



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 98 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

LYDIA NYAMBURA MUTHEE.....ACCUSED

JUDGMENT

The accused, Lydia Nyambura Muthee 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 24th September 2004 at Tulaga village in Nyandarua District, the accused murdered Francis Muthee Kararu (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, she pleaded not guilty to the charge. The prosecution called twelve witnesses to prove its charge against the accused. When the accused was put on her defence, she gave an unsworn statement in her defence. In the said defence she stated that she was suffering from depression at the time that caused her not to know what she was doing. She admitted that she had set their house on fire and was informed later that the deceased, who was her husband, had died in the blaze. After the close of both the prosecution and the defence case, Mr. Cheche for the accused and Mr. Mugambi for the State made closing submissions. I shall revert back to the submissions made after setting out the facts of the case as narrated by the prosecution witnesses.

PW6 Joseph Munene Ritho is the father of the accused. He testified that the accused was married by the deceased in the year 1984. He testified that the accused and the deceased lived together harmoniously as husband and wife. He testified that the accused and the deceased had no problem until the year 2004 when the accused developed a mental problem. The accused was taken to hospital and was treated and at the time of the incident it was thought that she had sufficiently recovered from her mental disease. PW1 John Njoroge Mwangi was employed by the deceased as a bar man. PW1 sold beer at the deceased's bar known as Highway Club at Tulaga. PW1 recalled that on the 23rd September 2004 he worked at the bar until 11.00 p.m. when he closed the bar. He recalled that he was with the deceased when he closed the bar. He gave the deceased the takings for the day which amounted to Ksh.3,000/=. The deceased escorted him to his house which was about 100 metres from the bar. PW1 saw the deceased go to his house which was behind the bar. On that day, PW1 saw the accused selling at their shop which was next to the bar. He did not see any abnormal behaviour on the part of the accused.

On the following morning, at about 6.15 a.m., PW8 Joseph Gathuku Wangai woke up and saw the house of the deceased (who was his neighbour) on fire. He saw smoke billowing from the house of the deceased. PW8 immediately rushed to the house of the deceased while screaming and attempted to put out the fire. The screams of PW8 alerted other neighbours who included PW1, PW5 Joseph Gitoru Gitau and PW3 Samuel Karugu Mbugua. The neighbours rushed to the house of the deceased with the intention of putting out the fire. The house of the deceased was constructed using timber. According to the said witnesses, the house of the deceased had two outer doors. The door at the back was locked from the

inside while the front door was locked from the outside.

The fact that the doors were locked, hampered their effort to salvage the property from the house of the deceased. They were able to salvage a few things but within no time the entire house was consumed by fierce fire. The neighbours of the deceased were unable to do much because they ran to their safety when the gas cylinder which was in the house exploded. After the house of the deceased had been completely burnt down, the neighbours moved into the remains of the house with a view to salvaging whatever that remained. It is while they were shifting the iron sheets that they saw the charred remains of a human being. The said charred remains had been burnt beyond recognition. It was then that a decision was made to report the incident to the police at Kinangop Police Station.

Meanwhile at about 9.00 a.m. on the 24th September 2004, while PW2 Peter Mwangi Karanja and PW7 James Kariuki Njoroge, (*who were employees of the Ministry of Public Works*) were installing culverts along the road leading to Engineer Trading Centre, they saw the accused walking towards the direction of Kahuru. The accused greeted PW2 and PW7. The accused was known to PW2 and PW7. PW2 and PW7 were told by the accused that she was going to see her sister at a place called Kahuru. PW2 and PW7 were surprised by the appearance of the accused. The accused was walking bare feet and was wearing dirty clothes at the time. The accused appeared anxious. PW2 and PW7 were surprised by her appearance because they always knew her to be a well dressed lady especially if she was away from her homestead. After a short while, PW2 and PW7 were informed by a passer-by by the name Muchai that the house of the deceased had been burnt down caused by a gas cylinder explosion. PW2 sent PW7 to investigate. PW7 returned to the site and confirmed to PW2 that it was indeed true that the house of the deceased had been burnt down.

PW11 Paul Mwai was the OCS of Kinangop Police Station at the material time. He was at the police station 7.30 a.m. when he was informed that the house of the deceased had been burnt down. PW11 immediately went to Tulaga where the house of the deceased was situated and found the house of the deceased had been completely burnt down. PW11 was present when the members of the public salvaged the remains of the house of the deceased. He was present when the body of the deceased was discovered. He testified that the body of the deceased was burnt beyond recognition. He immediately instructed PW12 David Kamau Kagweru, a commercial photographer to take photographs of the scene of crime. The film was developed by PW12 under his supervision. The photographs taken at the scene were produced in evidence by PW12 as *prosecution's exhibit No.3 (a) – (h)*. PW11 was informed that the accused and the deceased were the last people who had slept at the house. PW11 immediately suspected that the accused could have been involved with the arson. He put out a notice that should the accused be found, she should be taken to Kinangop Police Station.

Meanwhile, on the same day at about 10.00 a.m., while PW4 Mary Wangari Muthee was at her house at Kinangop, the accused visited her. PW4 is the sister of the accused. PW4 immediately realised that the accused was unwell. She was anxious and was not answering questions put to her. She immediately decided to take the accused to hospital because she was aware of her mental condition. The accused was however uncooperative and requested PW4 to give her a bed to sleep on. PW4 showed the accused a place to sleep. She then went up to Engineer Trading Centre to look for a vehicle to take the accused to hospital. It was while she was at Engineer Trading Centre that she learnt that the house of the accused and the deceased had been burnt down. She also learnt that the police were looking for the accused. PW4 made a report to the police station. She informed the police that the accused was at her residence. She told the police that the accused appeared unwell. She was advised to take the accused to hospital. She took the accused to Engineer sub-district hospital where unfortunately she was not treated because there was no psychiatrist present. She was advised to take the accused to Gilgil Hospital. It was at the Gilgil Mental Hospital that the accused was treated. She was given drugs and was released to the custody of PW4. PW4 then took the accused to Kinangop Police Station where she was detained.

The body of the deceased was taken to Naivasha District Hospital mortuary where post-mortem was performed on the 29th September 2004 by PW9 Dr. Moses Njue Gachoki, the Chief Government Pathologist. He testified that the body of the deceased was burnt beyond recognition that he could not reach a definitive finding of the cause of his death. On internal examination of the remains of the lungs

he found sooth which confirmed the fact that the deceased was alive and breathing at the time of the fire. He formed the opinion that the cause of death of the deceased was 100% severe burns. The post-mortem report was produced as *prosecution's exhibit No.1*.

On the 28th September 2004 PW10 Josephine Wairimu Maina, the sister to the deceased went to Kinangop Police Station and saw the accused who was then detained at the said police station. She managed to talk to the accused. According to PW10, the accused appeared normal. On the 30th September 2004 the accused sought forgiveness from PW10 for what she had done. PW10 told the accused to write a letter signifying her contriteness addressed to her family. The accused wrote the apology letter and gave it to PW10. A copy of the said letter was produced as *prosecution's exhibit No.2*.

As earlier stated in this judgment, the accused when put on her defence testified that she was depressed at the time she committed the offence. She testified that her depression was triggered by the fact that the deceased had told her that he was going to marry another wife. She was unhappy that the deceased had decided to marry another wife. She testified that on the material day, she woke up at 5.30 a.m. sprinkled part of the house with petrol and then set it on fire. She then left the house and went to her sister's house. She did not know what had transpired because at the time she was mentally unstable. She testified that it was after she had been given medication that she learnt that the deceased had died in the inferno. She testified that she wrote the letter of apology after she was forced by PW10 to write the letter in question.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case against an accused person is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to reach its own determination whether or not the prosecution has established the guilt of the accused person.

In the present case, evidence was adduced how the accused became mentally sick some months prior to the fateful incident. PW4 recalled that the accused had been taken to the Gilgil Mental Hospital in July 2004 where she was hospitalised with a mental illness. After treatment, the accused sufficiently recovered to the extent that she was released to stay at home with her husband. PW5, the father of the accused also confirmed that the deceased had complained that the accused had become quarrelsome to the extent that the deceased became worried of her mental condition. The deceased took the accused to hospital where she was diagnosed to be suffering from a mental disease. It is then that she was treated and later discharged to the custody of the deceased. From the evidence adduced by the prosecution witnesses, there is no doubt that it is the accused who set the house on fire. The accused admitted as much when she testified in court in her defence. The accused and the deceased were the only persons who were residing in the said house which was burnt down at the material time. The children of the accused and the deceased were at the material time in boarding schools. When PW8 rushed to the house of the deceased on seeing smoke billowing from the house, he found the outer doors of the house locked. The accused admitted in her defence that after setting the house on fire, she locked the house and went to her sister's house.

The issue for determination is therefore whether the accused was of such a state of mind that it can be said that she had formed the intention to set the house on fire and thereby kill the deceased while he was asleep in the house. As stated earlier in this judgment, there is sufficient evidence that confirmed that the accused had suffered a mental breakdown a few months prior to the incident. However, at the time of the incident, the accused had recovered and was in fact selling goods at their shop at Tulaga. PW1 testified that the accused appeared normal on the 23rd September 2004 when he saw her selling at their shop. PW2, PW4 and PW7 however testified that in the morning of the 24th September 2004 when they saw the accused, she appeared unkempt and dishevelled. The accused was walking bare feet and she was wearing dirty clothes. PW4 recalled that the accused had even worn a torn sweater. PW2, PW4 and PW7 testified that the mode of dress of the accused was unusual. Her appearance was also unusual. The accused was taken to hospital by PW4 immediately when she saw her and realised that she was sick. She was given medication at Gilgil mental hospital before she was taken to Kinangop Police Station where she was

detained at the police station. It is with this background that the letter of forgiveness she alleged to have written to PW10, the sister of the deceased, should be seen.

I have carefully evaluated the evidence adduced by the prosecution witnesses in this case and the defence offered by the accused. As stated earlier in this judgment, the accused admitted that she set on fire her matrimonial home. The deceased was burnt to death while he was asleep. According to PW9 Dr. Moses Njue Gachoki, the Chief Government Pathologist, the deceased was alive when he was burnt to death. This was because there was soot in his lungs indicative of the fact that the deceased had inhaled smoke before he died. The evidence on records clearly established that the deceased was suffering from a mental illness at the time she set the house on fire. The prosecution witnesses who saw the accused in the morning of the 24th September 2004 testified that the accused appeared confused and not in control of her mental faculties. There is no doubt in the mind of this court that the accused was not aware at the time that she had committed the offence or that she was doing anything wrong.

In the circumstances therefore, I do hold that the accused was not responsible for her actions when she set the house where the deceased was later found to have burnt to death. I therefore enter a special finding under **Section 166 of the Criminal Procedure Code** that the accused is guilty but insane. The three assessors who assisted this court during the hearing of this murder trial reached a similar verdict that the accused was guilty but insane. Pursuant to the provisions of **Section 166 (2) of the Criminal procedure Code**, I order that the accused be detained in such a manner and in such a place as the President may direct. The accused shall be detained at the pleasure of the President. Pending further directions of the President, the accused shall be detained by the prison authorities.

It is so ordered.

DATED at NAKURU this 14th June, 2007

L. KIMARU

JUDGE