



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO 35 OF 2016**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**BENARD JOHN OKUKU OUMA *alias* GEORGE OUMA .....ACCUSED**

**JUDGEMENT**

1. The accused was charged with the offence of murder contrary to Section 204 of the Penal Code, the particulars of which were that on the night of 12<sup>th</sup> April, 2016 at Mukuru kwa Reuben slums within Nairobi County murdered **LORNA AYIEKO**.

2. He pleaded not guilty to the charges on 13/6/2016 and on 6/3/2018 his trial commenced before me. To prove its case the prosecution called and examined eight (8) witnesses. When put on his defence the accused gave a sworn statement of defence without calling any witnesses.

**PROSECUTION CASE**

3. The accused had been in a romantic relationship with the deceased with whom they worshipped together at Revival Fellowship Church where they were active church members and leaders. Along the way it seems that the deceased entered into a relationship with **PW3** which led to a marriage, which did not go down well with the accused, who according to evidence kept on trying his luck to win her heart back and was a regular visitor to her house at Mukuru Kwa Reuben not so wealthy neighbourhood at Nairobi City. On the 12<sup>th</sup> of April 2016 the accused visited the deceased at her home at night while preparing supper and this is when she met her Sodom moment leading to her death.

4. It was **PW3 GEOFFREY MAKOKHA WERE's** evidence that he had courted the deceased from the year 2013 until 2016 when they moved together. He did not know the accused until the month of January when his wife, the deceased took him to their church when she pointed out the accused to him as the one who had wanted a relationship with her and was putting pressure on her despite the fact that they were now married.

5. On 12/4/2016 while the deceased was preparing supper, there was a knock on their door which she responded to and the accused came into the house briefly before going outside with the deceased, whom he heard laughing before they both came back to the house. From his bed where he was lying, he saw the accused put his hand into his sweater, removed a bottle which he opened and poured its contents on the stove and the deceased and himself causing an explosion of fire. He then held the deceased saying that they should die together.

6. At that point **PW3** pushed both of them outside the house, with the deceased screaming that the accused had killed her. The neighbours responded and put off the fire on the deceased and the house while he ran to call the brothers of the deceased who lived nearby. The accused was also burned on the hands. The deceased was taken to a local clinic for first aid before being referred to Kenyatta National Hospital where she later on died.

7. In cross examination he confirmed that the deceased used to tell him about the accused actions of seducing her which did not please him, since they were now married. He confirmed that they had electric light in their house and was able to see the accused well on that fateful night and that as a result of the fire his house was partially burned.

8. **PW4 JAMES AINGA** a brother of the deceased stated that he was called by PW1 to go to his house to see what had happened thereat, where he found the accused lying down surrounded by a crowd. He proceeded to the clinic of PW4 where the deceased told him that the accused had killed her by pouring petrol on her. He confirmed that the deceased was referred to Kenyatta National Hospital where she died the following day. It was his evidence that he had known the accused with whom they worshipped together at Revival Fellowship Church for

two years, where the accused was in charge of praise and worship, the deceased a choir member, while he was playing piano. He further stated that on 12<sup>th</sup> April, 2016 the deceased had sent him to talk to the accused to respect her marriage which he did not do.

9. In cross examination he confirmed that the accused was his friend. It was his evidence that the accused was injured on the hand while the PW1 who was with them in the house was not injured. He confirmed that the accused and the deceased were lovers and they broke up when PW1 came back from Mombasa.

10. **PW4 DENNIS OWENGA'S** evidence was that on the material day at 10.00 a.m. the deceased was brought to the clinic by a crowd having sustained 100% burns which he could not manage and therefore transferred her to Kenyatta National Hospital. He stated that the deceased told him that she had been assaulted by her former boyfriend whose name she did not give. He accompanied her to Kenyatta. When he came back, he found that the accused had been brought to his clinic by Nyumba Kumi. When he inquired from him, he said that he had been attacked by someone who claimed to be a boyfriend of the deceased.

11. It was his further evidence that when he told the accused that he would not treat him, he opened up and told him that he had a girlfriend who had left him so he decided to buy petrol and went to her house so that they die together. The following day he received a call on the death of the deceased and helped the police trace the accused who was later on arrested. In cross examination he stated that the accused sustained superficial burns on the face, neck, part of the hand and left leg.

12. **PW1 DR BERNARD MIDIA** conducted post mortem examination on the deceased whose body was identified by **PW6**, whose evidence was that she sustained a total burn surface area at 90% with a third degree burn. He further stated that the deceased was in first trimester pregnancy. As a result of his examination he formed an opinion that the cause of death was complication of burns second to third degree body surface area 90%. **PW2 DR. MAUNDU JOSEPH** conducted mental assessment on the accused who was in fair general condition with superficial burns on the face, around the neck, right ear lobe, both eye lids, the abdomen, upper part of the chest wall, upper limbs and lower limbs. He was found mentally fit to stand trial.

13. In cross examination **DR. MAUNDU** confirmed that the accused sustained 1<sup>st</sup> degree burns which he assessed at 9% on the leg, 10% on the neck, 9% upper limbs, 10% lower limbs. He stated that the burns sustained by the accused were not life threatening.

14. **PW6 ABUNERY OMUHANJA** who identified the body of the deceased testified that his wife had told him that the deceased was burned by her former boyfriend. He visited her at Kenyatta National Hospital burned unit where the doctor told him that the person who had burned the deceased had an intention to kill her. In cross examination he stated that on 11<sup>th</sup> day of April, 2016 the deceased had told him that the accused was disturbing her and had even assaulted her. She further told him that the accused had told her that if she did not accept his advances he would not allow her to be with **PW3**. He had promised to sort out the issue on Monday but she died before then. He further confirmed that the deceased was living with him until **PW3** came from Mombasa when they moved together.

15. **PW7 PC JUSTUS NGABE** on 13/4/2016 while on patrol received information of someone who had burned his girlfriend and was preparing to escape. He went to the house where the accused wanted to run away. **PW8 PC SGT GARRISSON AWANGA** investigated the case. He contacted **PW3** who took him to the scene which had already been cleared and managed to recover a stove outside the deceased house. He recorded statements from witnesses and confirmed that the accused visited the deceased while she was preparing supper using a stove with her husband resting on bed and pulled a plastic bottle full of petrol which he sprinkled on himself and the deceased causing the stove to explode.

16. He further stated that PW3 pushed both the accused and the deceased outside the house with the deceased screaming attracting the neighbours who pushed the deceased into a dirty trench and roughed up the accused. The deceased was rushed to a nearby clinic for first aid before being taken to Kenyatta National Hospital. From his investigation he heard that the accused had proposed to the deceased for a marriage which she declined for PW3. The two continued being friends since they were worshipping together. In cross examination he stated that the deceased complained to PW3 of the actions of the accused but he did not take any action. He further stated that the accused had held onto the deceased tightly wanting them to die together and PW3 pushed them outside the house so as to save the house from burning.

## DEFENCE CASE

17. The accused in his defence stated that they used to worship together with the deceased who was the choir secretary. On the material day she had requested him to go to her house and collect the money she had collected from the choir members to take to the treasurer. When he told her that it was late, the deceased told her that her husband (**PW3**) had threatened to use the money and would not repay. He went to her house and they started fellowship and she offered him supper which he declined. He then told her that it was not possible for him to find a girl to marry and she proposed to find for him a girl for "a one-night stand" and offered herself. At that point he heard a voice inside the curtain of **PW3** who said that they did not have respect yet they claimed to be church members yet seducing each other in his house.

18. He stated that as he said that he threw an item upon him which he did not know and to protect himself let it fall on the deceased and he heard an explosion which started fire. **PW3** then pushed him outside the house. He then rushed to assist the deceased and in the process got burned. They raised alarm and neighbours responded. He stated that the door was closed from outside. He was taken to the hospital where the doctor refused to treat him since he had information that he had burned the deceased. The doctor then went to his uncle who he told that he had committed an offence and would only treat him if he confessed who later on took him to the house.

19. He stated that he first knew the deceased in 2014 while a student and they later on got engaged, which she later on broke for **PW3**, but they remained friends. He confirmed having met **PW3** and used to go to their house several times. In cross examination he stated that when he went to the house of the deceased he did not know that her husband was there but was told that he was sleeping. He further stated that the husband of the deceased then pulled him towards the deceased and left the house closing the door from outside. He said that he was not beaten by members of the public.

20. He further confirmed that the doctor had initially refused to treat him since he had information that he had killed the deceased. He confirmed that the deceased was his girlfriend and that he is the one who left her.

## **SUBMISSIONS**

21. The accused filed written submissions while Mr. Okeyo for the prosecution made oral submissions. It was submitted by the accused that he was in good terms with both the deceased and her husband PW3 and that he visited the deceased upon her invitation. It was submitted that it was PW3 who was aggrieved when he heard him and the deceased laughing thereby throwing a bottle at him which fell on the deceased. It was contended that the prosecution failed to prove that he was responsible for the deceased's death.

22. It was submitted that the prosecution's narrative that the accused had a bottle was not believable as **PW3** did not sustain any injury yet he was in the same house which led to the death of the deceased. It was submitted that other than the accused, there was one other person who equally had opportunity to kill the deceased who was exonerated from suspicion of having committed the offence by the prosecution so as to leave the evidence pointing towards the accused. It was submitted that such evidence only raised grave suspicion against the accused for which the case of **NEEMA MWANGORO NDURYA v REPUBLIC [2015] eKLR** was tendered in support. It was contended that the action of PW3 of going back to the house and sweeping it as corroborated by the investigating officer corroborated the accused account that it is him who threw a bottle at him. It was contended that the court ought to exercise the necessary caution in receipt of the deceased dying declaration under Section 33 of the Evidence Act since the deceased sustained 100% burns. It was finally contended that the prosecution case was full of inconsistencies and irreconcilable contradictions that left doubt in the case as was stated in the case of **REPUBLIC v HASSAN SUBIRA [2017] eKLR**.

23. On behalf of the prosecution it was submitted that the fact that the death of the deceased was unnatural was proved through the evidence of **PW1**, the pathologist as corroborated by **PW3** and **PW4**. It was contended that the accused was linked to the death through the evidence of **PW3** and **PW4**. That malice aforethought was proved through the evidence of **PW3**, **PW6** and **PW7** to the effect that the deceased walked out of the house which did not go down well with him.

## **ANALYSIS AND DETERMINATION**

24. To sustain a conviction on a charge of murder the prosecution is under legal and evidential duty to prove:-

*a) The fact and cause of death.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That it was caused with malice aforethought as defined under Section 206 of the Penal Code.*

25. The fact and the cause of death of the accused is not in dispute. The fact of death was confirmed through the evidence of PW3 her husband, PW5 and PW6 her brothers, PW8 the investigating officer and the accused himself in his defence. The cause of death was proved through the evidence of **PW1 DR. BENARD MIDIA** and **PW4 DENNIS OWENGA** a nursing aid who first attended to her. From the evidence on record as analyzed herein I find and hold that the fact and cause of death was proved beyond any reasonable doubt.

26. On whether the said death was caused by unlawful act on the part of the accused person, the accused person put himself at the scene when in his defence he stated that he had visited her on the material night. This evidence was corroborated by PW3 the husband, whose evidence was that the accused visited them and found while the deceased was preparing supper while he was laying on bed, as any traditional African husband waiting for the food to be ready. At the house, there were only the three of them, one who now cannot tell use her side of the story.

27. It was PW3's evidence that the accused requested the deceased to step outside. He could hear them laugh before they both returned to the house, where the deceased continued with the cooking while the accused took his place at the sofa. According to **PW3** the accused then removed a plastic bottle from his sweater which he poured both on himself and the deceased claiming that they had to die together, before the stove she was using for cooking exploded into a ball of fire.

28. The accused account on the other hand is that it is **PW3** who threw the bottle on him which he deflected causing it to land on the deceased and that in his attempt to rescue her from the arising fire he too was burned. The accused evidence at the end of his case stood uncorroborated, thereby leaving it to circumstantial evidence.

29. Both the accused and **PW3** described the house of the deceased and PW3 as a 10x10 single-roomed house. **PW3** was sleeping on bed while the deceased was cooking at a corner within the house. **PW3** stated that the accused greeted them before going out of the house with the deceased for a short while where he heard them laugh. The accused's account I that they started fellowshipping inside the house before their topic moved to issue of "one night stand" and the laughter therefore which attracted the wrath of **PW3**.

30. The question which this court has to answer is whether the deceased, a newly married woman knowing that her husband was behind the curtain would discuss with the accused intimate details including offering herself for "one night stand" whatever that means? I am not persuaded with the accused account of what happened on the material day and would therefore believe the account of **PW3**. The accused stated that he had been told by the deceased that **PW3** was in the house and under cross-examination contradicted himself by stating that he did not know that he was in the house.

31. The accused has also been connected to the death of the deceased through the evidence of **PW4** the nursing aid who treated both himself and the deceased. It was his evidence that the deceased told him to help her, having been assaulted by her former boyfriend who wanted to

kill her. She did not give him the name of he said boyfriend but the accused who later attended to his clinic confessed that he had poured petrol onto both of them since she had left him and he wanted to die with her.

32. The issue for the court's determination is whether what the deceased told him constituted dying declaration and whether what the accused told him constituted confession which is admissible.

33. What constitutes dying declaration is captured in Section 33 (a) of the Evidence Act in the following words:-

*“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 cause of that person's death, comes into question. Such statement 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 proceedings in which the cause of his death comes into questions.”*

34. The Court of Appeal had his to say on dying declaration in the case of **PHILLIP NZAKA WATU v REPUBLIC [2010] eKLR**:-

*“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 them was or was not expecting death when he made the statement... While it is not the rule of law that a dying declaration must be corroborated, to find a conviction nevertheless, the trial court must proceed with caution and to get the necessary assurance that a conviction formed on a death declaration was safe.”*

35. Further, in the case of **STEPHEN MUTURIA KINGANGA v REPUBLIC [2013] eKLR** the Court of Appeal had this to say on the question of dying declaration.

*“10. This court has considered the above provision in several cases in PIUS JASUNGA s/o AKUMU v republic [1954] 21 EACA 333 the predecessors of this court stated:-*

*“The question of the caution to be exercised in the reception of dying declaration and the necessity for their corroboration has been considered by this court in numerous cases a passage from the 7<sup>th</sup> edition of Field of Evidence has repeatedly been cited with approval. It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (REPUBLIC v ELIGU s/o ODEL & ANOTHER [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused...*

*But it is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused not subjected to cross examination unless there is satisfactory corroboration.”*

36. In this case the evidence of PW4 was corroborated by that of PW5 JAMES AINGA her brother who visited her at the clinic of PW4 immediately after PW3 had called him and she told him that he accused had killed her having poured petrol on her. It was his evidence that the deceased kept on saying that the accused had burned her while being transferred to Kenyatta National Hospital. This was further corroborated by the evidence of PW6 ADUNERY OMUHANJA her other brother whose evidence was that on the 11<sup>th</sup> of April, he had gone to see the deceased who told him that the accused was disturbing her. It was his evidence that the deceased had told her that the accused had told her that if she did not accept his advances she would not be with PW3.

37. I have further taken into account the fact that the accused had also sustained burns thereby corroborating the account of PW4 and PW6 that he had threatened to kill both himself and the deceased and therefore find his defence to the effect that it was PW3 who threw the bottle of petrol on him which he deflected onto the deceased an afterthought. The deceased according to the evidence of PW2 was pregnant at the time with a child presumably of PW3 and therefore see no reason why the same would have wished to cause her death. He had won the heart of the deceased to the chagrin of the accused.

38. The other corroborating issue is the confession of the accused to PW4. In discussing confession in similar circumstances the Court of Appeal in **WANJALA NGAIRA v REPUBLIC [2019] eKLR** had this to say:-

*“Under Section 26 of the Evidence Act a confession is any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceedings if the making of the confession on admission appears to the court to have been caused by an inducement threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appeal to him reason able for supposing that by making it he would gain any ad vantage or avoid any evil of a temporal nature in reference to the proceedings against him ...*

*(23) In KANINI MULI v REPUBLIC [2014] eKLR the appellant retracted her alleged confession as a result of pressure from the clan elders to avert death in her family that was attributed to a Kamba Kithitu oath. The court accepted that there may have been pressure or intimidation stated as follows:-*

*“a chief was regarded for statements made to him by an accused person as a person in authority in REPUBLIC v ERIYA KASHULE & OTHERS [1947-1949] EA 148 while in GORPEGO GIDAMABANYA & OTHERS v REPUBLIC [1952 – 1953]*

*EA 318 a headman was treated as a person in authority. In an African Context like that in which the Appellant found himself, we would be slow to say that clan elders are not persons in authority. In this case on the evidence, the elders as family of the appellant brought pressure to been upon her to make a confession and to open negotiations with the family of the deceased so as to avoid evil of a terminal nature namely further death in the family believed to be cursed by the Kithitu oath. To that extend, the appellant's statement was one extorted from her by fear of prejudice to her family or life of the advantage of presenting further death in the family. We would add even sheer terms of the oath."*

39. It must be noted that the confession of the accused to **PW4** the nursing aid was not the type of confession covered under Article 49(1)(b) (d) and 50(2)(a) and 4 of the Constitution and Section 25 to 32 of the Evidence Act as supported by the Evidence Out of Court confession Rules 2009. The general rule however is that any confession or admission purported to be made by an accused person which appeared to court to have been made as a result of any inducement, threat or promise by a person in authority is not admissible if it gives the accused person grounds to believe that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him – see **CAROLINE WANJIKU WANJIRU & ANTOHER v REPUBLIC High Court at Nairobi Cr. Appeal No. 87 of 2012.**

40. Was **PW4** a person under authority as regards the accused and was there any inducement for him to make the statement? **PW4** was a nursing aid to whom the accused attended for purposes of treatment. This was the evidence as regards the confession:-

*"I asked him what had happened. He said he was attacked by someone who claimed to be the boyfriend of the lady. I told him that I will not treat him and he then told me that he had a girlfriend who had left him for another man, when he came from work he decided to buy petrol and went to the lady's house. He wanted to die with the lady."*

41. It was his evidence that he had already known what had happened and only sought to establish the truth from the accused. In his defence the accused stated that when he was taken to **PW4** he told him that he could not assist him since he had received a report that he had burned the deceased which he denied thereby corroborating the evidence of **PW4**. I saw **PW4** in court and heard his evidence and have no reason not to believe his account that the accused confirmed to him having burned the deceased and having fond that he was not a person under authority as regards the accused, I find his statement admissible. This statement is further corroborated by the evidence of the brother of the accused and her husband to the effect that the accused was on a mission impossible to win back the heart of the deceased, her marriage to **PW3** notwithstanding.

42. From both the direct evidence of **PW3** and the circumstantial evidence tendered before the court, I am satisfied that the death of the deceased was caused by unlawful act on the part of the accused person. His submission that **PW3** the husband of the deceased equally had opportunity to kill the deceased is not supported by the evidence tendered before the court. The evidence by the brothers of the deceased shows that it is the accused who was out to have the deceased or nobody else. The accused was their friend and a fellow worshipper and I see no reason why they would wish to frame him up.

43. On whether the said death was caused by malice aforethought, the evidence before the court is that the accused and the deceased were in some relationship deeper than just being church members. The deceased terminated the said relationship for one with **PW3** which did not go well with the accused who set out on a mission to win her back but he failed in his attempt. As submitted by the prosecution he decided to end the relationship between the deceased and **PW3** by killing both himself and her and this is what he did. The nature of injuries inflicted upon the deceased, 100% body burns, clearly shows that the accused had the intention to cause and indeed succeeded in causing the death of the deceased. The deceased fearful of his intentions had raised the issue with the brother and husband but they did not come to his aid. The accused's account that he is the one who ended their relationship is not supported by the evidence on record.

44. Having been placed at the scene of the incidence and having taken into account the defence as offered by the accused which I find unbelievable - against the prosecution evidence I am satisfied that the prosecution proved beyond reasonable doubt all the elements of the offence of murder contrary to Section 203 of the Penal Code and accordingly find the accused guilty as charged and convict the same and it is so ordered.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of May 2020 through Google Teams.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of**

*Ms. Onunga for the State*

*Ms Kinyori for the accused*

*Karwitha/Court Assistant*

*Accused person present*