



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CRIMINAL CASE NO. 3 OF 2019

THE REPUBLIC-----PROSECUTION

-VRS-

JACK KERUBO NYACHIENGA-----ACCUSED

JUDGEMENT

The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the night of 25th December 2018 at Nyaronge village in Masaba North Sub-county within Nyamira County the accused murdered Johnson Mageto Nyachienga.

The accused pleaded not guilty to the charge. The prosecution then called nine witnesses to prove its case.

Briefly the prosecution's case is that on 25th December 2018 the deceased brought home a woman, one Evelyn Mamboleo, and told his family that he proposed to marry her as his wife, the accused in this case, had left. According to the witnesses the accused had left the matrimonial home about seven months earlier and the deceased's mother (Pw2), sister (Pw1) and step-mother (Pw6) were preparing the Christmas meal when at between 6pm to 7pm, the accused arrived with her youngest child strapped to her back. According to the deceased's sister (Pw1), a quarrel soon ensued between the accused and the deceased over the woman. The deceased's mother (Pw2) calmed the situation with a promise that the issue would be discussed in the morning. The deceased also seemed to assist when he elected to spend the night with the accused in their matrimonial house and a decision was made that the woman would spend the night in the house of the deceased's step-mother. The accused and the deceased, who it was alleged was drunk, were then served dinner in their house and thereafter everybody retired to bed in their respective houses within the same compound and the accused, the deceased and their child were left to sleep in their house. However, at around 1am the deceased's mother (Pw2) felt an unusual heat and opened the door to investigate the cause only to see the deceased's house on fire. She started shouting for help while trying to put out the fire and her shouts attracted the other members of the family as well as neighbours. The deceased's step-mother (Pw6) testified that when she arrived at the deceased's house she noted it was locked from outside. Since the house was connected to electricity people were afraid of moving near so the deceased's sister (Pw1) was sent to call an electrician to disconnect the electricity. Once that was done the fire was put out but on entering the house all that was found was the badly burnt body of the deceased. The accused and their son, then aged four years old were nowhere to be seen. So badly burnt was the body that it was decapitated. The matter was reported to the police the same night and

a team of officers comprising Sergeant David Muriithi (Pw8), then attached to DCI Keroka and IP Marucha (Pw9) the officer in-charge of Scenes of Crime Nyamira County, was despatched to the scene. IP Marucha (Pw9) documented the scene and took several photographs which he produced in evidence together with the attendant certificate (Exhibit 3 (a) and (b)). Also produced was a gas cylinder found at the scene (Exhibit 1). The court heard that the body was thereafter removed to Gucha Mortuary where a post-mortem performed on 27th December 2018 determined that the cause of death was due to cardiopulmonary arrest secondary to severe inhalation and internal burns involving 100% of the body. In his report, the doctor who performed the post-mortem confirmed that the body was burn beyond recognition. Sgt. Muriithi (Pw8) testified that it was suspected that the fire could have been caused by the accused so he embarked a search for her but it was not until one and half (1 ½) months later precisely on 14th February 2019 that she was arrested. She was subsequently charged with this offence.

In his testimony, Pius Motanya Ayata (Pw3), the deceased's neighbour, claimed to have met the accused at around 6pm on 25th December 2018 and hearing her vow that she would show them something they had never seen before. Similarly, Joyce Bonareri Mogaka (Pw5), the deceased's aunt, testified inter alia, that the accused's marriage to the deceased was a troubled one; that they would become estranged quite often; that the deceased would always send her to talk to the accused to go back to the matrimonial home and she would but that on this occasion the accused had intimated that although she had left two of their children there she no longer felt the need to return but if she did she would burn both her husband and the children. Pw5 testified that the accused had intimated to her that the source of her anger was her husband taking her money 3,000/= without her consent. She stated that she counselled the accused who agreed to go back to the matrimonial home. She, (Pw5) nevertheless communicated the threat by the accused to the deceased and his mother. All the witnesses were emphatic that they did not see the accused setting the house on fire and neither did they know what caused the fire.

The accused was the only defence witness. She testified that she left her matrimonial home with their youngest child on 29th October 2018 because of a dispute over tea bonus cash that the deceased had received and left with without informing her yet she was unwell. She claimed to have gone back on 1st December 2018 to prepare one of their children for school only to find the deceased had sold the children's bed and some timber and finding that too much to bear she left again. She stated that on 20th December 2018 her husband went for her at her parents' home and apologized and told her that he had lent Kshs. 22,000/= to one Sammy who she called and confirmed it was true. They therefore reconciled and she agreed to go back to the matrimonial home albeit the next day. She stated that on 25th December 2018 the deceased called to remind her but after making some mandazi for her brother she felt tired and slept since she was two months pregnant. At 1pm the deceased called her again and for that reason at 3pm she took a boda boda and proceeded there with their youngest child. She stated that upon arrival she found their house locked. She went to her mother-in-law's kitchen and found her husband and asked her husband for the key but he retorted she could go look for it. She stated that as she left she heard her mother-in-law saying that a strange woman she had seen cutting wood outside would go and stay in that house. She stated that she protested this to her husband as she was the one who had built the house. It was then that he gave her the key and she went to the house. She stated that while she was inside the house the woman went and entered the bedroom and took her things and a water jug that was on the table and went to her mother-in-law's (Pw2) house. Later the woman who was drunk started an argument but it was agreed the matter would be discussed the next day. She stated that when they retired to sleep the deceased volunteered to sleep on the couch and asked their daughter Grace to sleep on his bed since he had sold their bed. She stated that she went and slept on her bed but the deceased went and started beating her with a big stick only to order her back to sleep when Grace woke up. She stated that he ordered her to leave her door open but fearing he would kill her she carried her baby and left. She contended that she did not talk to anybody and that she went to her maiden home and slept. Early the next morning she decided to go to a place far away to look for employment and that is how she ended in her grandmother's home, to live with her uncle. She confirmed Pw8's evidence that she visited a hospital at Litein for treatment and that she was arrested on 13th February 2019. She vehemently denied killing her husband and contended that the house had electricity.

In closing, Mr. Bwonwong'a, Learned Counsel for the accused, submitted that the prosecution did not

prove its case to the standard required. That, firstly, the incident occurred at night and was not witnessed directly; that the gas cylinder produced in evidence was found far from the body of the deceased and that it is possible an electric fault was the cause of the fire as some live wires were suspended at the meter. He contended that the officer who photographed the scene was uncertain on whether the fire was caused by someone or by an electric fault and further did not demonstrate how entry into the house was gained when the police went to the scene. Counsel contended that it was not made clear whether the house was locked from inside or outside; that nobody saw the accused fleeing the scene and nobody made an effort to go and arrest her. He wondered why the woman mentioned by the witnesses was not called to testify and whether it is she who started the fire. Counsel submitted that it was not clear whether that woman attended the deceased's burial. He submitted that no DNA was conducted to determine whether the body found in the house belonged to the deceased and therefore the evidence was purely circumstantial. He also contended that the fact that the accused was arrested after several weeks means that the investigating officer was not clear as to who his suspect was. He urged this court to acquit the accused.

On his part, Mr. Majale, Learned Counsel for Prosecution, submitted that there was no doubt that the deceased was at the scene on that fateful night and that the only other person who was there was their three-year-old child. He submitted that the allegation that the fire was caused by an electric fault was disproved by the witnesses and contended that the accused caused the fire and fled only to be arrested two months later. Mr. Majale argued that it could not have been a coincidence that the accused visited the deceased, that he suffered burns which fatally wounded him and that she fled only to be arrested later. He submitted that the prosecution demonstrated there was a history of quarrels between the deceased and the accused more so on this night when the deceased had brought home another woman. Counsel urged this court to find the prosecution had proved the charge beyond reasonable doubt and that the prosecution's evidence was not shaken by the defence.

In reply, Mr. Bwonwong'a submitted that only electric power or gas could burn a body beyond recognition and submitted that it was not the accused who caused the electric fault. He surmised that under Kisii Customs a man can marry many wives and a wife cannot be provoked to the extent of killing her husband who she required alive to take care of their children. He reiterated that no DNA was conducted to establish that the body belonged to the deceased and further stated that the prosecution ought to have waited for seven years before presuming his death. He also reiterated his submission that the evidence here is purely circumstantial and that this court ought to acquit the accused.

As in all murder trials the prosecution was required to prove **the death of the deceased, that the death was caused by an unlawful act or omission of the accused person and that the unlawful act was actuated by malice aforethought (see Sections 203 and 206 of the Penal Code)**. The standard of proof required is one beyond reasonable doubt. In **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** the court discussed "**proof beyond reasonable doubt**" and cited with approval the case of **Miller v Minister of Pensions [1947] 2 ALLER 372 – 373** where it was stated: -

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect (defeat) the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

That burden of proof as always lies squarely on the prosecution to prove the accused's guilt beyond reasonable doubt.

In this case there is no direct evidence against the accused person and the case against her revolves around circumstances surrounding the incident or in short circumstantial evidence. In the case of **Mwangi v Republic [1983] KLR 522** the Court of Appeal held: -

"1. An offence of murder can be established by evidence tendered directly proving it or by

evidence of facts from which a reasonable person can draw the inference that murder had been committed.”

It is clear therefore that the evidence in this case should not be ignored merely on the ground that it is purely circumstantial. However, before this court can convict the accused person on such evidence it must be satisfied beyond reasonable doubt that: -

“(a) The inculpatory facts must be incompatible with the innocence of the accused.

(b) The facts must be capable of no other conclusion or explanation except the guilt of the accused.” (See *Mwangi v Republic (supra)*). And further: -

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.” (See *James Mwangi v Republic [1983] KLR 327*).

This court shall bear in mind all the above principles when deciding this case. Mr. Bwonwong’a, Learned Advocate for the accused disputed the fact of death and submitted that a DNA ought to have been done to establish that the remains found in the house were those of the deceased. I have considered that issue carefully and come to the conclusion that it was proved beyond reasonable doubt that the body found in that house was that of the deceased. I say so because the house belonged to the deceased and there was evidence from three witnesses (Pw1, Pw2 and Pw6) that they saw the deceased going to that house with the accused person and that when everybody else retired to sleep in their houses the deceased and the accused remained in that house together with their child. The accused herself confirmed this and stated that she left the deceased in that house. The fact that there was no other person save for those three in that house and the fact that the accused and the child are still alive gives rise to the irresistible inference that the person who got burnt and whose remains were found in the house is the deceased. I am fortified in so finding by the statement of Olijor J of the New Zealand Court of Appeal in **Republic v Harry [1952] NZLR 11 (3rd Digest)** cited with approval by our own Court of Appeal in the case of **Dorcas Jebet Ketter & another v Republic [2013] eKLR** that:

“At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

It is my finding that despite the absence of a DNA the direct evidence as well as circumstantial evidence in this case is so cogent and compelling as to leave no doubt as to the fact of death of the deceased. As to the cause of death a post-mortem report was produced and the same established that the cause of death was injuries sustained during the fire, and indeed photographs were produced that prove beyond reasonable doubt that the deceased’s house was razed to the ground.

Having found that the death of the deceased and the cause of that death were proved beyond reasonable doubt the only other issues that remain are firstly whether that death was as a result of the unlawful act of the accused and secondly if it was, whether the unlawful act was actuated by malice.

From the evidence adduced by both sides it is evident that the accused person and the child were the last people to be with the deceased. In her testimony, the accused did not allege that anybody else went to that house that night. Any allusion to the other woman going there is negated by the accused’s own testimony that the said woman went into the house before she and the deceased retired to bed as well as the testimony of Pw6 that the woman spent the night in her house. The accused’s testimony that their daughter Grace also slept in that house is not supported by evidence because after she served her parents dinner she went back to her grandmother’s house. There is also evidence that the house was locked from

outside. Counsel for the accused submitted that this was not demonstrated through the photographs but my finding is that given that people had tried to rescue the deceased it is not feasible that the door could have been in the same condition as when it was first seen by Pw6. I believed the testimony of Pw6. She impressed me as a truthful and reliable witness given her objectivity in her evidence and I do not believe she could have been lying. The accused who had been left to spend the night with the deceased was not there anymore and my finding is that it is she who bolted the door on the outside when she left. Her evidence that she left because the deceased beat her was not convincing. I came to this conclusion because she also lied on the aspect of her daughter spending the night in that house when there was credible evidence that after taking dinner to them the girl went back to her grandmother's (Pw2) house where she spent the night. Secondly, there was evidence that perhaps save for the bed upon which the accused and the deceased slept there was no other furniture as the accused had carted it all away a fact confirmed by the accused's allegation that the deceased had sold their children's bed. Whether she had carted it away or he had sold it the fact remains there was no other furniture in that house and the two could only have slept in the same bed. The fact therefore that the accused and her child were not in the house when it burnt and the fact that there was nobody other than the deceased in the burning house coupled with the fact that the door was bolted on the outside and the accused's conduct of fleeing to her grandmother's house far away from homes where she could easily be found and indeed was not found until close to two months after the incident are in my view inculpatory facts which are incompatible with her innocence and are incapable of no other conclusion or explanation except that she intentionally caused the fire. That the fire was caused by an electric fault was disproved by the witnesses and is not borne by the evidence and to say so would be to admit **"fanciful possibilities to deflect (defeat) the course of justice."** (See *Miller v Minister of Pensions (supra)*). So too, and this is with utmost due respect to Mr. Bwonwong'a, would be to say that a Kisii man is entitled to marry many wives and the accused could not have been provoked to that extent.

Article 26 of the Constitution guarantees the right to life and categorically states that: **"A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."** That in itself is proof of the unlawfulness of the act committed by the accused person. Indeed, in the case of *Guzambizi Wesonga v Republic [1948] EACA 55* it was held that: -

"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excused, it must have been under justifiable circumstances, for example in self defence or in defence of property."

In the instant case I did not hear the accused bring herself within any of those defences and my finding therefore is that she caused the death of the deceased by an unlawful act.

The offence of murder is not proved unless and until malice aforethought is established. **Section 206** of the **Penal Code** sets out the circumstances by which malice aforethought may be established and in the case of *Republic v Tubere s/o Ochen [1945] 12 EA* cited with approval by the Court of Appeal in *Carilus Omondi Mboga & another v Republic [2019] eKLR* the court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered: -

"The nature of the weapon used; the manner in which it was used; the part of the body targeted, the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."

I am satisfied that in the instant case malice aforethought was proved beyond reasonable doubt. Firstly, the fact that the accused had communicated a threat to burn the deceased and their children if she ever returned to that home to Pw5; the fact that on that very day she had been heard by Pw4 vowing to show the family something they had never seen; the fact that she left the house burning and did not raise an alarm and the fact that she bolted the door of the house to prevent the deceased from escaping all demonstrate that her action was intentional and it was calculated to cause the death of the deceased. Further, the fact that after setting the house on fire she escaped to a place where she could not be easily traced and the fact that she was returning to the matrimonial home after being away for long and having carted all their properties also go to show that her actions were calculated to harm the deceased. Her own

evidence that she left the matrimonial house in the dead of the night without alerting anybody yet there were people in the adjoining house proves that she did not want anybody to go to the deceased's aid. It was her evidence if it is to be believed that the deceased had already stopped beating her meaning she no longer had a reason to leave the house. She had an infant with her and she should have waited until morning to leave if indeed her escape was not actuated by malice. Her evidence that she went to Litein Hospital confirms Pw8's evidence that he went there in search of her so Mr. Bwonwong'a's submission that nobody was looking for her cannot be correct. It is my finding that taking all the evidence together her defence was not convincing and it did not offer any rebuttal to the prosecution's case. The circumstances surrounding the incident taken together form a chain that irresistibly points to her guilt.

In the premises I find that the charge against her was proved beyond reasonable doubt. I find her guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict her accordingly.

Signed, dated and delivered at Nyamira this 13th day of February 2020.

E. N. MAINA

JUDGE