



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 63 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUKANGU KIMANI.....ACCUSED

JUDGMENT

James Mukangu Kimani faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on the nights of 15th and 16th August 2011 at Njoro Ngondu 'B' farm Nakuru District, jointly with others not before the court murdered Matere Gichohi Gitae. The accused denied the offence. The case proceeded to full trial with the prosecution calling a total of six witnesses. The accused was called upon to enter his defence and made a sworn statement. He did not call any other witness.

Francis Mbiyu Kamau (PW1) testified that the deceased was his friend. He knew the accused as a neighbour. He recalled that on 15/8/2011 about 5.00 p.m. he was going to the deceased's house but they met on the way and he invited the deceased to his house to meet his mother who was visiting. The deceased went to PW1's house about 7.00 p.m., PW1 introduced him to his mother. The deceased left after about 10 minutes. PW1 retired to bed about 9.30 p.m. About 12 – 12.30 a.m. he heard noises as if something was burning. On waking up they found the neighbouring house burning and his wife raised alarm. Neighbours responded and came out to help put off the fire but the fire was too big and they did not get near. The roof caved in and collapsed. They later managed to put off the fire. Accused was one of the people helping put off the fire. After the fire was put off, they found the body of the deceased inside one of the rooms. They did not see the head or legs and it seemed as if the body had been tied with barbed wire. A report was made to police and on 16/8/2011, police informed them that blood stains were seen along the road. PW1 went to see the blood. PW1 also saw drag marks near the blood about 15-20 metres from the burnt house. With others, they followed the drag marks and trail of blood to a nearby tree where the grass was disturbed. Later, the police and area chief asked him to call all those who were present when putting off the fire and accused was one of those who came back. PW1 later heard that utensils taken from the burnt house were found in accused's house.

PW2, Margaret Njeri Matere was the deceased's wife. She had traveled to Njoro and on 16/8/2011, she received a call that her husband's house in Njoro had been burnt. She went home and confirmed the death and found the house burnt. She identified the body for post mortem.

PW3, Rebecca Wangui Matere was also a wife to the deceased. She lives in Kinangop and was informed of the arson and death of her husband in Njoro. She went and confirmed.

PW4, Ibrahim Thuo Ndegwa, told the court that the deceased was his tenant. He recalled that on 16/8/2011, he was called from his house about 2.00 a.m. He had leased the house to the deceased and it

was 4 roomed. PW4 had kept his property in 2 rooms and the deceased had access to all the rooms. He was called to pinpoint where he was shown some of his items which had been in the burnt house and which were said to have been found with accused i.e. gear plate wheel, hammer spanner, bicycle peddle and bar plate (PEX.1-5). He denied that the axe he was shown was his. The exhibits were all burnt save for the axe.

The post mortem was conducted by Doctor Ngulungu (PW5). He did not get the base of the skull, other bones were found but in fragments; the fore limbs were missing, external genitalia was missing, between pelvis and knees was present but other limbs were missing. Ribs had multiple fractures and blood in chest cavity. The doctor found no sign of inhalation meaning that the deceased's body was burnt after death. He opined that the cause of death was severe chest and head injurie, blunt trauma in a charred body due to thermal dry heat application.

PC Abakun Manderu (PW6) was the Investigation Officer. He received the murder report, went to the scene with Sgt. Githinji, found deceased's body in the burnt house. He saw blood stains from the road to the house, the body was tied with barbed wire round the abdomen and he extracted blood for investigations. He visited accused's house where he recovered various items which PW5 identified as his except the axe. The items had been stored in the house that got burnt.

In his sworn defence, the accused denied committing the offence. He told the court how he heard screams on the night of 16/8/2011, went out only to find a big fire. He woke up Nahashon and they went and found neighbours trying to put off the fire. Police came and chased them but he was called later. The OCS asked him what he was doing in that area yet he had been warned not to step there. He was arrested along with Nahashon but Nahashon was later released while he was charged.

This case turns of circumstantial evidence because nobody saw who murdered the deceased or who set the deceased's house on fire. It is evident from the evidence of PW1, PW3 and PW4 that the deceased did not die as a result of the fire. He must have been killed elsewhere and taken into the house and the murderer must have set the house ablaze to try to conceal the crime. Further, the fact that PW5 did not find any inhalation of smoke in the deceased's lungs and that parts of the body were missing is evidence that the deceased was murdered elsewhere and only part of his body was taken to the house and the house was set ablaze to cover up the murder.

The question is who committed the murder? Is it the accused person? The accused was linked to the deceased's murder because first, he was in the group of people that went to help put off the fire and most of all, his house was searched later and found to have things that belonged to PW4 and which had been stored in one of the rooms that was burnt. PW4 identified a hammer, spanner, bicycle peddle and bar plate. He said that all these things had been burnt. It means that at the time the house was burning, these items were in that house. There is overwhelming evidence that by the time the house was set ablaze the deceased was already dead. It follows that if indeed the accused took the said items from the subject house, it is after the fire had razed the house down. He was one of the looters who took advantage of the fire. However, there is no evidence that he was in the said house before the fire or that he was involved in the murder of the deceased.

The court was told that blood was found outside the house and the trail of blood led to a nearby tree where the grass was disturbed. A sample of blood was drawn from the deceased for further investigations but there is no evidence of whether it was ever confirmed whether the blood belonged to the deceased or another person. It seems no further investigations were carried out to establish where the other body parts of the deceased were taken to.

In the end, I find that the accused is a mere suspect. There is no evidence that links him to the murder of the deceased. The finding of the accused with items removed from the burnt house only links him to an offence of theft, if at all the items were of any value. For circumstantial evidence to found a conviction, it must meet the threshold set out in the case of **Peter v R (1952) AC 489** where Lord Marned said:-

“circumstantial evidence must always be narrowly examined, if only because evidence

of this kind may be fabricated to cast suspicion on another It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15**, the East African Court of Appeal held that for circumstantial evidence to found a conviction:-

"the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The evidence herein falls far below the required standard and is too weak to found a conviction. In the end, I find no evidence to support the charge of murder and the accused is acquitted of the charge and is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 29th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Morintant for the accused

Ms Rugut for the State

Kennedy – Court Clerk