



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 55 OF 2009**

*LESIT, J.*

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VICTOR KENNEDY GICHURU.....ACCUSED**

**JUDGMENT**

1. The accused **VICTOR KENNEDY GICHURU** is charged with one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

**“That on 22<sup>nd</sup> day of May 2009, at Githurai 44 murdered LEWIS MWANGI IRUNGU”.**

2. This case was started by Kimaru, J who heard the evidence of PW1 and 2. It was taken over by Muchemi, J who heard PW3 to PW6. I took over the case under **section 201(1)** and **section 200** of **Criminal Procedure Code**. The accused opted to have the matter proceed from where the previous judges had left off.

3. I therefore took the evidence of PW7 who rescued the accused from members of public and PW8 the police officer who received accused from PW7. He also took a statement under caution from accused. It was produced without opposition as P.exh.2.

4. The prosecution called 8 witnesses. The facts of the prosecution case were that the accused was husband to PW3. They had two children, PW1 aged 8 years in 2009 and 11 years when she testified. The second child was the deceased in this case aged 3 years when he died.

5. On the material day, the accused and PW3 had separated. The accused visited PW3’s shop cum house and gave her a letter from the chief. The letter was summoning accused and PW3 to the Chief’s place. PW3 called her brother Fred, not a witness, who escorted her to the Chief’s place.

6. At the Chief’s place, the accused demanded his certificates from PW3 claiming she was left with them after they separated. After the meeting, the accused returned to PW3’s place at 9a.m., ahead of PW3 and her brother. He found PW2, an adult cousin to PW1 and deceased. The accused could not access the house or shop because PW2 had locked all the doors. He however came to the shop counter, took a family photograph of himself, his kids and PW3. He then told PW1 and 2 that he would do something bad which he had not planned. He then left.

7. The accused returned again at 9 p.m. that evening. PW3 was inside her shop with the children, PW1 and deceased and her niece PW2. The accused first asked for SM cigarette and PW3 said it was out of stock. The accused then produced a polythene bag he was carrying, made a hole in it, poured some liquid over the counter lit a match and threw it inside.

8. The results were disastrous as the deceased and PW1 who were near the counter burnt as the liquid spelt on them and the match stick lit them. PW2 and 3 managed to run out and escaped unscathed.

9. The accused was placed on his defence. He stated that he lived with his wife for 10 years and that they had a good relationship. The accused stated that he worked in Nakuru and that he went home only 2 days in a week. The accused stated that on 22<sup>nd</sup> May 2009, he woke up in the morning and went to the Chief's camp. He explained that the wife, PW3 had shifted from their home and that after a month he discovered where she had shifted to. He then went to the chief and was given a note to summon PW3 to his office.

10. The accused stated that when PW3 eventually reached the Chief's office, she was accompanied by her brother. The accused said that he had two requests of the chief. The first is to reconcile him and PW3. The second was to request PW3 to return his certificates to her. After hearing them, the chief ordered them to return with each of their parents.

11. The accused stated that the meeting with the parents could not be organized for the same day so he left. He stated that at 5 p.m. he queued for fish at a local place, bought and ate it. He then bought some and took it for his children. The accused stated that he went to his wife's shop and found a queue at the counter. He then knocked the door and entered. He found the children asleep. He said he sat on water drums and lit a cigarette. No sooner had he settled than his in-laws including PW3's brother who was with her earlier entered and started attacking him. He said that he sustained a fracture. He said that he held onto the door until a fire started for reasons he could not explain. He said that eventually he was escorted to the police after members of public resisted any attempts by his in-laws to assault him. He denied setting the house on fire.

I have carefully considered the evidence adduced by both sides in this case. I have also considered the submissions by both sides. The prosecution has the burden to prove its case beyond any reasonable doubt.

12. The accused faces one count of murder. **Section 203** of the **Penal Code** defines murder as follows:

**“203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

13. The deceased died of burns. The prosecution has to adduce evidence to show that it is the accused who started the fire which burnt the deceased; that at the time he set the fire, he had formed an intention to either cause death or grievous harm and finally, that the injuries he caused on the deceased were the cause of death.

14. Malice aforethought is an essential ingredient for the charge of murder. **Section 206** of the **Penal Code** describes circumstances which constitute malice aforethought as follows:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**

**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. **an intent to commit a felony;**

d. **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

15. Having considered the evidence adduced against the accused in this case, the accused defence and the submissions of counsels I find that the issues for determination in this case are:

i. **Whether the evidence adduced by the prosecution was inconsistent, and whether it required corroboration;**

ii. **Whether the evidence adduced by the prosecution was credible;**

iii. **Whether the prosecution failed to call crucial witnesses and whether it is fatal to the prosecution case;**

iv. **Whether the prosecution proved malice aforethought;**

v. **Whether the prosecution proved its case against the accused beyond any reasonable doubt.**

16. There are some facts which are undisputed. There is no dispute that the accused was at the scene of fire when the incident occurred. It is not in dispute that the accused was the father of the deceased. There is no dispute that the deceased died as a result of cardio respiratory failure due to extensive burns. There is no dispute that at the time of this incident, the accused and PW2 were estranged and were already living apart at the time of incident.

17. Mr. Njanja for the accused has filed written submissions. Counsel has submitted that the evidence adduced by the prosecution against the accused required corroboration. He relied on **section 124** of the **Evidence Act** in support of his proposition. Counsel also urged that the evidence the prosecution relied upon was inconsistent, contradictory and conflicting and could not sustain a conviction.

18. Mr. Njanja urged that PW1 testified that she did not know who caused the fire. As for PW2 and 3, counsel for the defence submitted that the two testified that there were electric lights at the scene. That PW7, the police officer contradicted their evidence by stating that it was very dark in that area. He invoked **Ndungu Kimanyi vs. Republic** where the Court of Appeal stated:

**“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

19. Ms. Wafula for the State submitted that the evidence adduced by the prosecution was sufficient to sustain a conviction.

20. The evidence the prosecution is relying upon is the evidence of identification by 3 witnesses, PW1, 2 and 3. PW1 indeed was a child of 11 years old at the time she testified. She was 9 years old when the incident occurred. **Section 124** of the **Evidence Act** provides:

**“s.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”**

21. **Section 124** of **Evidence Act** provides that where the evidence relied upon is that of a child victim

that evidence must be corroborated. Victim in this matter is the deceased. Besides, the evidence the prosecution is relying upon is that of PW1, a child and PW2 and 3 both adults.

22. PW1, 2 and 3 were inside the shop cum their home when the accused came to the shop counter and asked for cigarettes. The type he wanted was out of stock and he was informed as much. The three witnesses were consistent in their evidence that the accused came to the counter and ordered a cigarette. When he was informed that there was none, the three witnesses are consistent that the accused then produced a polythene paper, tore it and spilt a liquid inside the shop and lit a match.

23. PW2 and 3 testified that they smelt petroleum just before the accused lit a match and both of them ran out of the shop leaving the children behind. Both say that there was light inside the shop and also at the counter where the accused was standing at the time of the incident.

24. I have considered the evidence of PW1, 2 and 3. It is clear from this evidence that the prosecution is relying both on visual identification and voice identification of the accused. Regarding voice identification the principle applicable is clear. In the case of **Chogo vs. Republic (1985) KLR 1 (14a)** the court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant's voice and recognized it and that conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it. **(See also Karani vs. Republic (1985) KLR 290).**

25. In this case the accused person had a conversation with PW3 just before the attack. The details of the conversation was heard by PW1 and 2. Their evidence to that effect is very clear and the details consistent.

26. I find that the conversation held between PW3 and the accused was long enough to enable PW1, 2 and 3 identify his voice. The three witnesses knew the accused voice for a long time. I am satisfied that they all could recognize it. I am satisfied that the accused was properly identified, by the 3 and that there was no possibility for an error or mistake.

27. I am satisfied that the accused was positively identified as the one who splashed a flammable liquid inside PW3's shop, landing it on the children and starting a fire which burnt both children and the shop.

28. PW2 and 3 were adults. The two corroborated each other's evidence and also that of PW1. Even though in my view corroboration was not required, I do find the availability of corroboration.

29. Mr. Njanja for the accused submitted that the prosecution failed to call crucial evidence in the person of the investigating officer and that of the person who identified the body of the deceased at postmortem. He invoked **BUKENYA & OTHERS Vs. Uganda 1972 EA 549** where LUTTA Ag. VICE PRESIDENT held:

***“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***

***Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”***

30. The issue of the investigating officer is not quite correct because PW8 played the role of the investigating officer. Not only did he receive the accused from PW7 who arrested the accused from members of public. PW8 also took a statement under inquiry from the accused soon after he was brought to the station. A statement under inquiry can properly be taken by an investigating officer, as it is taken before investigations into the case have been done.

31. PW8 was a Chief Inspector of Police, not a corporal as defence counsel referred to him in his

submissions. He was the officer in charge of Crime Investigations. He clearly was in charge of the investigations in this case. It was not necessary to have any other investigator to be called to give evidence in this case.

32. Regarding the identification of the body of the deceased, the postmortem report, P.exh.I is clear that of the two women who identified the deceased body to the doctor for the identification was the mother, PW3. The accused advocates submission that none of those who identified the deceased body testified in court is not correct.

33. Most importantly, I am satisfied that there is no doubt that the results of post mortem adduced as P.exh.1 were those of deceased body in this case. Further the cause of death were consistent with the evidence adduced by the three key witnesses PW1, 2 and 3.

34. The other witness not called was the brother of PW3 who escorted her to the chief. From evidence of PW1, 2 and 3 this person was not present at the scene at the time of the incident.

35. The accused in his defence stated that PW3's brother was at the scene at the time of incident. In his statement under inquiry, he made no reference to PW3's brother being at the scene at the time of incident. The accused was not consistent in his defence and statement of inquiry.

36. I therefore find it controversial whether PW3's brother was at the scene at time of incident. I find that he was not a crucial witness in this case. Nothing turns on this point.

37. Regarding malice aforethought the prosecution has adduced evidence to show that the accused went to PW3's shop cum home on the morning of the day in question. After coming from the chief's place, the accused went to PW3's place where he found PW1 and 2 and the deceased. He then held a family photograph of himself, PW1, PW3 and the deceased and announced to them that he would do something bad. That was correctly taken by PW1 and 2 as a threat to their lives and they reported the same to PW3.

38. The prosecution has adduced evidence to show that the accused acquired a flammable liquid which he took to PW3's shop, poured inside and lit a match causing a fire explosion that burnt his two children and consumed part of the shop.

39. I find that from the evidence that accused issued a threat on the lives of his family and then bought a flammable liquid which he threw into the shop where his family was, and then struck a match lighting the deceased. PW1 and the shop all establishes a clear pattern. The pattern establishes that the accused person planned to set fire to his family on that day and that he bought a flammable liquid which he threw at them and set it ablaze, causing severe burns to the deceased.

40. I find that the accused actions leading upto the striking of the match to light the fire is proof that the accused had formed an intention to either cause death or grievous harm. The person the accused intended to harm has not clearly been established, whether he intended death or grievous harm to any particular family member or to all of them. As is clearly set out under **section 206 (a)** of the **Penal Code** as long as the intention to cause death or grievous harm is proved, it is irrelevant that the one who dies was not the one intended.

41. The accused denied the offence and gave a sworn defence which I summarized earlier in this judgement. In his defence he implicates PW3 as the one who lit a stove in her shop causing the fire.

42. The accused defence is however materially conflicted by his statement under inquiry as to show inconsistency in his story. In his defence in court he said that his wife screamed and in the process lit a stove inside the shop. The accused then said that he ran up to the gate where he was hit on the face. He said that he ran back to PW3's house where he found the fire. He said that he escaped as people put off the fire but was held by neighbours who beat him causing him a fracture.

43. In his statement under inquiry the accused stated that he was sitting on a drum of water when

members of PW3's family attacked him causing him a fracture.

44. In accused defence in court he does not explain why PW3 started screaming and also why he ran away. Likewise in his statement under inquiry he does not explain how the fire started. In both cases, I find that the accused did not tell the truth, that he left gaps in his explanations.

45. Accused defence is not reasonable or plausible. I find that it does not create any doubt in the veracity of the prosecution case nor does it shake the prosecution case established against him.

46. I have come to the conclusion that the prosecution case is watertight that the accused attacked his family by throwing a flammable liquid inside the room in which they were and lighted it, leading to a huge fire which burnt the deceased causing his death. I am satisfied that the prosecution has proved all the ingredients for the offence of murder contrary to **section 203** of the **Penal Code**.

47. Consequently, I reject the accused defence and find him guilty of murder contrary to **section 203** of the **Penal Code** and consequently convict the accused under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 19<sup>TH</sup> SEPTEMBER, 2016.**

**LESIIT, J.**

**JUDGE**