

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 74 OF 2008

REPUBLIC

VERSUS

BENSON MWAURA ACCUSED

J U D G M E N T

1. The accused, **Benson Mwaura** was charged with the offence of murder contrary to section 203 and 204 of the Penal Code.
2. The particulars of the offence were that on the 30th day of June 2008 at **Tala Township** in **Kangundo District** of the **Eastern Province** murdered **Caroline Nduku Mutunga**.
3. The case was partly heard by **Hon. Kihara Kariuki J** (as he then was) then it proceeded further before **Hon. A Makhandia J**, (as he then was) who has since been elevated to the Court of Appeal. I took over the proceedings at the stage of the final submissions.
4. In support of the case the prosecution called five witnesses. It was the prosecution case that on the material day at about 1.30 a.m, PW4 **P.C. Gabriel Masinga** was on patrol duties at **Tala market**. PW4 was in the company of a colleague. They then heard some people making noise and proceeded to the place where the noise was emanating from, about 50 metres away. They found a group of people had surrounded a man and a woman. The woman had burn marks all over her body and she was screaming saying she had been burnt by the man she was with. The man who PW4 identified as the accused herein was being beaten by the mob. The police officers gathered from the mob that the accused and the woman who is the deceased herein were lovers and that the man had poured paraffin on the deceased and set her on fire. The accused and the deceased were escorted to **Tala Police Patrol Base**. Both the accused and the deceased were taken to hospital. The deceased however passed away as a result of the burns. The accused was subsequently charged with the offence herein.
5. In his defence, the accused elected to give sworn evidence. He denied the offence. He stated that on the material day at about 7.00 p.m, he arrived home from his place of work. His wife and daughter were at home preparing supper. The accused then went to the bathroom at about 8.00 p.m. to take a bath. While in the bathroom he heard the wife screaming and calling for his assistance. He rushed out and used a blanket to cover the wife and with the assistance of neighbours they managed to put off the fire that had engulfed the house. They then rushed the wife to the hospital. On the way they came across police officers who assisted in taking the wife to the hospital. The wife however passed away and the accused was charged with the offence herein.
6. The evidence that links the accused to the offence is that of PW4 only. PW4's evidence is that the deceased made a dying declaration in that she pointed out the accused as the one who had set her on fire. During cross-examination, it turned out that PW4 had not mentioned in his statement that the deceased stated that it was the accused who had set her on fire. The statement did not mention that PW4 talked to the deceased at any stage. Although PW4 refers to other witnesses who were at the scene, none of them was called to testify. PW4's evidence that the accused and the deceased were lovers and that the accused had set the deceased on fire remains mere hearsay. The evidence of PW4 required corroboration by other material witnesses.
7. The evidence of PW1 **PC Elijah Onyancha**, PW2 **Joseph Muisyo Mutunga** and PW3 **Philip Musyoka Katuka** is that of identification of the body of the deceased to the doctor who carried out the postmortem. PW5 **Dr Peter Ndegwa** testified that the cause of death was 72% bodily scalds.
8. The accused in his defence denied the offence. The prosecution case is weak in that the

neighbours said to have administered “**mob justice**” on the accused were not called to testify. A conviction is based on the strength of the prosecution case and of the weakness of the defence case. I give the accused the benefit of doubt and acquit him. The accused is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 17th day of February 2014.

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B. THURANIRA JADEN

JUDGE