



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA Criminal Case 3 of 2008**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DISMUS MUKHULO OUMA.....ACCUSED**

**J U D G E M E N T**

The accused person Dismus Makhulo Ouma is charged with murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 19<sup>th</sup> February 2005 at Ambangusi village, Buyama sub-location, Nasuwa location of Busia District, he murdered Edwin Juma. He pleaded not guilty to the offence.

This case was heard by two judges. Justice Mbogholi Msagha heard four witnesses. I took over the case on 7<sup>th</sup> May 2009. I heard two prosecution witnesses and the defence case.

PW1 Dr. Zakaria Njau produced the post-mortem report. He formed the opinion that the deceased died of severe burns of the 5<sup>th</sup> degree. The accused was also examined and found to be an adult and of sound mental status.

PW3 Enos Ouma Okundi testified that he heard screams from the direction of accused's house and he went there. He met with the accused running away towards the sugar cane plantation. There were people at the scene trying to put off the fire and crying that there was a child inside the house of accused which was on fire. PW2 ran after the accused accompanied, by one Amin and arrested him. He handed him over to the village elder who escorted him to the area chief's place. The child was the deceased in this case a son of the younger brother of the accused. He was burnt beyond recognition. His remains were removed from the collapsed burning house.

PW4 Aggrey Kwoba Ekeya was the village elder. He testified that he heard screams from the house of accused's father. He then went there and found the father and other people screaming and struggling to put off the fire. They were shouting that there was a child burning in the house. The accused had been apprehended and he was handed over to him by Enos Mairo and Mary Kwona. He escorted accused to the Assistance Chief's office.

PW2 was the father of the accused Enos Ouma Busabero. He said he heard his daughter in-law screaming and went outside the house. He found the house of accused on fire and the accused was trying to put off the fire but the fire had overwhelmed him. PW1 Enos

Ouma Okundi came to the scene and found accused and PW3 at the scene. The child inside the house was burnt to death. Many neighbours came and found the fire had been put off. The village elder went with the accused to Assistant chief's.

PW5 was the police officer who received the report and visited the scene. He also removed the remains of the deceased's body from the scene to Busia District Hospital. He arrested the accused thereafter at Busia Police Station

PW6 was the Assistant Chief. He testified that the village elder PW3 went to his house on 19/02/05 around 10.00 a.m accompanied by the accused PW3 reported that there was a case of a fire where an infant was burned inside the house. The accused said he had left the child in the house and gone to look for flour to cook for the child. When he returned he found his house on fire. PW4 informed the area chief. As PW6 escorted accused to Nambale police station, the accused walked ahead and disappeared. He did not go to the station on that day but surrendered to the police the following day.

The accused in his sworn statement of defence denied the offence. He testified that he was staying with the deceased who was his brother's child. On the material day, he found the deceased outside the house around 7.30 p.m. He opened the house and both entered inside. He checked on maize flour to cook for the child and found the container empty. He left the child in the house and went to the house of his brother Wandera to borrow some flour. When he returned he found his house on fire and people trying to put it off. The deceased was burnt to death as he was still inside. He denied setting the house on fire. When the village elder escorted him to the Assistant chief's office, he decided to go to hospital because he was sick. He took himself to Busia police station the following.

The first witness to arrive at the scene was the father of the accused PW3. He was attracted by the screams of his daughter in-law shouting that the house was burning. The accused found his father at the scene when he and others were trying to put out the fire. His father says the accused wanted to enter the house and remove the child. The village elder PW4 and other people came to the scene. There was no eye witness who saw the accused setting the house on fire. PW2 Enos Ouma was the only one who said that he met the accused at the gate running away when the house was still burning. PW2 and one Amin arrested the accused and handed him over to PW4. PW2 said that when he asked accused why he was running away, accused said he did not know why. This is the only evidence implicating the accused in that he was prompted by his guilt and fear of the consequences to run away. The defence of the accused was that he had gone to the house of his brother one Wandera to borrow maize flour to cook for the child. PW2 said he saw the accused holding a cup with flour when he came to the scene. The accused did not call his brother as a defence witness. The defence in their submissions argued that the prosecution failed to adduce evidence to prove the *actus reus* against the accused. The accused was at the forefront trying to put off the fire when he returned and that he was not there when the fire started.

PW6 the Assistant Chief said accused ran away as he was being escorted to the police station. The investigating officer confirmed that the accused surrendered himself to the police the following day. The accused explained in his defence that he went to hospital for treatment that night because he was feeling sick. The two attempts of the accused to run away were the basis of attributing the guilt to him. This evidence and any other from the witnesses is purely circumstantial. The court can only convict on circumstantial evidence only when it is crystal clear that it is the accused who committed the offence. The evidence before this court leaves a lot to be desired. None of the witnesses saw accused set the house on fire or saw him leaving the house when it started burning. The standards of proof in a criminal case must be beyond any reasonable doubt. It is my finding that the prosecution have failed to prove the case against the accused to the standards required.

The *actus reus* has not been established as having been done by the accused.

For the foregoing reasons I give the accused the benefit of the doubt and acquit him accordingly under S. 215 of the Criminal Procedure Code. He is set at liberty unless otherwise lawfully held.

**F.N. MUCHEMI**

**J U D G E**

Judgment dated and delivered on the 2<sup>nd</sup> day of December, 2009

In the presence of the accused Mr. Okutta and the state counsel Mr. Onderi.