



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 6 OF 2007

REPUBLIC PROSECUTION

-VERSUS-

DANIEL CHANZA LUKANU ACCUSED

JUDGEMENT

The accused person herein **DANIEL CHANZA LUKANU** was arraigned before the High Court, Mombasa on 16th May 2007 on a charge of **MURDER CONTRARY TO SECTION 203 as read with S.204 PENAL CODE**. The particulars of the information were that:

“Between the night of 6th April and 20th day of April, 2007 at Miritini Village of Changamwe Location in Mombasa District within Coast Province murdered REBECCA ANINDO MUSANDO”

The accused entered a plea of **‘not guilty’** to the charge. His trial commenced before me on 26th May 2009. The prosecution led by **MR. ONDARI**, learned State Counsel called a total of six (6) witnesses in support of their case. **MR. OJODE**, learned counsel mounted the defence on behalf of the accused person.

The accused and the deceased **REBECCA ANINDO MUSANDO** were man and wife. They had been married for about two years and had two children. On the material date 6th April 2007 it appeared that the couple were involved in a domestic disagreement, a common enough occurrence within any marriage. However in this case flames were seen rising from their single roomed house. Neighbours and relatives rushed to the scene in a bid to help. They found the deceased on fire with flames engulfing her whole body. The accused was also present but was unharmed. The neighbours rushed to deceased to the nearby **LEWA CLINIC**, where she could not be treated due to the severity of her injuries. The group then went to report the incident at Changamwe Police Station. At that point the accused was arrested and placed in cells. They then took the deceased to Coast General Hospital where she was admitted and underwent treatment for 14 days but unfortunately lost the battle for her life and died on 20th April 2007. The police took up and investigated the matter, finally charging the accused with the offence of Murder. The offence of Murder as defined by S. 203 of the Penal Code is committed by any person who with malice aforethought causes the death of another person by any unlawful act or omission. It is and remains a cardinal principle of law in all criminal cases that the burden at all times lies on the prosecution to prove the guilt of the accused person beyond reasonable doubt.

I must before delving into an analysis of the evidence on record point out what I consider to be a

defect in the charge sheet. The particulars of the charge state that the accused murdered the deceased **“between the night of 6th April 2007 and 20th day of April 2007”**. This is a very puzzling assertion. It is inconceivable that the accused committed the act of murder over a span of 14 days! The act or omission which led to the death of the deceased was committed on 6th April 2007. The death of the deceased **resulting** from that act or omission occurred on 20th April 2007. Therefore the particulars ought to have stated that the murder occurred on 6th April 2007 since that is when the act complained of was committed. This defect is not however fatal to the prosecution case.

Having said that I will now proceed to analyze the prosecution case. In order to prove the offence of murder it is essential that the death of the deceased be proved. In this case there are several witnesses who include **PW1 STEPHEN JUMA OTIENO**, told the court that on the evening of 6th April 2007 he was resting in his house. He heard screams from the house of the accused who was his neighbour. **PW1** rushed out to find the accused’s house on fire. He and accused broke open the door to meet the horrific sight of the deceased who was the deceased’s wife engulfed in flames. This evidence is corroborated by **PW3 RAELE AUMA MUSANDO**, a sister to the deceased. She narrates how she was in her house a few metres from the deceased’s house at 8.00 p.m. A neighbour alerted her that her sister had been burnt. **PW2** also rushed to the scene. She found the deceased, accused and others at the bus-stage. The deceased was in a critical condition with severe burns all over her body. Likewise **PW4 SHADRACK WABWA MUSANDO** a brother to the deceased was alerted that same night and rushed to the home of the deceased and accused. He too met the group on the road. He told the court that **“Rebecca/deceased was totally nude and her skin was falling off.”** There can be no doubt therefore that the deceased sustained severe burns on the night of 6th April 2007. She was rushed to Coast General Hospital where she was admitted but unfortunately died on 20th April 2007. This is testified to by **PW1, PW3** and **PW4**. Conclusive evidence regarding the cause of death of the deceased was given by **PW2 DR. K.N. MANDALYA**, a consultant pathologist who conducted the autopsy on the body of the deceased which was duly identified by relatives on 27th April 2007 approximately seven (7) days after her death. **PW2** confirmed that the body of the deceased had superficial and deep burns over about 40 – 45% of the surface area of the body. His conclusion was that the cause of death was **“respiratory failure due to pneumonia due to severe burns”**. From this evidence there can be no doubt that the accused sustained severe burns over a large area of her body on the night of 6th April 2007 which burns ultimately led to her death on 20th April 2007. Therefore the fact of death of the deceased has been satisfactorily proved.

The next question is whether this death of the deceased resulted from any unlawful act or omission by the accused. The prosecution case is that the accused after quarrelling with the deceased set her on fire by throwing a burning stove at her. It is imperative to note that there was no actual eye-witness to this incident. The closest the prosecution were able to secure in terms of an eye-witness was **PW1** who was the couple’s landlord. In his evidence-in-chief before this court **PW1** stated that when he saw flames from the deceased’s house he rushed out to help. He states that he found the accused **outside** the house whose door had been locked from inside. Together he and the accused broke down the door and upon gaining entry found the deceased on fire **inside** the house. If as **PW1** claims the accused was outside the house when the fire started and the door was locked from **inside** then it would be highly unlikely that the accused had anything to do with this fire. However Mr. Ondari for the State applied and was permitted to declare **PW1** a **“hostile witness”**. He then proceeded to cross-examine **PW1** on his statement made to police concerning this incident. **PW1** did identify and confirm his statement as well as his signature thereon. In this statement to the police **PW1** contrary to what he has told the court, states that when he got outside after seeing the flames from his neighbour’s house he met both the deceased **and** the accused **outside** the house. The deceased who was on fire was wailing saying that the accused was beating her and the accused was pushing the deceased back into the house. Clearly this is in direct contradiction to this witness’s statement on oath in which he stated that the deceased was on fire inside the locked house. Evidently this is a witness who has no qualms about changing his story to suit the circumstances. In the face of such inconsistencies his evidence cannot be relied upon and I would even go so far as to state that he did more harm than good to the prosecution’s case. I will comment more on the evidence **PW1** later.

Apart from the testimony of **PW1** (which has been shown to be totally unreliable), the prosecution

did also rely on a **'dying declaration'** made by the deceased in order to prove their case. In the case of **DZOMBO CHAI –VS- REPUBLIC CRIM APPEAL 256/2006**, a **'dying declaration'** was defined at page 23 as:

“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question.”

In that case such dying declarations were held to admissible as proof of the cause of death under S. 33(a) of the Evidence Act Cap 80, Laws of Kenya. **PW5 CORPORAL JOAB OLUOCH** told the court that after the deceased had been admitted at Coast General Hospital he went there to record her statement. The said statement was produced as an exhibit in court **Pexb1**. In this statement the deceased stated that on the 6th April 2007 she went to a neighbouring house where palm-wine **'Mnazi'** was being sold to collect her husband the accused who was drinking there, as she objected to his partaking in alcohol. The accused told her to go home and he would follow. The deceased went home and began to prepare the evening meal. At 8.00 p.m. the accused came home furious because of her action in going to the bar to collect him. He then picked the lit stove and threw it at the deceased whose body caught fire. She screamed for help and members of public came to her aid. This statement was given by the deceased in the presence of **PW3** her sister. **PW3** confirmed to the court that the deceased told them that it was the accused who threw the stove at her and set her alight. This statement does amount to a dying declaration as it was made by the deceased whilst critically injured from burn wounds and she died shortly after making this statement. In his defence the accused confirms that indeed the deceased had followed him to the palm wine club and she started to quarrel with him about his wastage of money. In his defence accused denies having engaged in a quarrel with the deceased. He claims that when he got home he found his door locked from inside. He therefore suggests that the deceased in her anger and frustration set herself on fire. The witness whom the accused relied upon to corroborate his story that the deceased had locked herself inside the house was **PW1**. As I have already stated earlier **PW1** was clearly an untruthful witness and clearly intended to tilt his evidence to favour the accused. His evidence is not reliable proof of any fact in issue.

Further corroboration of the sequence of events as narrated by the deceased is provided by the photographs taken at the scene. Whereas the accused claims that he and **PW1** had to break the door in order to gain access to the house photographs (2) and (3) provide a clear view of said door and show it was intact. It had not been broken in at all. Further the photographs (4), (5), (6), (8), (9) and (10) show a view of the room in which the incident occurred. The house is in a total mess with goods scattered all around. The view tends to suggest that some commotion or fight occurred in that room. It does not look like a room where one poured paraffin on herself to set herself alight. Thirdly the anger which the deceased was feeling was against the accused, her husband, whom she had accused of wasting money on women and alcohol. She was more likely to have directed her violence at the accused and not against herself by committing suicide. I therefore reject the accused's defence that the deceased burnt herself inside the house as a fabrication. I am persuaded that the more likely scenario was that presented by the deceased in her dying declaration. The couple quarreled and fought and in the course of this commotion the accused picked the stove on which the deceased was cooking and threw it at her setting her alight. The evidence of **PW3** as well as the photographs at the scene confirm this. I therefore find that it was the unlawful act by the accused of throwing a lighted kerosene stove at the deceased which led to her burn injuries and ultimately to her death from these injuries.

The **'actus reus'** or unlawful act has therefore been proved. However in order to secure a conviction on a charge of murder the prosecution must prove the **'mens rea'** or mental element of the offence. This is the criminal intent to cause the death of another with malice aforethought. In other words the murder must be pre-meditated. Was the action of the accused in throwing a burning stove at the deceased such a pre-meditated act? I think not. There is evidence on record that the couple had quarreled. The accused as a normal African man must have been angered by his wife's action in coming to collect him from the palm wine club and berating him in public. I have no doubt that he came home in a foul mood determined to **"teach her a lesson"**. The scattered goods inside the house are evidence that the couple must have been engaged in a fight or struggle of some sort. The accused's male ego had been challenged. He probably picked up the stove and threw it in a fit of anger. Indeed the deceased in her dying declaration stated that

when the accused came home he vowed not to eat her food. No doubt his intent was to throw away the food. I find that it is more likely that the accused acted in a fit of anger rather than with intent to kill his wife. The fact that the accused remained with the deceased and helped to take her to hospital is further evidence that he had no malice aforethought. His intention was not to kill the deceased but more to vent his anger against her actions. Unfortunately he went too far, and his actions did result in the death of the deceased. In the absence of premeditated malice aforethought, the mens rea for murder is absent thus I find this offence not proven and I acquit the accused of the charge of murder. However having said that I find that the accused acted recklessly and caused the death of the deceased. I am satisfied that the facts adduced in evidence prove the offence of Manslaughter. I therefore convict the accused of the lesser offence of Manslaughter contrary to Section 213 of the Penal Code.

Dated and Delivered at Mombasa this 15th day of December 2010.

M. ODERO
JUDGE

Mr. Onserio for State
Mr. Onjoro holding brief for Mr. Ojode

MR. ONSERIO: Treat as a first offender.

COURT: Hearing on 16th December 2010 for mitigation.

M. ODERO
JUDGE
15.12.2010

16.12.2010

Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Onserio for State

Mr. Ojode for Accused

MR. OJODE IN MITIGATION: Following the court's decision it is clear the accused was provoked. This is why the court reduced the charge. I urge it to take a subjective approach in sentencing the accused. His loss of control was sudden and temporary. I ask it to consider the issue of provocation. I pray for a lenient sentence. This was involuntary manslaughter through recklessness. Accused has been in custody for three years. He is remorseful and prays for leniency. He is a parent and has two children.

COURT: Probation Department to prepare a report to include victim impact statements before sentencing.

Mention on 11th February 2011.

M. ODERO
JUDGE
16.12.2010

11.2.2011

Before: Hon. Lady Justice M. Odero
Court Clerk Mutisya
Mr. Onserio for State

Mr. Sitoni holding brief for Mr. Ojode for Accused

MR. ONSERIO: The Probation Officer seized of this matter passed away. We need more time to avail the report.

COURT: Noted.

Mention on 21st March 2011

M. ODERO

JUDGE

11.2.2011

21.3.2011

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Ojode for Appellant

Mr. Onserio for Respondent

COURT

I have considered the mitigation made by counsel on behalf of the accused. I have also considered the Probation Report which is favourable. However accused's reckless act led to loss of human life and deprived a young child of a mother forever. I hereby sentence him to serve five (5) years imprisonment.

Right of appeal 14 days.

M. ODERO

JUDGE

21.03.2011