



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL MURIMI KARUGUMIACCUSED

J U D G M E N T

1. The accused person **SAMUEL MURIMI KARUGUMI** (to be referred to as the accused person) is charged with murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. It is alleged that on the night of 26th and 27th day of May 2016 at Mutithi village within Kirinyaga County jointly with others not before the court he unlawfully murdered John Gichobi Karugumi. The accused was arraigned in court on 22nd June 2016 and the plea was taken. The accused person denied the charge. The matter proceeded to full trial. The prosecution called ten witnesses in an effort to prove the charge against the accused person.

2. The facts of the case are that on the night of 26th and 27th May 2016, the deceased John Gichobi Karugumi (to be referred to as **'the deceased'**) was asleep in his house with his son EKG (PW4) a male juvenile then aged about twelve years. At about 2.00 am, PW1 Beth Wanjiku Njuki (PW1) a sister to the deceased who was living in the same compound, went outside the house for a call of nature. As she went back to the house she realized that there was a smell of petrol in the compound. She decided to find out what was happening and went outside the house again. It is then that she noticed two men and one was carrying petrol in a jerrican and was holding a light bulb in his hand. PW1 recognized the accused as one of the two men she had spotted in the compound. The accused was by then removing the light bulb from its holder. The house of deceased was three metres from where PW1 was. The other man was standing at the door of the house of deceased. PW1 then saw some smoke and realized that the house of deceased was on fire. This prompted her to start screaming. When PW1 screamed, the accused and the person he was with left and she heard the sound of a motor bike. The deceased and his son were removed from the house which was on fire by the neighbours who went to answer the screams. The deceased and his son had sustained severe burns on their bodies and were rushed to Karira Hospital. The deceased succumbed to the injuries while undergoing treatment at the hospital. The matter was reported to the police at Wanguru Police Station. It was alleged that the father of the deceased had taken a second wife and she had a son who is the accused in this case. The father of deceased had given him four acres of land. The accused wanted to get land from the deceased and had sued him in court. The case was finalized in favour of the deceased. The accused harboured grudge with the deceased and would beat him whenever he found him in the shamba. Police investigated. The accused was arrested and charged with this offence.

3. The accused gave his defence on oath and denied the charge. He told the court that on the night of the murder he was in Nairobi at his cousin's place at Buru Buru. He testified that he had no grudge with the deceased.

The accused called two witnesses who testified that he was in Nairobi on the material day.

4. I have considered all the evidence adduced. In support of the prosecution's case eight witnesses were called to testify. I will proceed to analyse the evidence which was tendered by the prosecution witnesses.

Prosecution's case:

Beth Wanjiku Njuki (PW1) testified that the deceased was her brother. On the material night she went outside the house to go for a call of nature and as she returned she realized there was a strong smell of petrol. As she looked around she saw two men in the compound standing at the door of the house of the deceased. She recognize the accused who at that time was carrying a jerry can and a light bulb. The other man who she did not recognize was standing at the door. There was a security light bulb which the accused was removing and the light enabled her to recognize the accused.

PW1 testified that she suddenly saw smoke coming from the house of the deceased. She raised an alarm by screaming to alert the neighbours. They came and assisted to remove the deceased and his son from the burning house. They were rushed to hospital. She reported the matter at Wanguru Police Station and gave the name of accused, Sammy as the one who burnt the house. It was her evidence that the accused and deceased had a land despite as the accused was claiming land from him.

5. Peter Mwangi Karugumi, PW2 testified that on 26th May 2016 at 2.00 a.m he was attracted by screams from her sister (PW1). He woke up and saw that the house of this brother was on fire. He rushed there to go and assist him and called him out. The deceased did not answer. PW2 tried to break a window. He was joined by one Mutegi who is a neighbor and he assisted him to break a window. They called out the deceased and he came out of the house with burns all over the body. The deceased informed him that his son was inside the house. The neighbours Mr. Mutugi entered the house and managed to rescue the child. He called a neighbor who had a vehicle and requested him to take his brother and his son to hospital. He took the deceased and his son to Karira Hospital.

6. PW2 testified that her sister PW1 told him it was the accused who set the house on fire. He told the court that they had a land dispute with the accused which was decided in their favour at Wanguru court. He told the court that the deceased passed away while undergoing treatment at Karira Hospital.

7. Margaret Muthoni Karugumi (PW3) testified that she is the mother of the deceased. On the fateful night she was woken up by her daughter (PW1) and she went outside. She realized there was a strong smell of petrol. The house of the deceased was on fire and there were strong flames. She then saw the accused emerge from a footpath. She recognized him as there was moonlight, electricity and the flames from the fire. The accused was running away. She then requested her neighbor to take the deceased and his son to hospital. Later on 30th May 2016 she received the sad news that her son had passed away.

8. EKG (PW4) is the son of the DECEASED. He testified how while he was asleep with his father he heard footsteps at the window. He looked out and saw the accused with two other people. He went back to bed and after a short while there as fire in the house. He jumped on sacks of rice which were in his room. He started calling his father who is the deceased. The deceased went and wrapped a blanket on him and started fetching water which was near the door of his room and tried to put out the fire. The deceased opened the door and went out. There was a man who went and rescued him. He told the court that he was burnt on both hands, ears and face on the forehead while outside he saw the deceased was burnt on the chest. A vehicle came and they were taken to hospital. He was admitted in the children's ward for two weeks. Before he was discharged his mother went to the hospital and informed him that the deceased had passed away. He told the court that he knew the accused and his father had a dispute.

9. PW5 Joyce Njoki Gichobi testified that she was the wife of the deceased. She told the court that the accused and deceased had a land dispute on 2nd June 2016. She identified the body of the deceased and the doctor conducted a postmortem.

10. PW6 Dr. Joseph Thuo a Psychiatrist at Embu Hospital testified that he examined the accused and found that he had no abnormality. He formed the opinion that the accused was fit to stand trial. He produced the report as exhibit -1.

11. PW1 James Mutugi Kinyua testified that the deceased was his neighbor. On the material night he heard PW1 screaming. He woke up and went to his neighbours home. He assisted the deceased to open the door and received him from the burning house together with his son. He told the court that the sone had sustained an injury on the hand. They were taken to hospital. In cross-examination he told the court that PW1 said he had seen the accused that night. He also told the court there was an explosion and before that he had heard people walking behind his house. He further told the court that the child he rescued said he had seen somebody outside.

12. PW8 Susan Wanjiku Karani testified that on 2nd June 2016 she identified the body of the deceased to the doctor who performed postmortem. The deceased was his brother.

13. PW9 Doctor Andrew Karani a consultant Pathologist and Forensic specialist based at Kenyatta Hospital testified that he performed postmortem on the body of the deceased. He testified that the history was that the deceased was in a house that was torched he sustained severe burns. He was treated at Mwea Hospital and transferred to Kenyatta Hospital in the burns unit where he was for some days before he succumbed. He testified that the deceased had sustained 74% total body service area which he called 2⁰ (degree) burns. The deceased had suffered 2nd and 3rd degree burns. The cause of death was as a result of complication of 74% burns, a combination of 2⁰ and 3⁰ burns. He filled a postmortem which he produced as exhibit – 1.

14. PW10 No. 44401 CPL CHRISTOPHER OROKO is the investigating officer. He told the court that he took over the investigations on 2nd June 2016 over the report which was made on 26th May 2016. He visited the scene at Makongeni village and found a house which had been burnt. He learnt that the owner of the house and his child had sustained injuries and were escorted to hospital. He visited the child at Karira hospital and found that he had sustained burns on the hand but was stable. The deceased had been transferred to Kenyatta National hospital but succumbed to injuries. She was informed by PW1 that she had seen the accused trying to remove security light bulbs from the house of the deceased. She raised an alarm and neighbours went and rescued the deceased and his son. He told the court that he was convinced that the accused was the suspect and he was charged.

15. DEFENCE CASE:

At the close of the prosecution case the accused was put on his defence and he gave a sworn statement. He told the court that he travelled to Nairobi on 22nd May 2016 and returned on 27th May 2016. He told the court that he had no grudge with the deceased. He told the court that the rest of the family had claimed that he was not a member of the family as he was a child born out of wedlock. He told the court that his mother was given land of his step father. He told the court that on the day the deceased was buried, his house, that of his mother and that of his grandmother were torched.

16. DW2 Buta Mutitu testified that on 25th May 2016 the deceased was in his house at Buru Buru in Nairobi. She told the court that the accused was not involved in the Land Dispute as it is his mother who had the dispute.

17. DW3 Catherine Nyaguthi Wanjohi testified that on 22nd May 2016 she saw the accused leaving for Nairobi at 3.00 pm. He went back on 27th May 2016 and passed near her home informing her that he was suspected of murder.

Analysis and Determination:

I have considered the evidence tendered by the prosecution. This being a criminal offence, the prosecution had the burden to prove the charge against the accused beyond any reasonable doubts.

The issue which I have to determine is whether the prosecution has established the charge of murder beyond any reasonable doubts. The essential elements of the offence murder which are required to be proved by the prosecution are:

- a) The death of the deceased.
- b) The death of the deceased was caused by the accused through an unlawful act.
- c) That by causing the death, the accused had malice aforethought.
- d) That it was the accused who caused the death of the deceased

These elements were laid out by the Court of Appeal in the case of **Anthony Ndegwa Ngari -v- Republic.**

18. I will now proceed to consider whether the evidence tendered has established these ingredients.

a) The death of the deceased:

The general principle of the law on homicide death is that it may be proved by direct or circumstantial evidence tendered by the prosecution. It is trite that proof of death is by way of medical evidence although it may also be proved by other credible or cogent evidence. See **Republic -v- Cleya & Another (1973) E.A 500.** In this case, the prosecution called PW9, a pathologist who performed postmortem on the body of the deceased after it was identified by his two relatives, a wife and a sister (PW5 & PW8 respectively). The doctor confirmed that the cause of death of the deceased was due to complications as a result of 74% burns on his body with 2nd and 3rd degree burns.

The prosecution has therefore proved beyond any reasonable doubts that that the deceased died.

(b) Proof that the accused person committed the unlawful act which caused the death of the deceased.

It is trite that a person who kills another commits an unlawful act save where it is authorized or excusable under the law or occurs in self-defence or reasonable defence to property. The evidence in support of this element was tendered by the prosecution witnesses who were eye witnesses. Key among them is PW1 who testified that she saw the accused removing the security light and another person was standing at the door of the house of the deceased. PW1 knew the accused before and could not have mistaken him for another. Other evidence was adduced by PW3 who testified that he saw the accused emerging from a footpath, that she was able to identify him as he was being chased by PW1. Although PW1 said that the accused ran away when she started screaming, she did not adduce evidence that she had chased the accused. PW3 said she identified the accused with the help of moonlight. It means by then there was no light. This is confirmed by PW7 who said there was no electricity light at the time he went to the scene. He told the court it is PW1 who said he identified the people. The evidence of PW3 on the allegation that he saw the accused as he was being chased by PW1 is not credible.

19. As for the evidence by PW4 the minor who testified that he had looked outside and saw the accused, the testimony is not credible. This is because in the statement that he had recorded with the police he had not recorded that he had heard footsteps, and looked outside and saw the accused and two other people with the help of moonlight. This raises doubts in the testimony of PW4. This item of his evidence on the identification of the assailant was critical and if indeed it was true he could not have failed to include it when recording the statement. The evidence is not credible. The witness was intelligent and in my view he could not have failed to include such crucial evidence in his statement.

20. There is evidence that there were intruders in the compound before the fire started. This is shown by the testimony of PW1 and that of PW7. PW1 saw the two intruders and identified the accused who he recognized. As for PW7 he heard footsteps behind his house before he heard an explosion and fire. There is therefore no doubt that there were people in the compound of the deceased before the fire broke out. The fire was not accidental. It was started by intruders. There is only a single witness who saw the accused that material night. The prosecution relies on the evidence of this single witness. It is trite that the court can rely on the evidence of a single witness but the court must caution itself on the dangers of relying on the testimony of a single witness.

As was held in In **Jevan Mwanjau & another v Republic [2015] Eklr** The Court of Appeal in Malindi held the view that;

‘Under section 143 of the Evidence Act, in the absence of any provision of law to the contrary, no particular number of witnesses is required to prove a fact. It follows that there is no legal impediment in convicting on the sole testimony of a single witness. The time-honoured principle is that evidence has to be weighed and not counted, that is, whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise as opposed to whether there is a multiplicity or plurality of witnesses. It is therefore open to a competent court to fully rely on the evidence of a solitary witness and record a conviction. Conversely, it is equally true that the court may acquit a suspect in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The court must, however, where the evidence of a solitary witness relates to identification of a suspect in a criminal case, exercise extreme caution.’

The Court set out some of the considerations in weighing the evidence of a single witness, relevant to the matter they include;

- a. *The lighting conditions under which the witness made his or her observation.*
- b. *The distance between the witness and the suspect.*
- c. *Whether the witness had an unobstructed view of the suspect.*
- d. *Whether the witness had opportunity to see and remember the facial features and clothing of the suspect.*
- e. *How long did the witness observe the suspect and which direction was the latter facing?*
- f. *Whether the witness gave a description of the suspect and whether it matched the suspect.*
- g. *The mental, physical and emotional state of the witness before, during and after the observation, and*
- h. *Whether the witness ever saw the suspect prior to the occasion in question.*

There is well corroborated evidence that the house of the deceased was close to that of his mother. According to PW1 she was about three (3) metres away from where she saw the accused removing a light bulb. There is well corroborated evidence that the house of the deceased had electricity and there were security light bulb outside his house PW1 knew the accused before. The circumstances favoured a positive identification and recognition. It is trite that recognition is better than identification of a stranger. See the case of **Republic-v- Turnbolls and Others (1973) 3 All E.R 549** which has been greatly relied in our courts on the issue of identification and the factors to be considered with regard to the evidence of identification by a single witness the court stated:-

“The Judge should direct the jury to examine closely the circumstances which the identification by each witness came to be made. How did the witness have with accused under observation? At what distance? In what light. Was the observation impeded in anyway? Had the witness ever seen the accused before? How often. If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may more reliable then identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. This does not mean that safe recognition cannot be made at night. It will depend on the circumstances of the case and whether the recognition was free from error. See **Douglas Muthama Ntoribi -v- Republic Court of Appeal; (2014) eKLR** where the court stated:-

“It is our considered view that from the evidence on record the identification of the appellant based on recognition was free from error.....”

PW1 testified that the accused was holding a light bulb which he was trying to remove. The bulb had light which enable her to recognize the accused who was her step-brother. During cross-examination, PW1 stood her ground and stated that,

“ I am sure it was Samuel I saw because I saw him, it is not because of the land dispute.”

“ I saw Samuel, I was not told and I am not framing him.”

The witness stated that the deceased used to switch on the light bulb in the evening and it would be on through out the night. It is this bulb which she saw accused removing, he was holding it and saw him for a short while. There was no identification parade and in my view it was not necessary as the witness knew the accused very well. It is my view that PW1 was able to recognize the appellant as there was light which was sufficient and favoured a positive identification. PW1 recorded a statement at the police station the same day after the incident and in the statement she indicated that she had seen the accused removing the light bulb and gave the police his name. This was soon after the incident and it cannot be an afterthought that she had recognized the accused. The Court of Appeal has in various decisions emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. See **Moses Munyua Mucheru -v- Republic Criminal Appeal No.63/1987, Juma Ndongia -v- Criminal Appeal 13/83, Peter Njogu Kihika & Another -vs- Republic Criminal Appeal No. 141/1986 & Lesaru -v- Republic 1988 KLR.**

Indeed in **Republic – v- Turnbull (supra)** the court observed that, ***“the quality of identification evidence is critical, if the quality is good at the close of the defence case the danger of mistaken identification is lessened but the poorer the quality the danger.”***

In this case PW1 gave the name of the accused so soon after the incident. This as stated in the above decisions by the Court of Appeal was best mode of identification.

22. Despite this evidence by PW1 the accused has denied the charge and advanced a defence of *alibi*. I will now proceed to consider that defence. It is trite law that where an accused person raised a defence of *alibi* he does not assume any burden to prove that defence. This has been stated by the Court of Appeal in a binding decision in the case of **Kiarie -v- Republic** where the court stated

“An alibi defence raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that and it is sufficient if an alibi introduces in the mind of a court a doubt that is not unreasonable.....”

23. When an accused person advances the defence of alibi, it is upon the prosecution to dislodge that defence. The court will determine whether the defence is plausible.

In Sekitoleko- v- Uganda (1967) E.A 531 at page 533 Sir Udo Udoma CJ held-

“ As general rule the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. The burden always rests on the prosecution.”

I have considered the defence of the accused and I find that it is not credible for the reason that it was riddled with contradictions which are material and show that the witnesses were not truthful. To point this out, it was the evidence by the accused that he went to Nairobi on 22nd May 2016 and returned on 27th May 2016. On the other hand DW2- Benta Mutitu Njue testified that the accused went to Nairobi on 25th June 2016 to take rice to her. Her home is in Buru Buru Phase II and that accused left her house on 27th May 2016. DW3 Catherine Wanjohi told the court that the accused went to Nairobi on 22nd May 2016 to take rice to her cousin. The cousin is defence witness two (DW2). The accused and his witnesses could have been telling the truth. Furthermore, it is the accused who told DW3 that he was suspected. DW3 also testified that the accused was suspected to have committed the offence. The fact of the matter is that the accused was not suspected but was actually seen by a person (PW1) who recognized him while committing the offence. My view is that the defence is not plausible. The accused was in the area on 27th May 2016 after the offence was committed on the night of 27th & 26th May 2016 at 2.00 am. The defence is good for rejection.

I find that I have no reason to doubt the testimony of PW1. She identified the accused by recognition and also gave his name soon thereafter to the police. The circumstances were sufficient for PW1 to identify the accused. The prosecution has proved that the house of the deceased was doused with petrol as a result of which he sustained severe injuries and succumbed while undergoing treatment. The accused was at the scene when PW1 smelt petrol and saw her brother's house on fire. The accused had a jerrican which was burnt in the incident. The motive of the attack was disclosed, it was due to the land dispute where the deceased was given land and the accused did not get any. I am satisfied that the prosecution has proved that it is the accused who committed the unlawful act of setting the house of deceased on fire, an act which resulted in the death of the deceased.

c) **Proof that accused had malice aforethought**

Malice aforethought is defined under **Section 206 of the Penal Code**. The Section provides:-

“ 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.”

Simply stated, malice aforethought is the intention to cause death or to do grievous harm to a person whether that person is the one actually killed, knowledge that the act or omission causing death will probably cause death to that person whether that person is actually killed or not, the intention to commit a felony and 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.

24. The onus is on the prosecution to prove malice aforethought based on the factors stated under **Section 206 of the Penal Code**. There are various interpretations of **Section 206 of the Penal Code** by the courts. In the case of **Republic -v- Tubere S/O Ochen (1945) 12 E.A.C.A** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In **Ernest Bwire Abanga Onyango -v- Republic (1990) Criminal Appeal No. 32/90**, the court inferred malice aforethought based on the evidence that the accused conceived the criminal mind before converting it into acts of omission to commit the murder.

The court must determine whether accused person had the *mens rea* or malice aforethought while harming the deceased. Whether he had the intention to kill or cause grievous harm as set out in **Section 206 Penal Code**. In **NZUKI VS REPUBLIC [1993] KLR 171** the Court of Appeal held that

‘Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) *The intention to cause death;*

(ii) *The intention to cause grievous bodily harm;*

(iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.'*

The actions of the accused person were clearly intended to cause the death of the deceased and PW4. The land dispute between the two households was no doubt the motive which led the accused to kill the deceased.

The prosecution's evidence has effectively dislodged the defence offered by the accused person. The element of malice aforethought has been established in terms of **Section 206(b) of the Penal Code** beyond any reasonable doubts.

CONCLUSION:

I find that the prosecution has proved the charge against the accused person beyond any reasonable doubts. I therefore find him guilty as charged and I convict him under **Section 322 of the Criminal Procedure Code.**

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF MAY 2021.

L. W . GITARI

JUDGE