and **Faith Lucas MSA Criminal Appeal No. 274 of 2006 (CIA)**).

For all the foregoing reasons, this Court's ultimate finding is that the prosecution has clearly failed to discharge its burden of proving that the accused was the person responsible for setting her home on fire and killing the deceased in the process. She is hereby found not guilty as charged and is acquitted accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 23rd day of June 2016]