



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 24 OF 2015

REPUBLICPROSECUTION

VERSUS

MERCY KARIOKO MUTA.....ACCUSED

R U L I N G

1. The accused person faces a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. She pleaded not guilty to the charge.
2. The prosecution called eight (8) witnesses in this case. Precisely, the prosecution's evidence is that the deceased died of severe burns in the house where he stayed with the accused who was known to be the wife.
3. It was the evidence of PW1 a neighbour in the plot that on 23/01/2015 around 8.00 am. She heard the accused and the deceased screaming. The room occupied by the couple was about 12-15 metres from that of PW1. She did not go there to find out what was happening. It was much later that she went out and sat on a chair in the open area. She saw the accused and the deceased outside their room.
4. The accused took a paraffin stove and hit the deceased with it. The stove rolled down the chest to the legs of the deceased. The deceased took a matchbox from their house and said he would use it to light himself up. The deceased ran outside the plot saying he was going to buy another matchbox. The accused ran after him towards the shop and was later heard screaming.
5. PW1 and others helped to pullout deceased's cloths and covered him with a lessso. He was later taken to hospital but succumbed to the injuries.
6. At the close of the prosecution's case, the defence filed written submissions arguing that the prosecution had not make up a prima facie case against the accused. It was contended that the prosecution purely relied on circumstantial evidence which does not meet the standards set out in various cases by courts.
7. Mr. Kagio for the accused urged the court to acquit the accused.
8. I have perused the evidence of the prosecution witnesses. PW1 witnessed the fracas between the accused and the deceased. She said the accused hit the deceased with a paraffin stove.
9. The deceased took a matchbox and wanted to set himself on fire but PW1 intervened by snatching the matchbox.
10. The deceased had said to PW1: *"You want to kill me? Let me kill myself."*
11. After he took the matchbox from the shop, there is no evidence that anyone saw him set himself on fire or whether someone else did it. PW1 saw him already on fire after he ran toward the shop.
12. None of the other witnesses saw what transpired a fact which was admitted by PW8, the investigating officer. It is not in dispute that the deceased died of severe burns since PW6 the doctor confirmed it in his postmortem report.
13. However, the prosecution failed to adduce sufficient evidence on who set the deceased on fire. The fact that the deceased had threatened to light himself up and ran and picked a matchbox, makes the case against the accused quite doubtful.
14. The circumstantial evidence was only from PW1. For any court to rely on circumstantial evidence in a criminal case, such evidence must meet the standards required.

15. In the case of **MSEMBE VS REPUBLIC [2003] 521** the court cited with approval the case of **Kipkering arap Koske & Another Vs Republic [1949] 16 EACA** where it was held: -

“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

16. The defence relied on the Court of Appeal case of **Abanga alias Onyango Vs Republic Criminal Case No. 32 of 1990 (UR)** where similar principles as in the **Kipkering** case (supra) were set.

17. In view of the holding in the two cases and after evaluating the evidence on record, I find that the circumstantial evidence herein does not meet the threshold established in criminal law. It would be a futile exercise to call upon the accused to make her defence against the charge.

18. I reach a conclusion that a *prima facie* case has not been made up by the prosecution. Consequently, I hereby acquit the accused under **Section 306 of the Criminal Procedure Code.**

19. She is hereby set at liberty unless otherwise lawfully held.

20. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the State

Ms. Nzekele for Maina Kagio for accused

Accused present