



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO 10 OF 2011**

**FORMERLY NAIROBI HIGH COURT CRIMINAL CASE NO. 89 OF 2010**

REPUBLIC .....PROSECUTOR

VERSUS

ABDIKADIR AHMED MOHAMED.....CCUSED

**JUDGEMENT**

Abdikadir Ahmed Mohamed whom I will refer to as the accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The victim is one Neema Abdikadir Sheikh, deceased. She was wife to the accused. The offence is alleged to have been committed on 19<sup>th</sup> September 2010 at Township Location in Mandera. The accused denied the charges and the case was subjected to full trial where the State called seven witnesses in support of its case. On the other hand the defence called one witness, the accused, who testified under oath.

The evidence in summary is that at about 8.00pm on 19<sup>th</sup> September 2010, Abdisalam Ahmed Lakicha (PW1) saw smoke in a house next to the Equity Bank Building in Mandera and rushed to the place in company of one Yusuf, not a witness. He found a young girl, an employee of the deceased, holding a baby who informed them that there was someone inside the burning house. PW1 could hear someone crying from inside the burning house. He found the room, from where the smoke was coming from and where the woman was, locked. With help from members of public, the door was kicked open. Some water was poured into the room and PW1 switched off the lights. He attempted to enter but the smoke overwhelmed him. He managed to enter and attempted to pull the woman by hand but the hand slipped leaving pieces of burned skin in PW1's hand. The woman was finally rescued and rushed to hospital.

Dr. Martin (PW6) testified that on 19<sup>th</sup> September 2010 the deceased was taken to him following the fire for the examination. He places the time as 6.00pm which is at variance with the evidence that the deceased was rescued from the burning house at around 8.00pm. The doctor told the court that he found the deceased, who was alive at the time, having sustained 50% burns. After examining her, PW2 referred the deceased to Kenyatta National Hospital and contacted AMREF who airlifted the deceased to Nairobi. Further evidence shows that the deceased died at Kenyatta National Hospital. The date of death is placed as 3<sup>rd</sup> October 2010 according to the evidence of Mohamud Hassan Abdullahi (PW4) and Billow Abdow Abdullahi (PW5) who told the court that they are related to the deceased as cousin and brother respectively.

Mohamed Hussein (PW2) testified that on 19<sup>th</sup> September 2010 at around 8.15pm he received a telephone call from the accused who is his brother in law. PW2 was at the time walking towards Super Drug Chemist. The accused was asking him to meet him at the Chemist because there was a problem. On

arriving at the Chemist he did not find the accused there. PW2 tried calling him on his phone but did not go through. He called the deceased, his sister, and also did not go through. He decided to walk to the accused's house. He found the house on fire and members of public including PW1 and one Yusuf having gathered and attempting to put out the fire. PW2 joined in putting out the fire. They rescued the deceased and rushed her to hospital.

Police Constable Richard Muatha (PW7) learned of the fire while on crime duties stand-by at Mandera Police Station. He went to the scene. He found Mandera Fire Fighters putting out the fire. He learned that a woman had burned inside the house and had been taken to hospital. He went to the hospital and found the deceased unconscious. He returned to the scene the following day and collected from the scene Exhibit 3, a white five litre jerycan with some liquid. He also recorded statements of witnesses.

The accused testified under oath. He told the court that on 19<sup>th</sup> September 2013 he was away from his house when he heard some noise and went back. He found his house on fire and his ayah outside the house with the baby. He found people using buckets of water to put out the fire among them PW1 and Yusuf. He told the court that he did not see PW2 at the scene. He stated that he took part in putting out the fire and got burned on the hands and back. He said he never had domestic problems with his wife and that on the fateful night he had taken supper with his wife. He denied that PW2 had been reconciling them. He stated that he accompanied his wife to hospital and spent that night in hospital until the following morning when he was arrested as he went to buy breakfast.

Murder is defined under section 203 of the Penal Code thus:

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

The law places the onus of proving a criminal case on the prosecution. This never shifts unless where the law specifically provides so. In this case the prosecution has to prove three things:

- i. That Neema Abdikadir is dead
- ii. That her death was caused by the accused person before the court
- iii. That the accused caused that death unlawfully and with malice aforethought.

Malice aforethought is deemed to be established when there is evidence which proves an intention to cause death of or to cause grievous harm to any person whether that person is the one who actually dies or not (**see Karani & 3 others v. Republic, CA (1993) KLR 622**). In the same case, the court stated that the nature of the injuries caused and the weapon used amply prove an intention to cause the death or at least to cause grievous harm.

There is no direct evidence linking the accused before me with setting the fire to his house. PW1 who was the first at the scene testified that the accused arrived and found him (PW1), one Yusuf and members of public already at the scene and attempting to put out the fire. This case therefore relies entirely on circumstantial evidence.

Circumstantial evidence was held in **Tumuheire v U [1967] EA 328** often to be the best evidence in establishing the commission of a crime by a person. The court in **Tumuheire case** above was enunciating the principle as set out in the English case of **Republic v Taylor, Weaver and Donovan [1928] 21 Cr Appeal R 20** where the court stated that:

**“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial evidence.”**

In **Kipkering arap Koskei & another v. Republic [1949] 16 EACA 135** the court was of the view that:

**“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, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of innocence is always on the prosecution and never shifts to the accused.”**

Without direct evidence pointing to the accused person in this case, this court will examine the evidence of the surrounding circumstances to determine whether there are inculpatory facts which this court can base a finding that those facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than his guilt. The only evidence that seems to connect the accused with the offence is that of PW2. This witness seemed to advance the hypothesis that the accused set the house on fire with the intention of burning his wife because they were not in good terms. PW2 told the court that the accused called him and asked that they meet because there was a problem. This was denied by the accused who stated that PW2 never handled any domestic issues between the accused and his wife and that they did not have such issues. PW1 told the court that he could smell petrol fumes. PW7 testified that he collected Exhibit 3. This was a white five litre jericin which was partly burnt at the lid which PW7 said contained some liquid. It was taken to the Government Chemist for analysis. This court did not have the benefit of the report from the Government analyst as to the contents of that jericin. There is no evidence to establish that the contents of exhibit 3 were inflammable and whether this was used to start the fire; whether that fire was started by someone with the intention of burning the deceased and whether that person is the accused before this court.

I have read all the evidence by the prosecution carefully and I have noticed that the post mortem report was not produced. What was produced in court was a P3 form showing the extent of the deceased's burns.

On cross examination, PW1 said that the accused joined them when they were removing the deceased from the house and that he was crying. He also accompanied them to hospital. As I have stated above the accused person never assumes the onus of proving his innocence. It is the prosecution that bears the onus of proving that the accused set fire to his house with the intention of burning his wife to death or to cause grievous harm and that he knew that this action would result in the death of his wife or grievous harm to her.

After careful analysis of all the evidence and submissions by both counsels as well as the relevant law, it is my finding that the prosecution has failed to discharge its duty of proving that the accused murdered the deceased. Although the post mortem report was not produced, it is my finding that death was proved. The evidence of PW4 and PW5 attested to their identifying the body of the deceased at Kenyatta National Hospital for purposes of post mortem. However, the prosecution has failed to prove if the house was set on fire deliberately with the sole intention of burning the deceased inside the house; the prosecution has also failed to prove that the accused is the person who set the house on fire. In view of this, the court finds that the evidence that accused participated in rescuing the deceased, accompanied her to hospital and was crying when the deceased was being rescued raises reasonable doubt that he is not the one who set the house on fire. His behavior is not compatible with that of someone who set the house on fire with intention of burning his wife to death or causing her grievous harm. I therefore find the accused not guilty and order his immediate release from custody unless for any other lawful reason he is held. I make orders accordingly.

**S. N. MUTUKU**

**JUDGE**

Signed, dated and delivered this 16<sup>th</sup> day of September 2013 in open court.