



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 35 OF 2014**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**GRACE WANJIKU MAKUMI.....ACCUSED**

**JUDGEMENT**

Grace Wanjiku Makumi, whom I will call ‘the accused’ in this judgement, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 15<sup>th</sup> day of March 2014 at about 11.00am at Mihang’o Estate within Embakasi East in Nairobi County jointly with another not before the court murdered Elizabeth Atieno Maina. The accused denied committing the offence and the case proceeded to full trial. The prosecution called 11 witnesses in support of its case. After recording and considering the evidence of the 11 witnesses this court found that the accused has a case to answer and placed her on her defence.

The prosecution presented its case to the effect that on 15<sup>th</sup> March 2014 at around 11.00am the accused jointly with another person still at large were seen coming from the burning house at the home of Phylis Wairimu Makumi, PW1, at Mihang’o. They were spotted by Hussein Juma, PW2, and Swaleh Suleiman, PW3, as they rushed from the scene. They boarded a motor cycle commonly referred to as *boda boda* and escaped. Juma and Suleiman went to the burning house. They could hear a baby crying inside the house. In company of other members of public who had gathered they managed to rescue the baby known as J. W. Evidence shows that the baby was wrapped in baby blankets and was smelling of paraffin. The body of the deceased which was found inside the burning house was removed and placed outside. Both of her hands had been tied with a sisal rope.

The accused was traced to her home at Saika and arrested. The other suspect escaped. The accused was taken to Kayole Police Station where she was detained until the investigations were completed. She was charged with this offence. She is represented by Mr. Ochako, advocate.

In her defence the accused testified that on 15<sup>th</sup> March 2015 she woke up and opened her business after having breakfast with her two children; that she did not leave her home; that between 11.00am and 12.00pm her husband in company of police officers went to her home and took her with them to Mowlem Police Post without telling her why she was taken to the Post; that she was later taken to Kayole Police Station where she was placed in cells and later charged with this offence.

The accused denied that she knew the deceased. She denied that she was the owner of the brown skirt exhibited in court (Ex. 5) stating that the skirt is too big to fit her and that she did not wear it on that day and that she had worn a green skirt and black top. She told the court that she had no grudge with PW1 her co-wife and had no reason to burn her (co-wife’s) house or murder PW1’s house-help. She further stated

that her hairstyle was in curls and not braids and that she did not change her hairstyle that day. She admitted that she lived with her sister but she (her sister) had left to pick a book at accused person's aunt at the time of her arrest.

At the close of defence case, Mr. Ochako submitted that the prosecution has not met the threshold in this criminal trial. He submitted that the prosecution has not proved that it is the accused that killed the deceased; that the accused had formed the intention to kill the deceased or to cause her grievous bodily harm and that the deceased died as a result of accused's actions. Mr. Ochako further submitted that PW2 and PW3 had not met the accused before and described her as having worn a brown skirt without saying what she wore on top; that the skirt, Ex. 5, was too big to fit the accused; that no identification parade was carried out and the two witnesses did not describe the registration number of the motor cycle that allegedly carried the accused from the scene and that dock identification cannot be relied on as it is worthless. It was further submitted that the accused was arrested on mere suspicion and that suspicion no matter how strong cannot be a basis for conviction. Mr. Ochako asked the court to find that accused's evidence has not been challenged and that the prosecution case is weak and fails to prove the case against the accused beyond reasonable doubt. He asked the court to find the accused not guilty and set her free.

Mr. Ochako cited **Njoroge v. Republic Criminal Appeal No. 149 of 1986** and **Sawe v. Republic Criminal Appeal No. 2 of 2002** to support the defence case on the issue of dock identification and suspicion, respectively.

On the other hand, prosecution counsel Ms Macharia submitted that the prosecution had proved the case beyond reasonable doubt. She submitted that death of the deceased has been proved beyond reasonable doubt by the evidence of the pathologist, Dr. Peter Muriuki Ndegwa (PW9) who performed the post mortem and formed the opinion that deceased died as a result of smoke inhalation and carbon monoxide poisoning due to fire exposure. Ms Macharia further submitted that there is evidence to show that the accused was positively identified as one of the women seen leaving the scene and the skirt she was wearing was identified; that Samuel Makumi, PW7, who is husband to the accused led police to arrest the accused and recover the skirt from accused's house. Ms Macharia asked the court to dismiss accused's defence and find that she is one of the two women who caused the fire that led to the death of the deceased. She urged the court to find the accused guilty and convict her.

A charge of murder is brought under section 203 as read with section 204 of the Penal Code. Murder is committed when **“any person who of malice aforethought causes death of another person by an unlawful act or omission.”** The prosecution must prove beyond reasonable doubt that death of the deceased has occurred; that the accused before the court caused the death of the deceased by an unlawful act or omission and that the accused had formed the intention, malice aforethought, to cause the death of the deceased.

The first issue for determination is whether death of the deceased occurred. That Elizabeth Atieno Maina died is not in dispute. Phylis Wairimu, PW1, and her husband Samuel Makumi, PW7, confirmed that the deceased who had been working for Phylis had died in the fire. Hussein Juma, PW2, and Swaleh Suleiman, PW3, testified to witnessing the deceased's body being removed from the burning house. The body of the deceased was positively identified by her uncle Dismas Makhulu Oundo, PW8, to the doctor who performed the post mortem. The cause of death according to PW9 Dr. Peter Muriuki Ndegwa was smoke inhalation and carbon monoxide poisoning due to exposure to fire. In my considered view the evidence on record proves the death of the deceased beyond reasonable doubt.

The second issue for determination is whether the accused is the one who killed the deceased either by an unlawful act or omission. Of all the 11 prosecution witnesses who testified, none of them was at the scene when the house was set on fire. Hussein and Swaleh are the only witnesses who claim to have seen the accused near the scene. Hussein's evidence on the matter is as follows:

**“I was going to a place where they are constructing a market at Mihang'o. I was with my friend Swaleh. We were walking. We saw smoke at some house near the path we were using to go to the market. It was on our left. We knew the owner as Makumi. We got surprised.**

**We saw two people coming from the burning house to the road. It was a woman and a girl. We did not know the two. I can see one of the two in court. The woman is the accused in the dock. They were walking looking nervous. I remember the girl was in trousers and a jumper. She carried a knapsack. The woman was wearing a white blouse and a brownish skirt. This is the skirt she was wearing on that day..... The woman and the girl boarded a *boda boda*. We were shocked about the house. We shouted to *boda boda* man to stop. Accused hit rider on the shoulders to start off.”**

Hussein further stated as follows:

**“Makumi owner of the house also came. We told him the suspects. We described the woman and the girl. Makumi said he knew who the suspects were. He got into the vehicle and left. People said he had gone to the home of the other wife.”**

Hussein told the court that he was able to identify the accused after she had been arrested although when he saw her the second time she was no longer wearing the brownish skirt and white top. Hussein said the brownish skirt was recovered from accused’s house and that the white top was not recovered.

Swaleh captures the evidence as follows:

**“On 15<sup>th</sup> March 2014 I was going to the market with Hussein. We found a burning house and a woman and a girl running from that house. We were wondering if they were the suspects..... One of the women is the accused in court..... The two boarded a motor cycle and rode off. .... Police came and accused’s husband. I knew Makumi the husband. We described the women. Makumi said he knew who they were. We went to accused’s home. We found she had changed. At the scene she had a brown skirt. It is this one and she fit in it. She was bigger then and could fit. She has reduced now. At the scene she had tied her head but we found she did not have it (the head dress). ..... We told police she was the woman who we had seen near the scene. We had seen her well as we met her.”**

Swaleh told the court during cross examination that:

**“She was covering herself with a red cloth. I saw what she had covered herself with. It was like a *leso* red in colour. I could not see the top. No one could see the top because it was covered. I saw her features and the skirt. I was able to identify accused because she was telling the other one to hurry.”**

I have given the evidence of the Swaleh and Hussein a great deal of consideration. As I have stated above in this judgement, other than the two witnesses there is no other evidence connecting the accused with the burning house. The two witnesses said Makumi said the suspect described must be his other wife. Makumi testified as PW7. He told the court that he received a call from a neighbour informing him that his house at Mihang’o was on fire; that he went to pick his wife Phylis and both went home; that they found the house had burned and their baby had been rescued but the house-help had died. He said he went to his other home where the accused lived and found her at home but not her sister by the name of Sarah. Makumi told the court that he did not know what had happened to his house.

Evidence from Swaleh and Hussein, as well as police officers, show that the accused’s children including PW6 J.W told the police that the accused, their mother, left home in the morning and returned later and that she changed the clothes she had been wearing when she left the house. The truth of this evidence cannot be verified because J.W was stood down by the prosecution with intention of declaring her hostile. This was not done.

The evidence of the investigating officer CPL Timothy Wanyama, PW11, is that when he interrogated some witnesses he found out that the accused had been seen with another girl leaving the scene and that the accused was described as having worn a brown skirt. CPL Wanyama testified further that after the

description was given some people said the suspect was probably the accused. He did not disclose who the people who said this were. CPL Wanyama said that the children of the deceased admitted that the accused had left in the brown skirt and on returning she had quickly changed into other clothes. CPL Wanyama did not go to the home of the accused.

PC Enock Kipkemboi, PW4, told the court that he went to accused's home with CPL Mwema and while there Makumi showed them the brown skirt the accused had been wearing and they recovered it. I have said that Makumi's evidence is not useful to the prosecution case. Makumi did not confirm what witnesses said concerning the accused.

Swaleh and Hussein both mentioned a person known as Njenga said to be a collector of refuse. Hussein said: **"There was someone with a donkey carrying refuse. He is known as Njenga. He told us he suspected the two women as the ones who had set the house on fire"**. Swaleh said: **"Njenga who collects garbage told us those were the suspects."** Njenga was not a witness to tell the court why he suspected the accused and the other suspect at large.

I have analysed the evidence in great detail to show that it is only the evidence of Hussein and Swaleh that this court has to turn to in order to determine whether it proves this case beyond reasonable doubt. The two witnesses told the court that they had not seen the accused before that day. From what can be discerned from their evidence it is not clear exactly where the accused and the girl were found: was it inside the compound? How close were they to the house? I have no evidence to show that they were seen inside the house or inside the compound. I have no evidence to show that they were seen setting the house on fire. Njenga who suspected they could have set the house on fire did not testify.

Hussein said the accused was wearing a white top on the brown skirt. Swaleh said the accused covered her head and the upper part of her body with a red cloth and one could not see what top she wore. Swaleh said in cross examination that the accused had weaved her hair. How then could Swaleh and Hussein see the white top, the hairstyle and accused's facial features in circumstances that they found themselves in? There was a burning house and a baby crying inside that house. Did they see the suspects whom they had not seen before well enough under those circumstances to identify the accused later? It was day time but my concern is with the circumstances under which the two witnesses found themselves in.

This case causes me some anxiety especially the manner in which police handled it. CPL Wanyama said he did not conduct an identification parade because Hussein and Swaleh had seen the accused at her house. This case relies heavily on the issue of identification of the accused. Given that no one saw her committing this offence the evidence against her is exclusively circumstantial. As it was held in the **Sawe case** above, in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other co-existing circumstances weakening the chain of circumstances relied on and that suspicion alone, however strong, cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt.

The circumstances of this case are that the accused and another are seen near the burning house belonging to her co-wife. The two witnesses who saw her had not seen her before. The two women were in a hurry and left quickly in a motor cycle. Hussein and Swaleh were distracted by the burning house given their testimony that they could hear a baby crying inside and were shocked. They said that they ran towards the house to rescue the baby. Their evidence on how the accused was dressed does not agree except for the brown skirt. Hussein said the accused had a white top and brown skirt while Swaleh said she had on a brown skirt and the top could not be seen because she had covered herself with a red *leso*. Makumi who is said to have identified the accused as the suspect from the description given by Hussein and Swaleh and who led police to his other wife's (accused) home omitted to testify to this. The children who are said to have seen their mother leave and return and change into other clothes both did not testify. The one who testified did not say anything to that effect and was almost declared hostile and was stepped down. The police did not conduct an identification parade to enable Hussein and Swaleh identify the accused.

Murder is a serious offence involving loss of life of the victim. However, this court must be convinced beyond reasonable doubt that the accused being tried is the one who committed it. There can be no room for error because then this court would be sending the wrong person to the gallows given that the penalty for murder is death. This court was told there was no bad blood between the two wives of Makumi, Phylis and the accused. The accused told the court she had no reason to set her co-wife's house on fire. The prosecution has not established any motive on the part of the accused although motive is not one of the ingredients of murder. The person who tied the deceased, dozed paraffin (if it was indeed paraffin since no tests were done) on baby J. W and set the house on fire had one intention: to cause the death of or grievous harm to the deceased and the baby. This person or persons must have gained entry into the house and tied the deceased, wrapped J.W in baby blankets and poured some liquid said to be paraffin on her. Had she not been rescued, she would have burned inside the house or suffocated like the deceased. If this person is the accused and the other suspect at large, then there must have been reasons for doing so. Indeed Makumi may have had an idea of that reason for him to suspect that the person being described was his wife the accused. He did not disclose to this court why he thought the suspect must have been his wife, the accused.

After carefully considering all the evidence and agonizing on it because of the gaps it leaves, I find that the evidence on the identity of the accused as one of the persons who set the house belonging to Makumi and Phylis on fire is not cogent. The chain of events in the circumstances leading to the setting of the house on fire is broken in that it is not proved beyond reasonable doubt that the accused was at the scene since the evidence of Hussein and Swaleh does not show she was inside or near the house. Court was not told how far they were to the house. What remains is suspicion. I must admit that there is strong suspicion in this case but then suspicion alone, no matter how strong, cannot form the basis of conviction. I therefore come to the conclusion that the evidence on the identity of the accused as the person or one of the persons who set the house on fire is not safe to rely on. I find that I harbour some doubts about her involvement because of the gaps left by the available evidence.

Having made the above finding, I find it an academic exercise to proceed to determine whether the accused had formed the intention to kill the deceased or the baby. I have stated that the person who set that house on fire after tying the deceased and wrapping baby J. W and dousing her in some liquid thought to be paraffin must have formed the intention to kill both or to cause both of them grievous bodily harm. The only hitch being that the identification of the accused as one of the two or more persons is not proved to the standard set by the law. It is my finding, therefore, that the prosecution has failed to prove all the ingredients of murder beyond reasonable doubt. The accused shall benefit from the existing doubts. I find the accused not guilty and hereby acquit her of the offence of murder. She shall be set at liberty forthwith unless for any other lawful cause she is held in custody. It is so ordered.

**Dated, signed and delivered this 16<sup>th</sup> day of June 2016.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Macharia for the prosecution

Mr. Ochako for the accused

Ms Grace Wanjiku Makumi, the accused person

Mr. Daniel Ngumbi, court clerk