



**Republic v Kirimi (Criminal Case E020 of 2020)
[2023] KEHC 20706 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE E020 OF 2020
LW GITARI & LW GITARI, JJ
JULY 11, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ERICK KIRIMI ACCUSED

JUDGMENT

1. The accused person herein has been charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Chapter 63 of the Law of Kenya). The particulars of the offence are that on December 26, 2019 at Kangutu Village, Karingani Location, Meru South Sub-County within Tharaka Nithi County, the accused murdered one Susan Kathure.
2. The accused pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling a total of 6 (six) witnesses whereas the accused testified as the sole witness in his defence.

The brief facts of this case are that the accused and the deceased were a husband and wife and were living together. On 25/12/2019 the deceased attended a Christmas Party at a friend's home who was also a close neighbor. Later at 11.00p.m the deceased was escorted home upto her gate. She was received by the accused and the friend who escorted her left.

Later at about 2.00 a.m. the deceased had a confrontation with the accused who poured kerosene on her body and set her ablaze. The deceased fled to a neighbour's home and she was assisted and escorted to Chuka Hospital. Later on 20/2/2020 the deceased passed away while undergoing treatment in hospital. A postmortem was done on the body of the deceased by Dr. Nicholas Nkonge a medical officer at Chuka District Hospital and he formed the opinion that the cause of death sepsis due to 2 degree burns. The accused was arrested and charged with this offence.



The Prosecution's Case

3. PW1 was Ian Muchangi, a neighbour of the deceased and the accused. The deceased was the wife of the accused. It was PW1's testimony that on December 25, 2019 he had a Christmas party at his home and he hosted friends and neighbours. That the deceased and the accused were among the guests and at about 6.00 p.m., the guests left and PW1 was left with members of his family. Later that night at around 2.00 a.m., PW1 heard screams outside his door. The person outside was crying stating "Muchangi nisaidie" (Muchangi help me).
4. PW1 then woke up and switched on the lights and found that it was the deceased. She had a trouser on but was naked on the upper side. PW1 then noticed that the deceased had a burn injury on the upper left hand. He inquired what had happened and that is when the deceased told him that her husband had set her on fire. PW1 then called his cousin Kamau who came together with his wife. The accused also came as they were boarding their motor bikes. PW1 asked the deceased not to fear. According to PW1, the accused explained that it was a lamp that had fallen on the deceased. PW1, his wife (PW1's wife), his cousin (PW1's cousin), and the wife to PW1's cousin then took the deceased to Chuka Hospital. The following day, the deceased's brothers and sister visited the deceased at the hospital and then went to report the matter to the police.
5. On December 27, 2019, they visited the deceased at the hospital and found that she could not talk. They left her to sleep and later in February, PW1 received a telephone call informing him that the deceased had passed away. That is when they were called to Chuka Police Station where they recorded their statements.
6. On cross examination, it was PW1's testimony that the deceased told him that she had been burnt with kerosene. According to PW1, he could smell a slight smell of kerosene.
7. PW2 was Pamela Karimi Rugendo, the immediate neighbour to both the accused and the deceased. She corroborated PW1's testimony that they had been invited for a party on December 25, 2019 at PW1's home. That she left the party at around 6.00 p.m. and at 2.00 a.m., while she was asleep, she heard the deceased calling her. She opened the door for and noticed that she had a burnt injury on her upper left hand. PW2 asked the deceased what had happened to her and that the deceased told her that her husband (the accused) had poured paraffin on her and lit her with a match. The accused went to the house and the deceased started running away in fear. The screams attracted some people including one Mati and PW2's father. The deceased was then taken to hospital by PW1, PW2's husband and other neighbours. PW2 visited the deceased at the hospital where she met the deceased's family and one month later, she got news that the deceased had died.
8. PW3 was Dr. Nkonge Nicholas from Chuka Hospital. It was his testimony that upon conducting a postmortem examination on the body of the deceased he noted that she had second degree burns on her entire back. That the deceased had a burn on her left breast which had been infected and was rotting. There was also a burn of the deceased's left hand. Internally, the deceased had an effusion in the chest cavity and scarring of the lungs. He produced the post mortem report as P. Exhibit 1.
9. PW4 was Fredrick Mwiya, the deceased's cousin and neighbour to the accused. He stated that the deceased were husband and wife and were living together. He corroborated the testimonies of PW1 and PW2 that they attended a Christmas Party at PW1's home on December 25, 2019 from about 11.00 a.m. That the guests left at around 6.00 p.m. and then he went home. According to him, he later left his house at around 8.00 p.m. and went to Kangutu Market to buy some items. He stayed there until 11.00 p.m. before he hired a motor bike to take him home. On reaching a junction, the motor bike rider stopped and picked the deceased. That on reaching the gate to the deceased's home, the accused



- appeared and they left them there. Later at 2.00 a.m., PW4 received a call from one Mwenda who told him that he was with the deceased and that the deceased was claiming to have been burnt by her husband. The said Mwenda wanted to take the deceased to hospital. PW4 stated that he went to visit the deceased in hospital the following day.
10. PW5 was CPL Albert Koskei, formerly stationed at Chuka Police Station. He stated that on December 27, 2020, he reported for duty the accused had been brought by members of the public. PW5 was then instructed by the officer-in-charge crime, IP Ndubule to arrest the suspect for the offence of assault. That on 26th, a case of attempted suicide had been reported by the accused but the officer-in-charge crime visited the scene and found that it was not a case of attempted suicide but of the accused assaulting his wife, who was rushed to hospital with severe burns on her back. PW5 then arrested the accused and placed him in the cell. He also visited Chuka Hospital where he saw the burns on the body of the deceased. PW5 then recorded a statement from the deceased and other witnesses. PW5 found that there had been a Christmas Party at the home of PW1 and the deceased and accused attended the said party. At around 4.00 p.m., the accused left and the deceased was left at the party.
 11. On her way back home at around 10.00 p.m., the deceased met her cousin, PW4, who offered to escort her home on a motor bike. She met the accused on arriving home but he did not say anything. The deceased then went and slept and later that night, he realized that there was fire on the bed which had caught the blankets. The deceased screamed and that is when PW1 and PW2 went to find out what had happened and took the deceased to hospital. According to PW5, the deceased told him that the accused used paraffin lamp to start the fire. PW2 produced the statement of the deceased as P.Exhibit 2.
 12. PW6 was PC Samuel Wanora, the investigating officer and was formerly attached at Chuka Police Station. He stated that on February 4, 2020, a matter (File No. 1571/2017) was filed at Chuka Law Courts where the accused was charged with the offence of assault causing bodily harm. The file was handed to PW6 by PW5 who informed him that the deceased had passed away while at Chuka General Hospital. PW6 investigated the matter. Together with one Inspector Abdi, PW6 visited the scene of the crime. They did not find the accused but only his mother. They only found a partly burned mattress on the bed and another mattress had been placed on top. On 26th February, 2020, PW6 prepared the postmortem form and proceeded where PW3 conducted the postmortem examination on the deceased's body. The accused was later arrested by members of the public, remanded at Chuka Police Station and charged with murder.

Defence Case

13. When placed on his defence, the accused confirmed that the deceased was his wife and they were living together in the same house. He recalled that on December 25, 2019, they had been invited to a Christmas Party at PW1's home. He went in the morning and assisted PW1 to slaughter. That he then went for some brew and kept it in PW1's house. Guests started arriving for the party at 11.00 a.m. and he left at about 2.00 p.m. That the guests were served with juice, soda, and alcohol and the deceased ate and drunk.
14. At about 7.00 p.m., the accused went to his cousin's home, one Anderson Nyaga, to look after his chicken. He slept there as his cousin had allegedly gone for a burial. That at around 1.00 a.m., he received a call from PW1 and asked him to go over his house. That the accused went to PW1's house where he was informed that his wife was there and had been burnt. According to the accused, the deceased told him that she had been burnt after a tin lamp fell on her. The accused alleged that the deceased was drunk and that the accused and PW1 are the ones who took the deceased to hospital where she stayed from December 26, 2020 until January 6, 2021. The accused thus denied committing the crime and maintained that the deceased burnt herself.



Issues for Determination

15. The accused herein is accused of murder. The ingredients of murder are contained under section 203 of the Penal Code. From the ingredients provided therein, the main issues that arise for determination of guilt or otherwise of the deceased are:
- a. Whether there is proof of the fact and cause of death of the deceased.
 - b. Whether the accused caused the death of the deceased, and if so,
 - c. Whether the accused had the requisite mens rea.

Analysis

a. Proof of the fact and cause of death of the deceased

16. There is no dispute from the evidence of both the prosecution and the defence that the deceased died. The cause of the deceased's death as per the evidence of doctor Nkonge (PW3) who conducted the postmortem the cause of the deceased's death was due to sepsis secondary to severe burns on her body. The postmortem report produced in evidence confirms the cause of death. As such, the prosecution did sufficiently proved the death of the deceased and its cause.

b. Whether the accused caused the death of the deceased

17. It is trite that the onus lays with the prosecution to prove that the death of the deceased was caused by the accused. According to PW6, the accused and the deceased were the only two people in the house when the incident occurred. The deceased had been seen at PW1's party before she left and PW4 confirmed that he saw the accused when he dropped the deceased at their house. The defence counsel has urged the court to find that there was no evidence of any misunderstanding or even difference between the two. He has stated that there was no motive which has been proved by the prosecution. The defence states that the presence of the hurricane lamp poses a high possibility that the deceased was accidentally burnt by a fire from the lamp. The defence maintains that the accused was not responsible for the injuries that caused the deceased's death. It is not clear as to what happened when two were alone in the room in the wee hours of the night. What is clear is that the deceased sustained the burn injuries while inside the house. The evidence of the burnt mattress attests to that. Luckily the prosecution managed to obtain a statement from the deceased before she succumbed to injuries. The deceased stated in part in that statement:

“Later I was escorted by cousin namely Fredrick Mwathi to my house. We found my husband already at home. I went directly to sleep without uttering a word my husband using our lamp poured paraffin on my back and lit a fire. I got burnt on my back and left hand. I ran for safety to my neighbour's house. I was assisted by Muchangi and other neighbours.....” The statement was produced as exhibit 2 by the prosecution. The postmortem report exhibit 1. On the external appearance of the body observed that the deceased had 3 burns covering the entire back and left breast. This report corroborates the statement of the deceased that she was burned on the back. Section 33 (a) of the Evidence Act provides as follows:-



a)	<p>relating to cause of death</p> <p>“when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”</p>
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This section gives very specific instances when such a statement would be admissible. It deals with statements of persons who cannot be called as witnesses and the statement relates to the cause of death of its maker. For the statement to qualify for admission in evidence it must satisfy some requirements. These are:-

It must relate to the cause of death of its maker. It must relate to circumstances of the transaction which related to the death of the deceased. It was a dying declaration. It must purport to identify the killers of the deceased.

I find that the circumstances in this case satisfies the requirements for the admissibility of the statement which was made by the deceased. The statement was made by the deceased herself and relates to the cause of the death of the deceased (its maker). The deceased is unavailable through death.

I find that the statement of the deceased which was produced by the prosecution as exhibit is admissible to explain the circumstances that led to the death of the deceased.

The prosecution called three witnesses who corroborated the evidence in the statement that the deceased had indeed stated that the accused is the one who burnt her using kerosene and this was stated by the deceased so soon after the incident. These witnesses are PW.....

The principles governing dying declarations were considered by the Court of Appeal in [Philip Nzaka v Watu v Republic](#) [2016] eKLR where the court held;

“Under section 33(a) of the [Evidence Act](#), a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence under that provision statements of admissible facts oral or written made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made the statements was or was not expecting death when he made the statements. Clearly by reason of section 33(a) there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the [Evidence Act](#) courts have consistently held the view that evidence of dying declaration must be admitted with caution because firstly, the dying declarations is not subject to test of cross-examination and secondly, circumstances leading to death of the deceased such as acts of violence, may have occasioned confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a



conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

This was the same holding in *Choge v Republic* [1985] KLR 1 citing the predecessor of this court in *Pius Jasanga s/o Okumu v Republic* [1954] 21 E.A.C.A 331 where it was stated that admissibility of a dying declaration does not depend as it does in England. Upon the declaration having at the time, a settled hopeless expectation of imminent death so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.....

“In Kenya (as in India) the admissibility of statement by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declarations in this Country must, be less than that attached to them in England and that the exercise of caution in the reception such statements is even more necessary in this Country than in England.”

It has also been stated that statement made by a person who was not under contemplation imminent death is a dying declaration. This was held in *Nelson Karanja Irungu v Republic* [2010] KLR.

From these authorities a statement made by a deceased person is admissible in evidence under section 33(a) of the *Evidence Act* without requirement for corroboration but that the court has to exercise caution. In this case the deceased stated right from the word go that it is the accused who doused her with kerosene and set her ablaze. An analysis of the evidence is necessary. The deceased first went to Pamela Karimi Rugendo (PW2) was the first witness the deceased encountered. She told the court that at 2.00 a.m she heard the deceased calling her. She opened the door and saw that the deceased had burn injury on upper left hand. PW2 asked the deceased what had happened to her and the deceased told her that her husband had poured paraffin on her and lit a match which he threw at her and burnt her. As she was with the deceased, the accused appeared and the deceased started running away in fear. According to Pamela (PW2) the deceased was fearing that the accused might burn her again. As the deceased ran away from the accused, the deceased was running away and accused ran after her.

The deceased ran to the home of Muchangi (PW1) who heard her screaming outside and saying “Muchangi nisaidie” (Muchangi help me.) Muchangi opened the door and went outside where he found the deceased outside half naked with only a trouser, naked on the upper side. Muchangi saw that the deceased had a burn injury and enquired what happened. The deceased told him that her husband had set her on fire.

The accused also went there and Muchangi (PW1) assured the deceased not to fear. According to PW1, the deceased explained that she had been burnt with Kerosene. PW1 testified that she could smell Kerosene. There was consistency in the testimony of PW1 and PW2 that the deceased stated that the accused deliberately burnt her. The statement of deceased was recorded by corporal Albert Koskei (PW5) who produced it as exhibit.

Doctor Nicholas Nkonge (PW3) from Chuka Hospital who did the postmortem on the body of the deceased found that she had second degree burns on her entire back. The evidence of Muchangi (PW1) and Pamela is credible as they talked to the deceased soon after the incident.

The accused gave a defence that it is PW1 who called him and told him that his wife was burnt. This defence is not credible for two reasons;

Firstly, PW1 and PW2 placed him at the scene as he followed the deceased to the house of PW1 and then the house of PW2. Furthermore Fredrick Munyiathi (PW4) met the accused at his home when



he dropped the deceased there. Later PW4 received a call informing him that the deceased had been burnt by her husband.

Secondly, the accused attempted a cover-up. According to Corporal Albert Koskei (PW5) the accused tried to make a cover-up. He testified that on 26/12/2019 the accused went to the police station and made a report of attempted suicide. The officer-in-charge visited the scene and found that it was not a case of attempted suicide but that accused had assaulted his wife. I find that the defence of the accused that the deceased accidentally burnt cannot possibly be true. His defence is that he was not with deceased and it is a wonder that he cannot talk of possibility of accident. The report he made to the police that there was attempted suicide was a cover. She could not have attempted and only get injuries on her back.

I find that the statement of the deceased that it is the accused who burnt her with Kerosene is admissible to prove the circumstances which led to severe burn injuries which resulted in her death. The testimony of PW1, PW2, PW3, PW4 and PW5 is well corroborated that the accused is the one who burnt her using Kerosene causing her fatal injuries. The doctor who conducted the postmortem formed the opinion that the cause death was sepsis secondary to burns.

Taking the entire prosecution evidence into consideration, several witnesses placed the accused at the scene of the crime. Further, his testimony that the deceased burnt herself contradicts the report he made that it was a case of attempted suicide.

I find that the prosecution adduced overwhelming evidence which proves that it is the accused who committed the unlawful act which caused the death of the deceased.

18. The allegation by the accused that he had a grudge with PW1, in my view, is a mere afterthought. In addition, the accused claim that he was at the cousin's house is also a mere allegation. In any event, the testimony of PW1 and PW2 pointed to the fact that the accused was seen in PW1's and PW2's houses after the deceased had been burnt. PW4 confirmed that he was at his home and went inside the house with the deceased after she was dropped at the gate on a motor bike. The defence is a sham.

c. Whether the accused had the requisite mens rea

19. The prosecution in this case had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. Section 206 of the Penal Code defines malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



20. What can be deduced from section 206 (a) to (e) of the [Penal Code](#) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of [Bonaya Tutu Ipu & another v Republic](#) [2015] eKLR stated as follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesikat v Uganda*, CR APP No 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *REX v Tubere S/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

21. In the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.
22. In this case, the statement of the deceased proves that paraffin was poured on her body before she was set on fire. The degree of burns caused her to be hospitalized for two (2) months before she met her untimely demise. According to PW1, PW2, PW3, PW5 and PW6, the burns were very severe.

In [Republic v Mohammed Dadi Kokane & 7 others](#) [2014] eKLR, the court rightly held that, “Malice aforethought shall be deemed to be established by evidence proving any of the following circumstances.

- a. Intention to cause death or grievous harm.
- b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by wish that it may not be caused.
- c. An intent to commit a felony.

It is the submission by the defence that malice aforethought was not proved. From the above authorities, malice aforethought is not established solely on motive, it is proved by evidence which show the intention to cause death or grievous harm, knowledge that the omission will cause death, the weapon used, the part of the body the injuries are caused and the nature of the injuries. Section 119 of the Evidence Act provides:

Presumption of likely facts.

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”



In this case the accused must have known that paraffin is highly flammable and would lead to there being a fire which is very destructive to both property and person. By dousing the deceased with paraffin and setting her on fire show that he had malice aforethought to cause death or grievous harm. This action by accused led to deceased sustaining severe burns which led to her death.

I find that the prosecution proved beyond any reasonable doubts that it is the accused who caused the death of the deceased with malice aforethought.

I find the accused person guilty of the offence of murder and I convict him.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY, 2023.

L.W. GITARI

JUDGE

S E N T E N C E

**I have considered the submissions by the State and the mitigation. I note that the accused states that he is remorseful.

I however note that incidents of domestic violence against women are on the rise and it is disheartening that 40% of the women lose their lives in the hands of their loved ones through domestic violence. This calls on the court to pass sentences which punish the offenders and serve as deterrents.

In this case the deceased died a very painful death. She was a mother of young children who lost their mother through a most horrible and irresponsible conduct by the accused person like accused must meet the full force of the law. Having said that I will spare the accused the death penalty to give him a chance to change. I sentence the accused to serve forty five (45) years imprisonment. Right of Appeal with 14 days.**

L.W. GITARI

JUDGE

11/7/2023

