

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 45 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN OTWERE MTUKISA.....ACCUSED

RULING

The accused, Benjamin Otwere Mtukisa was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 9th September 2002 at about 10.30 p.m., at Kabati Estate Naivasha, the accused murdered Joyce Wanjiku (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge. The plea was taken on the 22nd September 2003. The case was first fixed for hearing on the 26th April 2004. On that day, the hearing could not proceed due to the absence of the defence counsel. The hearing was re-scheduled for the 2nd June 2004. On that day, the prosecution failed to avail any witnesses. This court granted the prosecution their application for adjournment. For one reason or the other, the case was not listed for hearing again until the 21st June 2005. On that day, the hearing did not proceed due to the fact that the case was mentioned before the Deputy Registrar of this court. The case was fixed for hearing on the 29th November, 2005. On that day, it was again not heard because the case was mentioned before the Deputy Registrar of the court. On the 20th December 2005, the case was finally listed for hearing by this court for the 13th March 2006. On that day, the case could not be heard because the State Law office was relocating from the High Court building to the Provincial Headquarters, Nakuru. The hearing was rescheduled for the 2nd October 2006.

On that day, two witnesses testified. PW1 Jane Njeri Mwangi testified that she was married to the accused. At the material time, she was estranged from her husband. She recalled that on the 9th September 2002 as she was sleeping in her house at Kabati village, Naivasha, the accused visited her. It was between 10.00 p.m. and 11.00 p.m. at the time. The accused did not enter the house but talked to her while standing outside the house. He asked PW1 if a Baba Chiku had come. PW1 answered that she had not seen Baba Chiku. She then heard the accused say that he was going to die or to be jailed for life. PW1 became frightened because the accused used to be violent towards her. She recalled that they had separated because the accused used to beat her. She did not open the door of the house for the accused. After a while, she saw fire emanating from the door of the house. She immediately woke up, got hold of one child and rushed out of the house. She met the accused standing outside the door of the house. She asked him why he had set the house on fire. The accused attempted to hit PW1 with a jerrican that he was at the time holding.

At that time, the fire was consuming the house. The neighbours came and attempted to put out the fire. Their efforts were in vain. PW1 had left two of her children asleep inside the house. The two children were called Judy Ndipesa, then aged about 10 years and Beatrice Wanjiku, then about 2 years. PW1 was emphatic that the second child was not called Joyce Wanjiku. PW1 testified that her house was constructed with iron sheets roof and was mud walled. She recalled that when the fire was consuming the house, she did not scream. She testified that when the house was on fire, she saw the accused run away from the scene. She reported the incident to the police on the following day. The police arrived at 2.00 p.m. on the following day and collected the bodies of the dead children. The said bodies were burnt beyond recognition.

PW1 recalled that she was certain that it was the accused who had set the house on fire because they had a

conversation before she realised that the house had been set on fire. After she got out of the house, she asked the accused why he wanted to kill her. She denied that she was drunk at the time. She further denied that she was a changaa dealer. She reiterated that she had stopped dealing in changaa in the year 1999. She recalled that the accused had said that he would die or be jailed for life when the house had already been set on fire. She testified that her attempts to rescue the deceased children were thwarted by the fierce fire. Another witness who testified was PW2 Simon Mwangi. He identified the bodies of the deceased children before the post-mortem was performed at the Naivasha District Hospital mortuary on the 13th September 2002.

Thereafter, the prosecution sought an adjournment to enable them call other witnesses. The case was rescheduled for hearing on 12th February 2007. On that day, the prosecution sought an adjournment for the reason that they had not informed the police of the hearing date. This court granted the adjournment but marked the adjournment as the last adjournment on the part of the prosecution. The hearing was rescheduled for the 14th May 2007. On the 14th May 2007, the prosecution again sought an adjournment on the grounds that the witnesses were not in court. This court having granted the prosecution the last adjournment, ordered the prosecution to proceed with its case. The prosecution closed its case.

The issue for determination by this court is whether the evidence adduced by the prosecution witnesses is sufficient to enable this court put the accused to his defence. Only one witness gave testimony which connected the accused to the arson that led to the death of the children of PW1. It should be noted that the person stated in the charge sheet as the deceased is not the person who PW1 claimed was one of her deceased children. It is further surprising that although two children are said to have died in the said inferno, their two names were not listed in the charge sheet or information. PW1 testified that it is the accused who set the house on fire. She however did not see the accused set the said house on fire. She testified that she had disagreed with the accused prior to the said fire incident. The accused and the deceased were husband and wife. She testified that they had been separated at the material time.

PW1 recalled that before she saw fire at the door of her house, she had had a conversation with the accused. The accused had asked her if she had seen Baba chiku. She then heard the accused say that he would die or would go to jail for a long time. She was talking with the accused while she was inside the house and the accused was standing outside the house. At that time, she had not seen the accused but recognised him by his voice. It was after she had seen fire at the door, that she rushed out of the house and saw the accused. She testified that the accused had a jerrican. The accused attempted to hit her with the jerrican. When the accused saw the house was on fire, he ran away from the scene. She denied that she had taken alcohol at the time. Her efforts and that of her neighbours to rescue the two children who were sleeping in the house were in vain. The two children were burnt beyond recognition.

This is the only evidence that was offered by the prosecution. The accused has been in remand custody for nearly four years. The prosecution has been indolent in the prosecution of this case. The accused was first arraigned before this court on 8th September 2003. Since then, for one reason or the other the case has not been heard. In the majority of instances, the adjournments have been occasioned by the prosecution. It is clear that the prosecution has not been serious in the prosecution of this case. When this court granted a last adjournment on the 12th February 2007, the prosecution should have made effort to avail the remaining witnesses. They did not rise up to the occasion to avail the said witnesses.

This court is conscious of its duty to do justice to the parties when dealing with serious offences such as murder. Ideally, it should hear and determine such cases based on its merits and not determine it on procedural technicalities. But this court also has a duty to protect the rights of accused persons as enshrined by **Section 77 of the Constitution**. One of those rights enshrined in our constitution is the right of an accused person to be afforded a fair hearing within a reasonable time. In the present case, it is clear that the prosecution has been indolent in the prosecution of this case. The accused has been in remand custody for a period slightly less than four years. Despite of the prosecution being warned by this court to avail its witnesses, it failed to do so even after being given a three month period by which to secure the attendance of the said remaining witnesses.

The evidence on record is not sufficient to enable this court put the accused on his defence. Several material aspects of the case has not been established due to the fact that the material witnesses were not called. I therefore hold that the prosecution has not adduced sufficient evidence to enable this court put the accused on his defence. He is therefore acquitted of the charge of murder. He is ordered set at liberty and released from remand custody unless otherwise lawfully held.

DATED at NAKURU this 23rd day of May, 2007

L. KIMARU

JUDGE