



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 17 of 2004

REPUBLIC :::::::::::::::::::::::::::::: PROSECUTOR.

VERSUS

JOSEPH KARIMI KAMAU :::::::::::::::::::::: ACCUSED.

J U D G M E N T.

The accused, *Joseph Karimi Kamau*, is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars in Count 1 are that on the 23rd day of February, 1999 at Kaburu Village in Kiambu District of the Central Province murdered one, Lucy Wanjiku Karanja.

Particulars in Count II are that on the 23rd day of February, 1999 at Kaburu Village in Kiambu District of the Central Province murdered Anthony Gathiru Karanja.

Particulars in Count III are that on the 23rd day of February, 1999 at Kaburu village in Kiambu District of the central Province murdered Caroline Nyokabi Karanja.

The prosecution called six (6) witnesses in support of its case.

NO. 45361 PC. Anthony Gichungu (PW1), attached to Githunguri Police Station stand-by duties received a complaint of assault causing actual bodily harm from Karanja Nyokabi. The complainant was issued with a P3 and advised to attend a clinic within Githunguri Township.

The same night, at about 12.30 a.m., two administration officers attached to Kaburu chief's camp reported that while searching for the accused, they passed by the complainant's house which was on fire. They also confirmed that members of the public informed them that three (3) children died in the inferno.

They visited the scene in the company of station commander, Chief Inspector James Maina. Upon undertaking preliminary investigations at the scene, the three bodies were taken to the mortuary. Chief Inspector Maina ordered for the arrest of the accused.

On 24th February, 1999, PW1 learnt that the suspect had been arrested.

On 2nd March, 1999 he visited City Mortuary in the company of the deceased's relatives, Ismael Nyokabi and Wakabi Karanja, for purposes of identification of the bodies for postmortem.

In the company of P.C. Andrew Ikaba on 3rd March., 1999, the accused was taken for mental checkup. Later the accused was charged with murder of the 3 deceased children.

Dr. James Wasike Simiyu (PW2), a pathologist working with the National Health Laboratories deployed at the City Mortuary gave evidence, on behalf of Dr. Olumbe, under Section 33 read together with Section 34 of the Evidence Act. However, she was stood down without producing the post mortem report because it lacked the requisite signature. Later on Dr. Njue was summoned to produce the report as PW4.

Anna Marenga Karanja (PW3), was told by Anna Nyambura about assault of her (Anna's) husband on 23rd February, 1999 by the accused. In company of his brother-in-law she went to check on the condition of her husband at Kaburu Trading Centre. At the said trading center she received information that her husband had been taken to Good Samaritan Hospital. While still at the said trading center the husband was brought back by Mama Wambui's vehicle.

The husband confirmed to her that it was the accused who assaulted him. The policemen from Kaburu Police Post promised to take action against the accused. They then set on foot towards home.

About 70 metres on the way home, she saw accused wearing a whitish sweater and carrying a white jericane heading towards their direction. Time was about 10.00 p.m. There was moonlight. When she reached within site of their home she saw white smoke billowing from her house. She screamed and fell down suspecting that her three (3) children, namely, Lucy Wanjiku Karanja (6 years), Antony Gatharu Karanja (5 years) and Caroline Nyokabi (1 ½ years) were burning in the house.

During the day she had seen accused wearing a black trouser and a shirt. She had also seen the accused at the shopping center the fateful night holding a whitish 5 litre jericane. She had known the accused for 4 years prior to this incident of arson.

Dr. Njue Moses Gachoka (PW4), was acquainted with handwriting and signature of Dr. Kirasi Olumbe. They had been at the University of Nairobi for five years studying medicine. He produced the post-mortem reports dated 2nd March 1999 as Exhibit 1A, 1B and 1C on behalf of Dr. Olumbe under and in accordance with Section 33 as read together with Section 77 of the Evidence Act (Cap 80) Laws of Kenya. He established the cause of death as labia monoxide toxicity due to the fire exposure.

ESMAEL WAKAHIU (PW5), recalled 2nd March, 1999 at about 8.00 a.m. He accompanied the police officer from Githunguri Police Station to witness the postmortem on the 3 bodies of the deceased children. He identified the three (3) bodies to the doctor who carried out postmortem. After that the bodies were released to them for burial.

STEPHEN KARANJA NYOKABI (PW6), husband to PW1 recalled that on 23rd February, 1999 at about 8.00 p.m. he was on duty as a route manager. He went to the shops at Kaburu Trading Center to do some purchases. He was in the process assaulted by the accused using a hammer. He was rushed to Kaburu Good Samaritan Hospital. From the said hospital the vehicle carrying him passed by Kaburu Trading Centre where he found his wife (PW1), mother and brother waiting for him. One Paul Kinuthia, advised him not to go home as the person (accused) who had assaulted him had been seen at the same trading center brandishing a panga.

As a family, they resolved to go home at 1.00 a.m. About ½ a kilometer away, they saw a house burning. He recognized it was his house. Later he confirmed that his children, Lucy Wanjiku, Anthony Maina and Caroline Nyokabi, go burnt in the inferno. He though that the accused was the perpetrator of the crime because they had fought before this incident. The accused had later told one Joseph Nganga that he would kill him and finish his family. Another day the accused had told his wife that he would kill him. That as he approached his burning house he over-heard somebody lamenting that the Catholics should pray for him as he had done abominable act. That prior to the arson the accused had been cited by PW3 carrying a white jericane.

In his defence, the accused testified that in the morning of 23rd February, 1999 at about 12.30 a.m. a group of people came to his home baying for his blood. At first he thought it was a dream. It soon thereafter dawned on him that it was indeed a reality.

He escaped to the area chief's home as he feared for his life. The chief advised him to get a place to sleep until morning and thereafter return during day break.

The following day he returned to the chief's camp as earlier on agreed. The chief instead arrested him. He was taken to the police station and booked in the O.B with the offence of arson and murder.

On the one hand, the prosecution maintained that the prosecution had established its case beyond reasonable doubt on the basis of circumstantial evidence and also voice identification. That the accused had earlier on fought with PW6 and had threatened to kill him and finish his family. On the fateful day, the accused had hit him with a hammer. He went to Good Samaritan Hospital and on the way back, in company of his wife and brother from about half a kilometer away, he saw his house on fire. He then heard someone lamenting that the Catholics should pray for him as he had done an abominable acts. There was moonlight. That the accused had earlier on been seen by PW3 carrying a white jerrycane on the fateful night heading towards the house of PW6 and PW3. Thereafter the house caught fire. That PW6 and PW3 did not have a grudge with anybody other than the accused. That the foregoing circumstances irresistibly point to the accused as the person who set fire to the house of PW3 and PW6 and in the process the three children sleeping threat perished in the inferno.

The defence on the other hand, contend that the prosecution had not proved its case beyond reasonable doubt. That accused was reported as having assaulted PW6 during the day. About 12.30 a.m. two APs reported that while looking up the accused with a view to arresting him on assault charges, they passed by PW3 and PW6 home and found a house completely burnt down and three children equally burnt inside. As regards identification PW3 alleged to have seen accused dressed in a white sweater (not produced in court as an exhibit) that very night. That accused was also seen by PW3 carrying a jerrycane (equally not produced in evidence). That identification was not proper. That the circumstantial evidence does not meet the test laid down in *SAWE VS. REPUBLIC (2003) K.L.R. 364*. That some vital witnesses were not produced in court. That where the evidence is barely adequate the court may infer that the evidence of the witnesses not summoned tended to be adverse to the prosecution's case.

There is only one eye-witness (PW3) who claimed to have seen the accused with a white sweater and a jerrycane during day time and at night. Both the jerrycane and the white sweater were never produced by the prosecution in evidence. The other witness is PW6 who claimed to have identified the accused by voice. *Both PW3 and PW6 are husband and wife*. Other witnesses in the company of PW3 and PW6 were not called by the prosecution to give evidence regarding identification. In the circumstances the only evidence of identification is that of the wife (PW3) and the husband (PW6). That evidence is not independent.

In my view this case turns on credibility of the witnesses and the circumstantial evidence. Equally this is a case turning on identification by single eye-witness (PW3) at night time. Consequently, a careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, is essential. The guidelines are laid in *R. VS. TURNBILL (1976) 3 ALL E.R. 549*.

Having the aforesaid principles of law in mind it is significant to note that it was night time – past 10.00 p.m. There is no evidence of the length of time for which the witness (PW3) had the accused person under observation. These circumstances added to the need to exclude possibility of error leads me to the conclusion that it would be extremely dangerous to rely on the visual identification by PW3. Accordingly, I decline to accept the evidence regarding identification. That leaves me with circumstantial evidence.

The prosecution set out to piece together certain events which it placed before me as circumstantial evidence connecting the appellant with the death of the deceased. The first fact which the prosecution set

out to prove was that there was bad blood between the accused and Stephen Karanja Nyokabi (PW6). The two had fought previously and equally fought during the day hours before the arson and death of the three children of the complainant.

On this first issue, I am of the view that that alone cannot constitute the motive for the murder of three (3) children. If it was the accused or PW6 who had been murdered the evidence of assault could have a bearing in the case. Extending the bad blood between PW6 and the accused to the children (deceased persons) would be straining the logic too far. I reject this argument. I bury the same.

The second fact that the prosecution set out to prove was that the deceased was seen during the fateful night by PW3 heading towards the direction of the house of the complainant and so soon thereafter the house was on fire. Consequently, the three (3) children were burnt to death. This calls for evidence of visual identification by witnesses. The only evidence is that of PW3 at night. As I said earlier, the length of time for which the witness, PW3, had the accused under observation was not clearly brought out by evidence. The test laid out in *R. VS. TURNBILL (1976) 3 ALL. ER 549* was not met by the prosecution. I equally reject this argument. I equally bury the same. The third fact was the admission by the accused of the commission of the offence. The law is laid down in Section 25A of the Evidence Act (see Miscellaneous Amendment Act No. 5/03). The said confession is inadmissible. That aspect of evidence cannot therefore avail the prosecution. I also bury the same.

It was the prosecution's case that the relationship between the accused and the complainant had deteriorated so much so that the accused could do anything against the complainant and his family. True, the accused and the complainant had fought even on the fateful day but that in itself cannot constitute motive of burning the children of the complainant without further evidence that he did so. The prosecution case, as I understand it, is that the accused was very bitter about the complainant. But there is no further evidence of *actus – reus* on the part of the accused connecting him with the crime. No evidence was produced relating to the dressing of the accused or some peculiar aspects of the accused physique to ascertain without doubt that he was the one seen carrying a white jerrycan walking towards the home of the complainant on the material night. The jerrycan itself was not produced in court. The white sweater the accused is said to have been wearing on the fateful night was equally not produced in evidence. Last but not least there is no evidence that he had bought inflammable material anywhere.

Having discounted the direct evidence relating to identification what now remains is to deal with circumstantial evidence. In my judgment the available evidence did not satisfy the legal requirements of circumstantial evidence to warrant the conviction of the accused. On the basis of the evidence on record there is really nothing to connect the accused with the death of the deceased save for the fact that the two had bad blood. This amounts to mere suspicion. The suspicion may be strong but it must be remembered that the law on circumstantial evidence is now well settled. In order to justify a conviction based 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.

True, circumstantial evidence can be a basis of conviction. But that can only be if there is no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and never shifts to the accused. The prosecution also has the burden of proving the case against the accused beyond reasonable doubt. The evidence adduced by the prosecution in this case, in my view, amounts to mere suspicion. Suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Although PW3 claimed in her testimony that she saw the accused walking towards her house on the material night she did not say so to the police while recording her statement which was the earliest available opportunity. This cast doubt in my mind as to visual identification. PW3 is a person who had a grudge with the accused by reason of assault on her husband. This incident of arson and murder could well have provided PW3 and PW6 with the perfect excuse to nail the accused for the assault. In addition thereto, no proper investigations were done in this case. Not even the investigating officer gave evidence. The charge and cautionary statement of the accused was not produced in evidence or even an attempt to do so. In these circumstances, I am of

the view that it would be extremely dangerous to convict on the basis of mere suspicion.

In the result, I am not satisfied that the accused was properly identified on the fateful night. Equally, I am not satisfied that the circumstances which the prosecution set out to piece together in the process of building up its case is capable of sustaining a conviction on the basis of circumstantial evidence.

Although the assessors returned a verdict of GUILTY, I have the misfortune of disagreeing with them. They failed to fully appreciate the principles of visual identification by a single eye witness. Equally, they failed to comprehend the concept of circumstantial evidence as known to the law.

By reason of the foregoing, I therefore return a verdict of NOT GUILTY. Accordingly, I acquit the accused of the charge of murder. I set the accused free unless lawfully held for some other lawful reasons.

Dated and delivered at Nairobi this 20th day of March, 2008.

N.R.O. OMBIJA.

JUDGE.