



**Republic v Omuyoyi (Criminal Case 32 of 2018)
[2023] KEHC 18739 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 32 OF 2018
HK CHEMITEI, J
JUNE 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

AGNES OMUYOYI ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal code*. The particulars of the charge were that on the 29th day of May 2018 at Rhonda estate Nakuru west district within Nakuru county murdered Melvin Akinyi.
2. The accused denied the charge when the matter came up for plea. The prosecution called five witnesses to establish its case. When placed on her defence the accused gave sworn evidence and called one witness. Before looking at the merits or otherwise of the case it shall be appropriate to summarise the evidence as presented during trial.
3. PW1 Irene Adhiambo Odhiambo the mother to the deceased testified that the accused came to see her on 29th May 2018 and told her about a t-shirt which she had recovered and she did not know the owner. Apparently the t-shirt was hers and she told her that the same had been given to her by one Carol who was her friend.
4. She went on to state that the said t-shirt had kshs. 4000 belonging to a group. She went to Carols place at 5pm to ask for the money and as they discussed she heard screams from her house and they rushed to the scene. They saw the accused running outside the gate.
5. She went to her house where fire emanated from and she put off the tin lamp, koroboi. Meanwhile she saw the child's legs tied and was burned and she couldn't save her from the fire. Hellen her friend then came and put off the fire. The child was thereafter taken for treatment but she later passed on.



6. When cross examined she said that she did not see anybody burn the deceased or who lit the tin lamp. She also said that she did not know when the t-shirt disappeared. That the accused was a neighbour and a close friend of the children.
7. PW 2 a minor was unable to testify and she was stood down. The court found her too young to do so and despite the orders granted to testify vide an intermediary she was not brought.
8. PW3 Erick Odhiambo the deceased father testified that she was inside the house on 29th May 2018 and pw1 had gone to the shop. He then heard her quarrelling outside with the accused about the kshs.4000 and wanted to fight. Later the accused mother agreed to pay the money.
9. Later he heard the children screaming in his house as he was at the gate and he rushed to the scene where smoke was billowing. He saw the child who was burning and he collapsed. They took the child to the hospital but she never made it.
10. When cross examined he said that he did not know the cause of the fire and that he was following up the payment of his kshs 4000.
11. PW4 Dr. Titus Ngulungu performed the post mortem exercise on the deceased body and found the cause of death to be asphyxia due to 60% burns on the body.
12. PW5 Chief Inspector Judy Nyakira undertook the investigation exercise and recorded witness statements. She said that they could not take any specimens or do much at the scene because it had been interfered with. She said that the witnesses said that the accused had poured some liquid substance on the deceased and set her on fire.
13. She was however unable to trace pw2 as the family had moved away and the couple had separated. Another key witness Helen could not be traced.
14. When cross examined she said that she did not see the contentious t-shirt as it was not availed. She denied that there was any kerosene lamp at the scene as well as no previous conflict between the accused and the complainants.
15. In her sworn defence, the accused denied the charge and stated that the t-shirt was among her clothes which were collected from the communal hanger outside her house. She said that she inquired about the owner who happened to be pw1 and 3. She said that on the material day she had been sent to buy cream by her neighbour where she had gone to watch television.
16. In the process she heard a child screaming and they went to check where she saw one of the ladies pouring water on the fire in an attempt to extinguish it. She said that she was accused of the offence despite confirming from the place she had gone to buy cream that indeed she was there.
17. She said that her mother gave them money for purposes of the deceased vaccination against tetanus. She denied going to Maggys house that specific day.
18. DW2 Mary Awinja Joseph the mother to the accused testified that one Erick(pw3) came to her house and told her that that accused had stolen some money. Although it was found that she had not stolen she told them to take the motorcycle. Later after three days they came and told her that the accused had burned the deceased and they needed some money for vaccination
19. She said that she was too sick and she gave out kshs250. After two weeks the accused was arrested and accused of committing the offence.



20. The court thereafter directed that the parties file written submissions which the court has perused. Generally, they are reiterating the issues raised in their respective perspectives of the case.
21. It is the contention by the prosecution that they have established their case beyond any shadow of doubt and in particular that the accused left the scene without any reasonable cause while the fire was raging. It submitted that by all indications it was the accused who had committed the offence and attempted to run away.
22. On her part the accused submitted that the state did not establish the ingredients of the offence in particular the source of the fire. That mens rea was not proved and instead shifted the burden to the accused. The learned defence counsel prayed for the accused to be set free.

Analysis and determination.

23. The provisions of Section 203 of the *Penal code* are clear on the ingredients of the offence of murder. The same can be summarised as;
 - “(a) The death of the deceased.
 - (b) That her death was through unlawful acts or omission of the accused.
 - (c) That the accused had malice aforethought.
 - (d) As such, the quality of the evidence placed the accused person at the scene of the murder.”
24. It is incumbent upon the prosecution to establish the above ingredients and at no time does the burden shift to the defence.
25. In this case there was no eye witness to the incident. It appears from the evidence tendered that all the witnesses saw the fire and rushed to the scene. Nobody saw the accused or any other person light the same.
26. The allegation that the accused poured some liquid substance on the deceased before she got burned was not proved. It is true that there was the issue of the t-shirt and the loss of the money which had protracted between the accused and the deceased family. It appears from the evidence that the same had not been concluded before the incident occurred or it was still ongoing during the incident.
27. What then caused the complainants to suspect the accused. In my view it was the loss of kshs4000. They believed that she had stolen despite an explanation that she gave, that is, that she found the cloth among her clothes as her friend picked it from the communal hanger outside.
28. Further and more significantly, the way the fire started was not well explained by the prosecution witnesses in my opinion. All the adults seemed to have been outside the house that evening. They all rushed to the scene when the fire had already started and in the process badly injured the deceased.
29. It was not disputed that there was a tin lamp in the house which pw1 testified that she went and put off. Could it be possible that that was the cause of the fire. If indeed she put it off, who then lit it except probably the children who were inside the house. Unfortunately, none came up to testify.
30. The child who was supposed to testify as a vulnerable witness was not called despite the court orders to that effect. At least she would have shed light on the allegations by pw3 that the accused poured some liquid substance on the deceased before she set her on fire. This line of argument as well as the deceased being tied with some ropes on her legs was not contained in the statement given to the investigating



officer by pw3 or any other witness. This was very material and would not have been left out if it was true.

31. The other key and essential witness was one Hellen who assisted in putting out the fire. She was material as she was among the first persons to arrive at the scene and would have explained the state she found the deceased for instance whether her legs were tied with a rope as was alleged by the father. Further she would have shed light on the question of the tin lamp which probably may have caused the fire.
32. All in all, i find that in the absence of the two crucial witnesses, the prosecution case lacked a proper footing.
33. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya and Others v Uganda* 1972 EA 549 LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”
34. The issue of the t-shirt and the loss of kshs,4000 which was unsubstantiated was to say the least very peripheral. At least the said t-shirt should have been produced as part of the prosecutions evidence.
35. Although the accused had no obligation to assist the prosecution in its case, the defence she raised ought to have been considered by pw5, the investigating officer. Her presence in the scene was simply just like all the other members of the public despite the dispute over the lost money.
36. The prosecution i conclude was not able to establish mens rea on the part of the accused. There was no malice aforethought proved against the accused herein.
37. In the premises, the accused is hereby set free unless lawfully held under the provisions of Section 215 as read with 322 of the [Criminal Procedure Code](#) and the sureties discharged.

DATED SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

