



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO 31 OF 2008

Republic.....Prosecutor

Versus

Joseph Ndungu Kimath.....Accused

JUDGEMENT

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.^[1] The particulars of the offence are that on the 18th day of May 2008 at Kiringa Village in Rongai Sub-Location in NaroMoru Location in Nyeri North District of the Central Province he murdered Mariam Wanjiku.

Hearing of this case started before Justice Wakiaga who heard all the prosecution witnesses and the matter only came before me for defence hearing. The accused requested that the case proceeds from where it had reached. This court explained to the accused his right to recall the witnesses but he stated that he did not wish to exercise his right to have any of the witnesses recalled. His advocates also confirmed the same position; hence the case proceeded from where it had stopped.

As mentioned above, all the prosecution witnesses testified before Justice Wakiaga. Their evidence is summarized below:-

PW1 Daniel NgatiaGatheria, the area assistant chief rushed to the scene responding to some noise (alarm), and also helped to bring police to the scene.

PW2 Joseph Muitamahiri testified that the accused was suspected of burning the house, on arrival at the scene he helped in controlling crowd and handed over the accused to the police.

PW3 Francis MuhanyuKimithi responded to the alarm, found the house on fire and helped with others to put off the fire. When they finally entered the house they found that the child was burnt and everything in the house.

PW4 Charity NjokiMwita testified that he met the accused in 2008 and started living with him, she had four children before they started living together and she bore him one child. Her evidence was that on 18.5.2008, the accused came home and started abusing her and said Kiara will die or he would commit suicide. She decided to go to his house, and heard him coming with three children and she asked him where Wanjiku was and her son told her he was in the house. He continued with his abuses and she decided to escape to the forest. When she went back she saw smoke and light and realized the child was in the house. She screamed for help but they were not able to save the child. Since the accused had threatened to kill her earlier she told the people that he could be the one who caused the fire.

On cross-examination, the witness said the accused did not have a problem with the children and that she did not know whether he was the one who burnt the house and that the accused did not know that he had left the house.

PW5 Lawrence Machira Wamae was among the persons who assisted to put off the fire. On cross examination he said he was the first to reach the place and in answer to a question from the court he confirmed that he did not get anyone in the compound.

PW6 John Mutahi Kimotho was also among the persons who assisted to put off the fire and testified that he did not see the owner of the house and the he did not see Mama M there.

PW7 S M aged 17 years. His evidence was that the accused woke them up at about 9.00pm, that it was him, his two brothers and a sister, that the kitchen fire was on, that on their way to the accused's house they thought their mother was still in the house, but the they found her in the accused' house, and as her mother was going back they heard her make noise.

PW8 No. 58640 John Mugo produced photographs of the scene showing the general view of the scene, close view of point where the deceased was sleeping on the bed, general view of the same showing the human skull and a close view of the skull and some human bones while **PW9** was the investigating officer and he recorded the statements and charged the accused with the offence.

At the close of the prosecution case, the learned Judge concluded that the prosecution had established a *prima facie* evidence and put the accused on his defence.

The court complied with the provisions of Section 211 of the Criminal Procedure Court^[2] and the accused elected to give sworn evidence. He denied the offence and recalled that the deceased was his daughter, that in the evening of the material day he went to his wife's house, that they used to live about 150 M apart, that he did not find her but found his 3 children, the children told him that their mother had gone to the shop, that he told them he would return, but on his way back to his house the children followed him, he gave them food at his house and as they were eating his wife came and told the children to finish and go back home, she left but after a short while he heard the sub-chief and 2 other persons calling him, and he accompanied them and he was put in a police vehicle. The police also picked the remains of the deceased. He was charged with the offence.

The standard of prove placed upon the prosecution is to prove the offence beyond reasonable doubt. There are three ingredients of the offence of murder which the prosecution must prove. These are:-

(a) proof of the fact and the cause of death of the deceased,

(b) proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused,

(c) proof that the said unlawful act or omission was committed with malice aforethought-this constitutes 'mensrea' of the offence.

I now proceed to analyse the evidence. The fact of the death of the deceased is not in any doubt. The fact that the deceased was burnt to death is not disputed. What is not clear is the cause of the fire. Whether or not there is sufficient evidence to demonstrate beyond doubt that the fire was caused by the accused is the issue for determination in this case.

Counsel for the appellant **Mr. Gorif** filed written submissions and citing the case of *Republic vs Nicholas Onyango Oloo*^[3] correctly pointed out the ingredients of murder as outlined in the preceding paragraph. He submitted that both *actus reus* and *mens rea* were not proved, hence in his submission, the prosecution failed to prove its case.

The learned State Counsel **Miss Jebet** relied on the submissions filed by at the close of the prosecution

case and urged the court to find that the prosecution had proved its case to the required standard. In the said submissions, the prosecution counsel cited threats issued by the accused, the fact that he knew that the child was in the house and insisted the prosecution had proved the case.

I have carefully considered the submissions both counsels. I have also reviewed the evidence on record and the relevant law. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent person. The court has to balance each situation depending on the facts at hand.

It is necessary to examine whether the accused had the necessary *mensrea* so as to be said he intended to commit the offence in question. *Mensrea* or criminal intent is the essential mental element considered in court proceedings to determine whether criminal guilt is present while *actusreus* functions as the essential physical element. These two elements, Latin terms for ‘*culpable mind*’ and ‘*culpable action*’ respectively, are required to establish the guilt of a defendant.

The essence of criminal law has been said to lie in the maxim ‘*actus non facitrem nisi mens sit rea.*’ There can be no crime large or small, without an evil mind.^[4] It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.^[5] I have evaluated the evidence tendered by the prosecution and the accused and I am persuaded that the same does not disclose a guilty intent on the part of the accused. This position was held in the case of *Gwezi S/O Mukozho*^[6] where the court held that:-

“*It must be shown that the accused had a positive intention to kill or cause death*”

The prosecution needed to prove that the accused had a positive intention to unlawfully cause the death of the deceased and that the same as manifested through an overt act as was held in the case of **Jane Koitee Jackson vs Republic**.^[7]

The evidence adduced in this case is manifestly weak to support the charge facing the accused. No one saw him light the fire. The children left the house with him, they left the deceased asleep and **PW7** said at the time they left they thought their mother was in the house. The appellantserved the children with food in his house and his wife found them there. No evidence was adduced to show that he left the children in his house and went back to light the fire. I find a serious gap in the evidence and this raises serious doubts and makes the evidence adduced totally unsafe to support such a seriousoffence.

I am fortified in my above finding by the proposition that mere suspicion no matter how strong cannot form the basis for a conviction. This was the holding in the case of *Abdallah Bin Wendovs Republic*.^[8]In the case of *Mary WanjikuGichiravs Republic*^[9] the court reiterated that an accused person who is convicted on the basis of mere suspicion is entitled to an acquittal on appeal.

I also find that no direct or circumstantial evidence was adduced, and in any event, even if there was any circumstantial evidence (which is not the case) as per the decision in *KipkeringArapKoske& Another vs Republic*^[10] in order to justify conviction on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

In *Omar Mzungu Chimera vs Republic*^[11] it was held that where a case rests entirely on circumstantial evidence, such evidence must satisfy three tests **(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 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.

From the analysis of the evidence, it’s not in dispute that the deceased died in the fire. It’s also not in

dispute that no one saw the accused light the fire. It's also not in dispute that the child was left alone sleeping in the house at night. It's not in dispute that the accused was with the other children at his house some 150 meters away when the house was gutted by fire. No evidence was tendered to show that the accused was the last to leave the house. In fact the evidence adduced was that the children followed him. The evidence adduced did not exclude the possibility of an accidental fire caused by either a lamp or lantern or any other source. These are possibilities that in my view ought to have been thoroughly excluded by submitting clear evidence. In my view, these glaring inconsistencies and gaps in the evidence make it unsafe to use the evidence adduced as a basis for conviction.

Considering the manifestly weak and insufficient evidence adduced, the nature of the offence and the punishment prescribed under the law, and all the circumstances of the case, I hereby find the accused **not guilty** of the offence of murder contrary to Section **203** of the Penal Code^[12] as read with Section **204** of the Penal Code^[13] I hereby dismiss the charges and acquit the accused of the said offence under Section 215 of the Criminal Procedure Code.^[14]

I hereby order that the accused be released forthwith unless otherwise lawfully held.

Right of appeal 14 days

Dated at Nyeri this 24th day of November 2015

John M. Mativo

Judge