



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE 97 OF 2005

REPUBLIC.....
.....PROSECUTOR

VERSUS

ANTHONY KINUTHIA WANJIKU.....1ST
ACCUSED

GREGORY MWANGI MUNGAI.....2ND
ACCUSED

ISMAEL ONOMO.....3RD
ACCUSED

JUDGMENT

Anthony Kinuthia Wanjiku 2. Gregory Mwangi Mungai and 3. Ismael Onomo (*together the accused*) are charged with the murder of Viz Tom Okeyo on the 30th day of October at Mchanganyiko Estate in Nakuru District within Rift Valley Province jointly with another not before the court.

This case has taken a long time to conclude because the hearing with the aid of assessors by the first Judge, then it was taken over and heard without the aid of assessors by another Judge when the first judge was transferred to a different station. Those proceedings were a nullity in light of the provisions of Section 23(2) of the Interpretation and General Provisions Act (*Cap. 2, Laws of Kenya*) that where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not affect among other legal provisions. So when a third judge was seized of the matter, one assessor had relocated from Nakuru, and others were difficult to get. It was agreed by both State Counsel and counsel for the accused that the matter commences afresh, or **de novo**.

The circumstances leading to the death of the deceased are rather unfortunate. The deceased Viz Tom Okeyo, was a victim of circumstances. The three accused were among a gang of others who are at large. These three accused were met by PW1, who had known them before. PW1 greeted them, but they refused to acknowledge her greeting. She was on her way to the local kiosk at Mchanganyiko Estate to buy Kerosene with which is a cheap source of energy, for cooking and to make a meal for herself and her son, the deceased and Wanjala, her little daughter who also perished in the fire.

PW1's misfortune was that she lived by a neighbor called Dixon (PW5) with whom a friend of the accused together with others not before the court, had entered into an agreement for sale of a bicycle

to PW1 for the sum of Ksh 1,500/=. PW5 testified that he paid the sum of shs 800/= leaving a balance of shs 700/=. The transaction having been entered on 28/10/2005, it was not clear even from the evidence of PW5, the buyer when the balance of the purchase price was to be paid. From the evidence of both PW1, PW5 and PW8 the balance of the purchase price was to be paid not later than the next day, the 29th October 2005.

According to the evidence of PW5, he was sold the bicycle on 28.10.2005. On 29.10.2005 as he was returning to his house, he was accosted by a large group (*of young men*) who demanded the balance of the purchase price from him. He had to ran for his life. A good Samaritan, also a neighbor, who saved him. That was PW8, a Mr. Gichohi, who confirmed the evidence of PW5, that the mob demanded that he hand over Dixon (PW5) to them.

Yet on the next day, 29th October 2005, the same group of people followed him, and the person who had sold him the bicycle warned him that unless they got the money, he, Dixon, would not rest, the significance of which warning he failed to appreciate. The group had come from watching a game of football. They went away.

The seller or seller\'s agents, did not tire, they returned on 30/10/2005 at 7.00 a.m., and threatened PW5 (*Dixon, the buyer*) that if they did not get the bicycle that day, they would be at liberty to take anything else (*of value*) from his house, including Dixon\'s wife.

Scared of what might happen to him or his family, PW5, went to Solai, where his brother, who had taken the bicycle lived. As fate it would have it, when he reached Solai, he did not find either the brother or the bicycle, and he returned empty handed. He was met with tragedy upon his return to Mchanganyiko. His house, and that of his immediate neighbor PW1 (Miriam) had been burnt. Worse still, Miriam\'s two (2) children had been burnt to death in the arson attack.

Upon inquiry who might have burned down his and his neighbour\'s house he was informed that the act was done by the boys who had been looking for him. He went out looking for them, and in particular the boy who had sold him the bicycle. He found the 1st accused and with the help of PW8, effected a citizen\'s arrest, and took him to Central Police Station Nakuru. They also effected a similar arrest on the 2nd and 3rd accused at Mchanganyiko Estate, and handed the accused to the Police.

When cross-examined by Mrs Ndeda learned counsel for the accused, PW1 discarded any notion that the deceased child caused the fire. Lighting materials were kept away from the children.

PW2 testified that the two children were burnt in the house, elder child Tom Okeyo had a face lift unburnt. His sister Naliaka had been burnt beyond recognition. PW3 and his colleague rescued, the 2nd and 3rd accused from being lynched. PW4 and his colleagues recovered the bodies of the children and received information that origin of the fire was a disagreement over payment of the purchase price for a bicycle. It is PW6 who re-arrested the accused.

When the accused were put to their defence, the 1st accused denied any knowledge of the incident of which he is charged. He however confirmed the citizens\' arrest by PW5 and PW8, on 2.11.2005, and re-arrest by PW4 and PW6. DW1 knew PW1, the deceased\'s mother.

DW2, the 2nd accused too gave sworn testimony. It is he who called the Police because of threats by the citizens to lynch his co-accused, DW1. DW2 denied killing the deceased.

When cross-examined by the State Counsel, this accused stated that he had no dealings with PW5, but again also knew PW1 the mother of the deceased. She used to sell vegetables. He also knew PW5, Dixon but did not sell any bicycle to PW5.

DW3 the accused testified likewise. He too knew PW5 only on 2.11.2005, he did not know PW1, the mother of the deceased. He never sold any bicycle to PW5.

DW4 was an independent witness. He testified in support of the 2nd accused. In his testimony - the 2nd accused was with his parents the same day at the same time. He could not have committed the offence for which he is charged. He did not understand why his brother was in court. He however confirmed in cross-examination that he was not with his brother on 29/10/2005, but he would not state what he did on that date.

DW5 testified in support of the 2nd Accused his brother. Again, he followed the same script as DW4, they were at their mother's house watching TV, and the 2nd accused would not have been out there burning neighbours' houses. This witness wondered why DW2, his brother, the 2nd Accused, erred in not failing to mention him in his evidence.

ANALYSIS OF EVIDENCE

As I said in the beginning of this judgment, the accused are an unfortunate lot. The evidence against the three of them is circumstantial. According to Mrs Ndeda, learned counsel for the accused, it is evidence which does not reach the threshold for murder. The deceased died from a fire in the house of PW1. There was no eye witness.

These accused were connected by the evidence of PW1 in a group of youths. PW1 was not in the house when the fire was lit, and could not identify who set the house on fire.

Indeed PW5 evidence shows the seller of the bicycle is not before court. Mrs Ndeda submitted that it was unsafe in the circumstances to convict the accused.

Mr. Omwega learned Senior Principal State Counsel urged the court to find the accused guilty on the evidence and to convict them of the offence of murder.

OPINION & CONCLUSION

Culpability for the offence of murder is determined by malice aforethought. Under Section 206 of the Penal Code, malice aforethought is established inter alia by knowledge that the act or omission causing death will probably cause the death 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.

In this case, the evidence of PW1, PW5 and PW8 is consistent and corroborative.

The accused, were from the evidence of those witnesses a gang of "**toughs**" from "**mitaani**". They were ready muscle to enforce discipline upon any erring member, or other persons with whom a member had dealings, or on hire by those able. There is of course no such direct evidence in this case. The circumstances are however clear. The accused used to move in groups of 7 or 10 according to the evidence of PW8. The purpose was to enforce dealings with any person with whom they or any of their member had dealings.

The case in point here was the sale of the bicycle. One of their member, who faded away from the picture when the accused and other hot heads decided to let PW5 not rest, by burning his house, and unfortunately including that of PW1. The question is what evidence is on record that it is those accused who set the two houses on fire? There is of course no direct evidence to prove so.

It was however the evidence of both PW1, PW5 and PW8 that there was a transaction for the sale and purchase of a bicycle. The purchaser failed to keep his part of the bargain. He was threatened that unless he met the deadline of 1.00 p.m. on 30.10.2005, he would not rest. The three accused had said this to PW1 in the morning. PW1 met the same three men in the evening on her way to buy kerosene from the shopping centre.

Upon her return she found smoke billowing from her house, and her two children had been engulfed by the fire and burnt to death in the house. She did not find the three men, the accused. It is unclear from our level of Police and Forensic Fire investigations where the fire started from either her house or that of PW5. What is clear from the evidence of PW1 is that she left her house without lighting any "jiko", charcoal or kerosene, her 2^{1/2} child was incapable of causing the fire that consumed him and his sister.

Although no one appears to have seen any of the accused lit the fire, when he was informed that some boys had been looking for him, PW5 was clear in his mind that it could only have been the three accused. He, with the assistance of PW8, found them, and had them subjected to a citizens arrest, and then handed over to the Police. PW5 clearly knew the three accused among the 10 or so members who were pursuing him for the payment of the balance of the price for the bicycle.

PW8 clearly said that there were other 7 youths, but those in court were the three to be recognized. It is three boys, the accused who were clearly recognized, and not others. There was no mistake on the part of either PW1 and PW5 or PW8.

The evidence of the accused actually corroborated that of these prosecution witnesses. The three accused acknowledged they knew both PW1, PW5 and PW8, and these witnesses knew them too. There was no grudge by these witnesses against any of the accused. They were the primary suspects. They had threatened Dixon that he would not rest unless he paid the balance of the purchase price. If they suffered loss of the balance of the purchase price, PW5 would not rest either. But PW5 was lucky. He had gone to collect the bicycle from his brother. He actually brought back the bicycle. By that time however, the deed had been done, PW5's house had been burnt, and that of his neighbor, burning to death his neighbour's children. Who could have done that?

It is said that suspicion however strong is no substitute for hard facts. However many a criminal case has no hard facts or direct evidence. Most evidence is circumstantial. It is evidence of all the surrounding circumstances, which some ancient authorities, say, go to prove a proposition with the accuracy of mathematics. Other authorities say, it is evidence based upon hypothesis that, there are no other facts inconsistent with the guilt or innocence of the accused.

In this case, I have no doubt in my mind that it is the accused who set the house, PW1 on fire. They did not care that Dixon (PW5) whom they had said would not rest until he paid up the money, was in the house or any other person, whom they did not intend to kill or cause grievous bodily harm. Their act was malicious. The accused were part of a gang of 7 or 10 youths who aided and abated the demands of the bicycle seller and led to the burning of the deceased and are culpable for his death under Section 20 of the Penal Code.

I do not accept the evidence of alibi advanced by the evidence of DW4 and DW5. If there was any such supper in their parents' house, DW2 would have said so in his evidence on oath. The evidence of DW4 and DW5, was a fiction to try and assist their brother. I reject it as such.

In the circumstances, I hold each of the accused to have caused the death of the deceased in this case. I find each of them guilty and I convict each of them with the offence of murder of the deceased contrary to Section 203 of the Penal Code.

I therefore call upon counsel for the accused to give me reasons why the accused should not be sentenced to death in terms of Section 204 of the Penal Code.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of April, 2012

M. J. ANYARA EMUKULE

JUDGE