



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 7 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES WAWERU NDIKAA.....1ST ACCUSED

CECILIA WANGITHI NDIKAA.....2ND ACCUSED

JENIFFER WAMBUI.....3RD ACCUSED

RULING

A. Introduction

1. The accused, **James Waweru Ndiaka, Cecilia Wangithi Ndiaka & Jeniffer Wambui** were jointly charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code* (Cap 63) Laws of Kenya for which they all pleaded not guilty.
2. The 2nd accused passed on during the trial and thus the case against her was withdrawn under Section 87(a) of the Criminal Procedure Code. The 3rd accused then became accused No. 2.

B. The Evidence

3. In order to prove the contrary on the presumption of innocence of the accused, the state summoned eight witnesses. I will give a brief summary of the evidence material to the case.
4. PW1 testified that she was working on a shamba when she heard a lady scream from the house of a neighbour after hearing that there were three men who wanted to lynch a young man. PW1 later saw the man burning and realised it was her brother, the deceased and upon enquiry she identified two of the culprits as the 1st and 2nd accused.
5. PW2 testified that he received a report that a thief had been arrested at his home area and upon arrival at the scene he was able to identify the deceased who had been cut and burnt on suspicion of being a thief. PW2 did not see the accused persons at the scene of crime at the time he arrived.
6. PW3 told the court that he identified the deceased as a thief who was stealing from her house and whom she knew as an employee of the 1st accused. PW3 further testified that the deceased was chased by a mob who eventually caught up with him. She further testified that she did not witness the beating and the burning of the deceased. Neither did she see the accused persons at the place where the deceased had been caught.
7. PW4 testified that he heard people screaming “*thief, thief*” and chasing after someone whom he later realised was the deceased who had been employed by his son. He did not see any of the accused persons at the scene of the crime and did not witness the deceased being burnt.
8. PW5 is the psychologist who examined the accused and deemed them mentally fit to stand trial. PW6 who was working alongside PW1 said he similarly heard screams from a mob chasing a young man who was on fire whom she later realised was Peter, a brother to PW1. PW5 said he identified 1st and 2nd accused as the persons who had tied a rope on the deceased’s neck and were attempting to set him on fire.
9. PW7 was the officer in charge of crime at Sagana and visited the scene where the deceased had been beaten by a mob after which he rushed him to hospital. He testified that an inquest was carried out in a court in Kirinyaga County with recommendations that certain suspects be charged. He further testified that he led the investigations in the inquest but was not involved in this murder case.

10. PW8 conducted the autopsy of the body of the deceased and concluded that the deceased died of the 65% burns. In cross-examination, PW8 reiterated that despite the deceased having a big cut wound that led to bleeding, it was the 65% burns that caused his death.

C. Analysis of Law

11. The two accused persons are facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code **Section 203** it is defined as to **“when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

12. The prosecution thus has a duty to prove that the deceased died as a result of the unlawful omission or commission of the accused persons. Further, that in killing the deceased the accused did so actuated by either express or implied malice. Thirdly, it is incumbent upon the prosecution to place the accused persons at the scene of the murder.

13. The question under Section 306 of the Criminal Procedure Code is whether on objective consideration of the situation the state has presented a *prima facie* evidence implicating the accused persons in the death of the deceased. The scope and ambit of the prosecution case must fall within any of the defined circumstances under section 206 of the Penal Code on what constitutes malice aforethought.

14. The issue in the present case is whether given the evidence and the ingredients of the offence under Section 203 as read together with Section 206 of the Penal Code the accused has a case to answer or not.

15. The relevant provision to this question falls under the provisions of **Section 306 (1) and (2) of the Criminal Procedure Code** which provides *inter alia* that: -

“when the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal.”

16. *I have carefully perused the evidence of the eight (8) prosecution witnesses and I hereby make a few observations.*

17. PW1 said she heard screams and later saw a young man burning whom she identified as her brother the deceased. She said the police on patrol came to the scene and said nothing should be done to her brother who already had cuts on the leg. It appears that the police left the deceased at the scene and proceeded for their mission.

18. It was later that PW1 saw the 1st and 2nd accused come and tie the deceased with a rope on the neck and drag him on the road where they placed twigs and firewood on him. She said she saw the 2nd accused strike the deceased with a mattock.

19. PW6 said she was working alongside PW1 and also identified 1st and 2nd accused as they tied the deceased with a rope.

20. From the evidence on record I find that the prosecution have established a *prima facie* case against the 1st and 2nd accused persons.

21. The 1st and 2nd accused are hereby called upon to make their defences against the charges.

22. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF MARCH, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Momanyi for 1st accused and h/b for

Ms. Njeru for 2nd accused