



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 14 OF 2012

[FORMERLY NYERI HCCR 21 OF 2012]

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MACHARIA MUIRURI *alias* MACHAA....ACCUSED

JUDGMENT

1. On the night of 21st and 22nd May 2012, *Elijah Kiarie Mwangi* (hereafter *the deceased*) was found outside *Sunshine Bar* at Nguku Trading Centre. He was still alive; but he had suffered extensive burn wounds.
2. Witnesses said that the deceased *told* them that *Machaa* poured paraffin on his clothes and set him alight. The deceased was taken to hospital but succumbed to his injuries some hours later.
3. The Republic brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
4. The particulars are that on the night of 21st and 22nd May 2012 at Nguku Trading Centre, Githima Sub-location, Murang'a County, he murdered the deceased.
5. He pleaded *not guilty*. The prosecution called *six* witnesses.
6. PW1 was Stephen Chege. He is a nephew of the deceased. He also knew the accused as a village-mate. He said that the accused was employed as a casual labourer by PW1's aunt, Lucy Nyambura.
7. At 7:00 p.m. on the material night, he was informed by Mama Ciku that the deceased had suffered burns at Nguku Shopping Centre. He went there. It was about 2 kms from his home. He was accompanied by his sister Nancy Wanjiku and his mother Hannah Waruguru.
8. The deceased told him that he was drinking at a bar and left with one Mary Nyambura Mwangi (now also deceased) and the accused. He also said that he had bought a bottle of paraffin which he stashed into his pocket. The accused attacked him and ransacked his pockets for money. He found none. He then removed the deceased's coat and covered him on the face. He took the paraffin, poured it all over the body, struck a match and set the deceased ablaze.
9. PW1 assisted to take the deceased to Kigumo Dispensary for first aid. They later secured an ambulance and transferred the patient to Murang'a Level 5 Hospital. They were then referred to Kenyatta National Hospital. He said the deceased was still conscious and talking. Later at about 11.00 p.m. one of the deceased's daughters informed him that the deceased had died.
10. PW1 said that while still at the scene, members of the public arrested the accused. They gave him a thorough beating. The police from Githima rescued him from the mob.
11. PW2 was Julius Murigi, a brother of the deceased. When he got to the scene, the deceased was sitting down. He had burns on the head, face and legs. The deceased was more or less naked as his clothes had burned.
12. PW2 accompanied the deceased to Kigumo Dispensary, and to Murang'a Level 5 Hospital. He heard the deceased state a number of times that it was the accused (whom he called *Kamachaa*) that poured paraffin on him and lit a fire.
13. PW4 was Florence Wanjiru. She also went to the scene. She testified that the deceased told her that *Machaa* had burned him with some

paraffin after he failed to get money from the deceased's pockets. She said there were other people who overheard her conversation with the deceased.

14. PW5 was Samuel Chege. He is a local pastor. He saw the deceased at the scene. He said the deceased had suffered burns on the chest and back. He asked the deceased what had happened. He answered that *Machaa* had burned him over Kshs 200. That is all he told him. PW5 knew the *Machaa* that the deceased referred to "because no one else in the area was called *Machaa*".

15. PW6 was Administration Police Constable Mureithi from Githima Post. He received information about the incident from a member of the public. He and his colleague APC Kosgei went to the scene. He said the deceased had burns on the face, shoulders and both arms. The deceased told him that he was burnt by *Patrick Macharia Muiruri*, after a confrontation in which he (Patrick) was demanding money. The witness said he spoke to the deceased for about 20 to 30 minutes.

16. While still at the scene the accused was arrested from his house, 100 metres away. The mob was beating him. The police rescued him and took him to Kigumo Police Station. They also took the accused and the deceased to the hospital.

17. PW3 was Isaac Miringu. He is a nephew to the deceased. On 30th May 2012 he identified the body for postmortem examination. The pathologist did not testify.

18. When the accused was placed on his defence, he protested his innocence. He said he did not know the deceased; and, that he did not douse his body with paraffin. He testified as follows-

"I am also known as 'Machaa'. I used to sell fruits such as bananas at Nairobi. I do not know the deceased. On 22nd May 2012 I arrived in Kigumo, Nguku from Nairobi at 8.00 a.m. I slept a little in my house. As soon as I removed my jacket, someone knocked at the door. I found over 10 people. I knew some of them. They started beating me. They got hold of me and took me to Nguku Centre. They said I poured paraffin on the deceased. The deceased was at the scene. I did not know him before then.

"The beatings continued. On 21st May 2012 I was in Nairobi. I know a bar called 'Sunshine'. I do not know the barman.

"Police found me being beaten. They rescued me and took me to Kigumo Police station. I had lost my teeth and I had a cut on the head. I was taken to Kigumo Hospital. I was then returned to the station and charged for this offence. I do not know why I was charged. I did not pour paraffin on the deceased"

19. Learned counsel for the defence filed final submissions on 28th February 2019. Learned Prosecution Counsel filed submissions on 26th March 2019.

20. From the evidence of PW3 there is no doubt about the death. From the evidence of PW1, PW2, PW4, PW5 and PW6 the deceased suffered extensive burns on the head, face, chest, back, arms and legs. He died the following day at Kenyatta National Hospital.

21. PW3 identified the body for post mortem on 30th May 2012. The pathologist did *not* testify. In *Ndungu v Republic* [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. The Court stated at page 493 as follows:-

"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."

22. I am satisfied that the deceased died; and, that his death resulted from an *unlawful* act. He suffered *extensive and serious burns* all over his body. He succumbed to those injuries a few *hours* later.

23. The key question then is whether the accused, *of malice aforethought*, killed the deceased.

24. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

25. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

26. *Malice aforethought* is the *mens rea* or the *intention* to kill another person. Section 206 of the **Penal Code** defines it as follows;

"206. 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.”

27. None of the six witnesses saw the accused attack the deceased. But there is *very strong* circumstantial evidence. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

28. Although none of the witnesses saw the accused pouring paraffin on the deceased and setting him alight, the deceased saw him. The deceased disclosed it *immediately* after the attack to PW1, PW2, PW4, PW5 and PW6.

29. Although the deceased had suffered extensive and serious burns, he could still *talk*; and, kept talking to witnesses as he was ferried to the hospital. The words spoken by the deceased to the five witnesses amount to a *dying declaration*.

30. *Dying declarations* should be treated with *caution*; and, there is need for *corroboration*. See **Pius Jasunga Okumu v Republic** (1954) 21 EACA 333, **Choge v Republic** [1985] KLR 1. The statement by the deceased was *corroborated* by *each* of the *five* witnesses who in turn *corroborated* each other. The declaration is thus admissible under section 33 (a) of the **Evidence Act**.

31. The deceased was categorical that he was burnt by the accused who was also known by the moniker, *Machaa*. PW5 said that no one else in the area was called *Machaa*. Furthermore, the accused conceded in his defence that he is also known as *Machaa*. He also admitted that he was arrested by the public in his house which was a mere 100 metres away from the scene.

32. I did not believe the accused when he claimed he did *not* know the deceased. The accused was previously employed by a relative of the *deceased* as a casual labourer in the *same* village. PW1, PW2, PW4, PW5 all knew him as a resident of their village.

33. I thus entertain no doubt that the *deceased* clearly *recognized* the accused as the person who attacked him; poured paraffin on his clothes; and, set him on fire. The *actus reus* is proved.

34. The accused burnt the deceased following a confrontation in which he demanded money. He ransacked the pockets of the deceased and recovered none. He then removed the deceased's coat and covered him on the face. He took the paraffin, poured it all over the body, and struck a match setting the deceased ablaze. Therein lay a clear *motive*.

35. The action was clearly *pre-meditated*. By using fuel to set the deceased on fire, he *knew that the act would cause death; or would probably cause death; or would cause grievous harm* to the deceased. It proves *malice aforethought* as defined in section 206 (b) of the **Penal Code**.

36. The entire defence by the accused is hollow and unbelievable. I have reached the conclusion that the entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the accused. The chain of events is *complete*. There is *no* hypothesis that exonerates the accused.

37. The prosecution has *proved* the charge *beyond reasonable doubt*. The upshot is that the accused, *of malice aforethought caused the death of Elijah Kiarie Mwangi by an unlawful act*.

38. I accordingly enter a finding of *guilty*. The accused is hereby *convicted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 14th day of May 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Bwonwonga for the accused.

Ms. Otieno for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.