



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Criminal Case 138 of 2004

REPUBLIC.....APPLICANT

- VS -

HUMPHREY KIHOGGE MUCHERU.....RESPONDENT

JUDGMENT

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence as stated in the information are as follows:

“On the night of 24th July, 2004 at Gitira Village in Thika District of the Central Province murdered Lucy Mumbi Waboro”.

In his evidence, PW1 – John Kariuki Chege recalled that on 24th July, 2004 at around 2.00 a.m. while he was asleep, he was woken up by screams of Bernard Waweru who was also knocking on the door of his neighbour viz, Peter Kimani Kariuki. According to the PW1, one Bernard Waweru wanted a vehicle to take somebody to the hospital. The PW1 further testified that they later went to the house of the accused that was burning. While there, they took the wife of the accused to Kigumo Hospital. The PW1 recalled that a large part of the body of the woman had been burnt with the exception of the face. In addition to the above, the PW1 recalled that the wife to the accused (now deceased) drank a soda that she had asked for. After taking the deceased to the hospital, the PW1 went to report the matter to Kibicho Police Station. On the other hand, the PW2 – Moses Njoroge Kamau testified that on 24th July, 2004 at around 2.00 a.m. while he was asleep he heard some noise and rushed to the scene where he saw the house of the accused burning. According to PW2, he saw many people at the scene and he was informed that there was nobody inside the house that was by then completely burnt. Subsequently, PW2 heard some screams and on approaching he saw the deceased who was completely naked. Thereafter, the women at the scene carried her while covering her with a “lesso”. From there, PW2 accompanied members of the public who took the deceased to Kigumo Health Centre. In his evidence, PW3 Edward Gatiba Mbugua introduced himself as a cousin to the deceased. He recalled that on 13th August, 2004 he accompanied two police officers from Gatundu Police Station to the Kenyatta National Hospital mortuary where he identified the body of the deceased before a post-mortem was carried out. The PW3 observed that the body of the deceased had been burnt. On her part, PW4 Beatrice Mugure Karanja testified that on 24th July, 2004 at around 1.00 a.m. while she was asleep, she heard some cries and noise and on going out she saw fire and joined her neighbours. Subsequently, on seeing Jacinta Wanjiku and Nduta (children of he deceased) shivering, she took them to her house to sleep. However, on the following day, the two children were taken by their grandfather viz, Joseph Murigi. In her evidence, PW5 Jacinta Wanjiku, aged 12 years introduced herself as the daughter of the deceased. She recalled that on 4th July, 2004 the accused (who is her father) went home with one Wamemia and called out to the deceased who opened the door for them. Immediately, the accused assaulted the deceased in the sitting room in the presence of

Nduta and Mucheru. Subsequently, PW5 and Nduta saw their mother vomiting in the sitting room. While PW5 was giving her mother water to drink, the accused looked for a matchbox and paraffin. Consequently, PW5 saw the accused pouring paraffin over her mother's body before putting her on fire by using a matchbox. When the accused left, PW5 and her siblings also did the same while the mother ran into the coffee plantation. According to PW5 it was after the mother left that their house started burning. On the other hand, PW6 Stephen Mucheru Kihoge, aged 13 years introduced himself as the son to the deceased. He testified that on 24th July, 2004 while he was asleep, their house got burnt and the accused went there and called his mother but she never heard. The PW6 reckoned that he later opened the gate for his father who later went to his bed-room. Thereafter PW6 was woken up by the father and found that the house was on fire. The PW6 further explained that after he got out, the father went back to put off the fire. In his evidence, PW7 – PC Benjamin Wambua testified that on 24th July, 2004 at around 3.05 am while he was attached to Gatundu Police Station, he was informed by PC Maina that he had received a report that there was a fire within Kiamari Area. Subsequently, PW7 went to the scene while accompanied by CPL Kabinda and PC Driver Njeru. On arrival, PW7 found a four-roomed house that had been built by iron-sheets and timber. After observing that the house was completely burnt, PW7 together with other officers proceeded to Kibichoi Police Station where they were informed that the victims were:

Ø **Lucy Mumbi and Humphrey Kihoge.**

Besides the above, PW7 recalled that on 25th July, 2004 he led scene of crime personnel to scene where they took photographs. Apart from the above, on 5th August, 2004 the PW7 went to the ICU at Kenyatta National Hospital where he was told that the deceased had already passed away on 27th July, 2004. On 8th August, 2004 PW7, CPL Apindi and driver Njeru proceeded to Kiambu Hospital where the accused was receiving treatment. However, on being discharged they arrested him as a murder suspect. They later escorted him to Gatundu Hospital where he was admitted and later discharged on 12th September, 2004. On the following day, PW7 proceeded to Kenyatta National Hospital where he met two relatives of the deceased who identified the body of the deceased before a post-mortem was carried out. On the other hand, PW8 – CPL Kennedy Apindi informed the court that during the year 2004, he was instructed by the OCS viz, Chief Inspector Okumu to proceed with the investigations of the case. In pursuance of the above, PW8 and PC Wambua proceeded to the scene where they found debris and interviewed bystanders. From there, they went to Kiambu Hospital where the accused was being discharged and they arrested him. On the way, the accused complained of feeling unwell and they got him admitted at the Gatundu Sub-District Hospital. After compiling all the statements, PW8 charged the accused for the offence of murder. In her medical evidence, PW9 – Dr. Jane Wasike Simiyu, a Pathologist, recalled that on 13th August, 2004 she performed a post-mortem on Lucy Mumbi Waboro who she assessed to be about 28 years old and in good nutritional status. As far as external appearance is concerned, Dr. Simiyu was of the opinion that the deceased had 95% burns. Besides the above, she observed that the burns had spared the feet and scalp, perinium and axilla. Dr. Simiyu also observed the following:

Ø Two wounds – one was 6 cm with four stitches.

Ø The other was 4 cm with 24 stitches.

Ø She also had depression on the occipital region.

Ø She also had bruises on both feet with a cut wound on the right foot. The wound was for the IV infusion.

On internal appearance, she had inhalation burns while as far as the central nervous system was concerned, she had a diffused bilateral subarachnoid haemorrhage (within the brain). She also had intraparenchymal pinecrate bleeding on occipital region. On completion of her examination, Dr. Simiyu formed the opinion that the cause of death was severe burns secondary to fire exposure/head injury.

In his defence, Humphrey Kihoge Mucheru (hereinafter referred to as the accused) recalled that on 24th July, 2004 at around 1.00 a.m., he reached his house and called his wife viz, Lucy Mumbi Wabao (now

deceased). Immediately, the accused heard his son viz, Stephen Mucheru calling him and when the door was opened he saw his wife carrying a lamp. After talking to the son, the accused and his wife went to the bedroom where the latter welcomed him to a seat. After the wife went to the shop (that was attached to the bedroom) she raised an alarm and the accused woke up quickly before pushing the door. On entering the shop, the accused found a lot of fire on the table that was being used for cooking. According to the accused, he found his wife had thrown herself down while her clothes were burning. On seeing the above, the accused tore the clothes that his wife was wearing and in the process he also got burnt on both hands. The accused further explained that when he was lifting his wife some burning cartons fell on his back. It was due to the above that the accused left his wife on the ground and she fell on the bicycle that was there. Unfortunately the bicycle fell on her and the accused called out his children so that they should not get hurt. Consequently, the accused took his wife about 15 metres away from the burning house. Subsequently, the accused was given a jacket by Simon Ndavi and as he was looking for transport, he fainted. On regaining consciousness, the accused found himself at the Kiambu District Hospital. Despite the fact that the wife of the accused was later transferred to Kenyatta National Hospital, she later died on 28th July, 2004. Thereafter on 8th August, 2004, three police officers took the accused to Gatundu Police Station before taking him to Gatundu Hospital where he was admitted for three weeks. The accused reckoned that the evidence of Jacinta Wanjiku was not correct and that he had earlier quarreled with Pauline. The accused concluded his evidence by stating that the death of his wife was actually just an accident.

After the summing up, all the three assessors returned a unanimous verdict of “Not Guilty” against the accused for the offence of murder. Their underlying reason is that the circumstances of the death was not clear. This Court has carefully considered the evidence on record. From the above, it is apparent that the PW5 and PW6 – who are the children of the accused and deceased contradicted themselves fundamentally. Whereas the PW5 stated that the mother was assaulted and burnt by the father, the PW6 gave a different story. According to the PW6, he was the one who opened the gate for the father on the material night. When the father went to his bedroom, the PW6 also went to sleep. Thereafter, it was the father (accused) who woke him up and he realized that the house was on fire. The PW6 denied seeing the father doing anything wrong. He also confirmed that he had seen the father burning on the hands. Even the State Counsel, viz,

Mr. Njogu conceded that he did not understand why the PW6 was intent on protecting his father.

Besides the above contradictions, it is apparent that after the incident, the deceased was conscious and could talk. According to the PW1, the deceased asked for a soda that was later given to her. One would have expected the deceased to have complained about any assault or burning – in the event that the same had been perpetrated by the accused. Unfortunately, she never made any complaint against the husband. Apart from the above, this Court is aware that we

have five experts in this country. Unfortunately no efforts were made at all to call any fire expert to shed light on the cause of the incident. Had the prosecution availed such evidence, then that would have greatly assisted the court in making an informed decision. As it is, the cause of the fire is hazy and uncertain. Lastly, it is apparent that the prosecution never led any evidence to prove the motive for the killing. One is left guessing as to the cause of the domestic dispute.

Given the above the doubts, the court wishes to resolve them in favor of the accused. It also follows that the defence case is reasonable and plausible under the circumstances. The upshot is that the prosecution has failed to prove their case beyond any reasonable doubt. The Court concurs with the assessors that the accused is found “Not Guilty” of the offence murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya

accused is hereby “acquitted” of the charge and should be released forthwith unless held lawfully.

Those are the orders of the Court.

MUGA APONDI,

JUDGE.

Judgment read signed and delivered in open court in the presence of the accused Mr. Odero Defence Counsel, Mr. Njogu State Counsel.

Order: Assessors to be paid.

MUGA APONDI,

JUDGE.

8th MAY, 2007.