



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 110 OF 1999

(Being an Appeal from Original Conviction and Sentence in Criminal Case

No.836 of 1998 of Snr, Resident Magistrate's Court at Mombasa – Ms. B. Maloba, SRM)

ERIC KEAH LUGHO APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant appeals against conviction and sentence on a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. He was sentenced to life imprisonment the maximum sentence for that an offence.

The main evidence for the prosecution was given by PW.4, Susan Dujaba. Susan was an employee of the deceased in the capacity of house main. She was living with the deceased and children in the two roomed house. She used to sleep in the sitting room. The deceased was sleeping in the bedroom which she shared with her children their beds being separated by a curtain. The deceased had a boyfriend, the Appellant with whom she was having her bed on the fateful night on 27.6.97.

On this evening at about 7 p.m. Susan was at home when the Appellant came in. He asked for food and tea which was given to him by Susan and he ate. He also asked for cigarettes. This evidence is confirmed by the accused in his statement. The accused then went into the bedroom to sleep at 8.00 p.m. The deceased came home and she asked Susan to serve her food in her bedroom which was done. While Susan was sleeping in the sitting room she heard the voice of accused from the bedroom asking the deceased why she came home late. The deceased said she was in a meeting. The deceased opened the door. He was going outside. The toilet was outside the house. According to Susan the accused went in and out of the house 6 times that night. This evidence is not challenged. In the house they used a lamp in the sitting room and a candle in the bedroom and this was the position on this night. However the appellant took the lamp and match box from the sitting room to the bedroom sometime in the night. This evidence is not challenged.

Sometime that night according to PW.1 Samson Musinga Maleya who was a neighbour it was 1 a.m., Susan heard someone crying in the room where the appellant and deceased were sleeping. The cry was as of a person who mouth was blocked with something. The children also started crying. Susan called the name of Appellant asking him to open the door, but the appellant did not open the door. However the deceased opened the door. Deceased had burns on the chest. Her clothes were burnt. She was crying. This

was observed by Susan. She was helped by neighbours. At this time we turn to the evidence of PW.1 the said Samson Musinga Maleya who said that the house of the deceased was 10 yards away from his. He hears when deceased came home at about 9.00 p.m. and at 1.00 a.m. that night he heard the deceased screaming. He got out of his house and in the corridor met the deceased who was crying saying "Moto Moto nafa nafa" He held her and helped her to sit down. He then saw appellant coming from deceased house. His hands were with severe burns. PW.1 asked the appellant what had happened and the appellant said an accident had occurred. He said the deceased was trying to light the lamp when it exploded and the deceased was burnt. To Susan he had just said "that the lantern had exploded"

The PW.1 arranged for the deceased and accused to be taken to the hospital at Bakrani and later to Pandya where the deceased died while undergoing treatment. The evidence surrounding the lamp or lantern is that it was in the sitting room where Susan was sleeping. The appellant took the lamp and a box of matches to the bedroom sometime at night when the deceased was sleeping. There was also a candle in the bedroom which was usually the light used in the bedroom. The deceased would not have known that the lamp was in the bedroom since it was usually left in the sitting room. If she was to wake up at night she would have tried to light the candle not the lamp. The allegation that the lamp exploded is not true. This lamp was working early that night when the food was being served by Susan. There is no reason why it should have exploded at night. The kerosene which was in the lamp cannot have been much as it did not spill on the clothes which were sent to Government Chemist for examination. There is no sign that the lamp had exploded. It was described by Government Chemist as "intact". Looking at the body photograph exhibited the deceased was burnt on the front side of her body which had severe burns. The mattress upon which she was sleeping was not burnt much. The conclusion that can be reached in these circumstances is that the clothes were put on fire while the deceased was asleep and by the time she woke up her body had been burnt severely hence she was screaming loudly. The Appellant did not open the door for her to enable her to get out quickly. When Susan called him he did not answer or take any action. He was seen getting out of the house by PW.1 after deceased was already outside.

The available evidence of PW.1 shows that the deceased was unconscious when they reached hospital and could not have talked to the doctor.

On the evidence as to the cause of death, the pathologist, Dr. Mandalia testified that it was "cardiorespiratory failure due to severe burns". This evidence is not challenged. The Appellant made a sworn statement and called one witness. He said he slept and at 1.30 a.m. he woke up because there was noise in the house from children's bed. He saw a big fire. He saw the T Shirt of deceased was on fire. He started removing the T shirt to help her. At this stage it will be remembered that the two were sleeping on the same bed and the children in the bed nearby. Where was the big fire? Were the children burnt by this fire. There was no evidence that the children were touched by the fire at all.

Why was the Appellant not burnt and he was on the same bed with the deceased. He said he was burnt only when he was helping the deceased with T shirt.

Appellant states that the lamp used to be in the sitting room yet the witnesses said it was found in the bedroom. He also said there was a candle in the bedroom. He again says he did not recollect where the lamp was.

Lastly he was angry that the deceased returned from work late.

He was so disturbed all night he went in and out of the house about 6 times. Susan could see these movements because she was in the sitting room.

Looking at all this evidence I do not hesitate to say that the conclusion to be reached is that the evidence of Susan PW.4 is correct and truthful. The appellant quarreled with deceased and he was restless all night. He took the lamp and box of matches to the bedroom although there was a candle there. The evidence points to him as the one who had the lamp and matches. He was the first to wake up and to see big fire burning the T shirt of deceased which she was wearing. In the circumstances no one else had opportunity to light fire which severely burnt the body of deceased and caused her death. I find there was strong

evidence upon which the trial magistrate convicted the accused. I see no reason to interfere with the conviction. As for sentence the trial magistrate applied the maximum sentence. The appellant is a young man and is a first offender. There is room for reform. I consider the sentence of life imprisonment to be excessive and harsh in the circumstances and the same is set aside and substituted with imprisonment for a term of 10 years from the date of conviction.

Dated at Mombasa this 30th Day of October, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE