REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 27 OF 2010

REPUBLIC

VERSUS

ALBANAS KIOI MAWEO……ACCUSED

JUDGMENT

Albanas Kioi Maweo was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. It is alleged that on the 6th day of August, 2010 at Mathari area in the then Nyeri District of the then Central Province, he murdered Geoffrey Maina Wambui. He was arraigned on 27 September 2010 when he denied the charge.

By way of a brief background, the prosecution case is that the deceased died as a result of the burns he sustained in his house. It was also its case that the fire was deliberately started by the accused who was the only other person in the deceased's house at the material time and who was either intent on harming the deceased or causing his death because of some disagreement between them. As it will be demonstrated in due course, none of the prosecution witnesses saw how the fire was started and therefore the prosecution evidence in this regard was largely circumstantial. However, prior to his death, the deceased is said to have made a statement which the prosecution heavily relied upon as a proof of the cause and the circumstances of his death. Thus, besides circumstantial evidence, the prosecution also put forth a dying declaration in support of its case against the accused.

According to Julia Wairimu (PW1) who lived in the deceased's neighbourhood, she heard screams from the deceased's house at about 2 PM; she noticed smoke billowing from its door. She rushed there and forced the door open; she attempted to put the fire out but the smoke was so heavy that she could barely see. Police officers arrived almost immediately and assisted in putting out the fire. It was then that she managed to see the accused and the deceased inside the house; both of them had sustained burns in different degrees- the deceased's face was burnt and his injuries appeared more severe while the accused sustained burns on one of his hands.

It was the evidence of Wairimu that both the accused and the deceased lived in the single-roomed house; the house had been let out to the deceased by the Catholic arch diocese of Nyeri for which he worked as a security guard.

James Kariuki Njuguna (PW2) testified that like the deceased, he too was a security guard at the arch-diocese of Nyeri though the deceased was his junior. He was aware that the deceased and the accused lived together in the deceased's house. On 4 August 2010 he had received a complaint from the deceased to the effect that the accused had fought him. Since the deceased had visible injuries on his face, he advised him to seek medical attention. He also advised him to take up the matter with the police since the dispute between him and the accused was a private affair.

On 6 August 2010 he was informed by one Joseph that there was fire at the deceased's house. He went to the scene but found when it had already been put out. He also found the police who requested for transport to take the deceased to hospital. They arrested the accused as a suspect.

The accused, according to Njuguna, had assisted the deceased secure employment at the arch-diocese. The accused also sought to be employed as a guard though the deceased informed him that the accused was then engaged at a church outfit that he referred as 'saint brotherhood'.

Police Constable Paul Kemei (PW3) who was attached to Nyeri police station at the material time testified that he received a call from the deceased that he had been attacked at his residence. The deceased appeared to be in distress and wanted the officer to come quickly. He, together with his colleague, corporal Cheruiyot (PW5) rushed to the scene and found the deceased's house on fire. They, together with two other ladies who were already at the scene, managed to put the fire out.

The deceased came out of the house first followed by the accused; he observed that the deceased's face had been burnt while the accused's hands were also burnt. The deceased told him that the accused had deliberately set the house on fire using paraffin. The accused attempted to flee while on the way to hospital. He managed to take the deceased's statement in which he stated, inter alia, that the accused poured paraffin on the mattresses and set the house on fire as a result of a disagreement between them. Apparently, the deceased had asked the accused to vacate his house.

He took the deceased's statement in the presence of the accused. When he was asked his side of the story, the accused said that the dispute was complicated; he refused to say anything more.

Corporal Cheruiyot (PW5) testified that indeed he was with his colleague Police Constable Kemei (PW3) at Mathari patrol base on 6 August 2010 at about 2.30 PM when the latter received a call that there were some disturbances at the spiritual centre residence. They rushed to the scene and found Wairimu (PW1) and one Joan Karemi trying to put out a fire. He heard some cry for help from the house. The deceased came out and according to him, he was completely burnt from the waist all the way to the face. He was followed by the accused who was also burnt on his right hand. While on their way back to the patrol base, the accused attempted to flee; however, he fell down and the officer subdued him. The officers took the statement of the deceased and took him together with the accused to hospital. The officer visited the scene again on 8 August 2010 together with police constable Marangu (PW6) and collected a container which they thought contained a substance that was used to burn the house together with burnt pieces of clothes which the deceased was wearing.

The officer established that the deceased was a security guard at the spiritual centre. When he interrogated the accused, the latter told him that he was unemployed and that the deceased was his friend.

William Kailo Munywoki (PW4) a government chemist testified that he examined a burnt jerrican and burnt clothes which had been forwarded to the Government laboratory by Nyeri police station to ascertain the substance used to burn them. Upon examination, he established traces of diesel in the burnt items.

Dr Dindi Kithi testified that he examined the accused and filled a police medical form in respect of the accused. He had sustained what she described as second degree 4.5 per cent superficial burns on the upper limbs which were managed by topical antibiotics. The doctor got the history of the burns from the accused himself; he told her that he had burnt himself. She is also the one who treated him.

The post-mortem on the deceased's body was conducted by Dr Dorcas Wangari Thairu (PW9) on 12 August 2010 at the Nyeri Provincial General Hospital. She observed that the deceased had sustained fifty percent burns; in particular, he sustained fire injuries on the neck, anterior chest and both upper limbs. The lungs were darkened. She opined that the cause of the deceased's death was respiratory failure secondary to the burns.

The investigations were conducted by police constable Marangu Mbiuki (PW6) who confirmed in his testimony that the deceased was seriously burnt and for that reason he was admitted in hospital. He also

established that the accused had his right hand burnt and it is him who escorted the accused to hospital. The deceased died on 8 August 2010. He confirmed that he collected a jerrican and burnt clothes from the deceased's house for forensic analysis; as a matter of fact, he escorted these items to the government analysist. The officer also testified that the deceased's statement was recorded at Mathari police base; he testified that the deceased had told him that he had been burnt by the accused because he had told him to vacate his house. He produced the deceased's statement which was admitted in evidence as part of the prosecution evidence.

In his sworn statement of defence, the accused described himself as a brother in the brotherhood of St Joseph's congregation. He testified that in August 2008, the deceased approached him seeking a job from the congregation or community. He was eventually employed as a farmworker but was sacked in September 2009. The accused managed to secure him another job, this time as a security guard at the arch-diocese of Nyeri. In due course, the deceased befriended the accused's sister who lived with the accused at the time. She, however, died on 17 May 2010 of HIV Aids. The deceased, according to the accused, became wild when he was examined and found to have contracted the same disease.

He testified further that he had his belongings in the deceased's house and that the deceased set himself on fire when he went to collect these belongings. He went to the house in the company of security guards. It was his evidence that the deceased threw a paraffin jerrican at him. In short, he denied having murdered the deceased.

This is all there was to the evidence that this honourable court is now confronted with; the task now is to consider the evidence in light of the law applicable.

The offence of murder is defined in section 203 of the Penal Code; that section reads as follows:

> ***203. Murder***
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> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

To establish a case of murder the prosecution must prove death of a person and that the death was unlawful. It must also prove that the death was caused by an act or omission of the accused person and, finally, in so acting or omitting to act, the accused was motivated by malice aforethought.

The death of the deceased was certified by the pathologist, Dr Dorcas Wangari Thairu(PW9) who conducted a post-mortem on his body and therefore there is no much dispute about whether or not the deceased died. There is also uncontroverted evidence that the deceased's death was unlawful; at least there is no suggestion from any quarter that the death and the manner of the deceased's death were justified. On the contrary, the evidence points to only one direction; that the act out of which the deceased sustained the fatal injuries was unlawful and so his death was unlawfully caused.

The pertinent questions which linger for determination are whether the accused is the culprit and if so whether he had the necessary malice aforethought; these are the question that I now turn to as I analyse the evidence.

It is apparent that part of the prosecution evidence is circumstantial. According to section 164 of the Evidence Act when a witness, the truthfulness of whose evidence it is intended to confirm, gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

It follows that where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, it is trite that

circumstantial evidence must be narrowly examined before drawing any inference of guilt on the accused. The trial court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the accused's part. The leading decisions on this issue are

In **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA** 135 the Court of Appeal for Eastern Africa considered this issue and cited ***Wills on Circumstantial Evidence***, that:

> ***In order to justify 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. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.***

And in **Simon Musoke versus Republic (1958) EA 715**, the Court of Appeal extended this principle further and stated an inference of guilt may only be drawn if there are no other co-existing circumstances which may weaken or destroy the inference of guilt. **(See Teper versus Republic (1952) AC 480)).**

There was credible and uncontroverted evidence that the accused was with the deceased when the fire started; the deceased called the police for help apparently when it dawned on him that he was in danger of being harmed. The police arrived to find the deceased's house on fire with both the deceased and the accused inside. Prior to this, there was a physical confrontation between the accused and the deceased. The police officers who arrested the accused were consistent in their evidence that the accused made futile attempts to resist arrest and flee.

Further, when he was asked the history of the burns he sustained, the accused told the doctor that he had burnt himself. His utterance to this effect is documented in the medical report in respect of his treatment and which was admitted in evidence.

All these facts, in my humble view, constitute inculpatory facts that are not only incompatible with the innocence of the accused but they are also incapable of explanation upon any other reasonable hypothesis than that of his guilt. Further, I have not found, and there is no proof of what I would regard as other co-existing circumstances that can weaken or destroy the inference of guilt on the part of the accused.

Even if circumstantial evidence was found wanting, the prosecution has put what in my humble opinion is an insurmountable case for a dying declaration.

Two police officers testified that the deceased called one of them, apparently in distress to alert them that he was in imminent danger; they rushed to his house only to find it on fire. The deceased managed to walk from the burning house although he was severely injured. The officers also managed to take his statement in the presence of the accused at the police base. The statement which was admitted in evidence was to the effect that the accused set the deceased's house on fire after he asked him to leave. He closed the door and therefore the deceased could not escape. It is only after he shouted for help that his neighbours broke the door. He sustained serious burns.

Counsel for the prosecution urged that the deceased's statements should be accepted as a true account of the cause of his death since it was sufficiently corroborated and there was no danger of mistaken identity; the accused was positively identified as the aggressor, the incident having occurred in broad daylight.

Counsel for the accused submitted, on the other hand, that there was need for caution in admitting evidence of a dying declaration and that the court should consider, inter alia, that the declaration was recorded in the absence of the accused and not subjected to cross-examination; further, it was neither dated nor signed.

Counsel cited the decisions in **Choge versus Republic 1985 KLR** where the Court of Appeal held a dying declaration is made in extremity when the mind is induced by the most powerful considerations to tell the truth; however, in this country, while there is no need for corroboration of a dying declaration, the

trial court must be cautious that a conviction based solely on a dying declaration is unsafe. The court reiterated this point in **Aluta versus Republic (1985) KLR**

The sort of statement made by the deceased is admissible in evidence under **section 33 (a)** of the **Evidence Act, cap. 80;** that part of the law reads as follows:

> ***33. Statement by deceased person, etc.,***
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> ***When Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—***
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> ***(a) relating to cause of death 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 cases in which the cause of that person's death comes into question. Such statements 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 proceeding in which the cause of his death comes into question***

This provision of the law is in *pari materia* with section 32(1) of the Indian Evidence Act, which applied in this country prior to the enactment of Evidence Act; on one such occasion, it was considered and discussed in **Jasunga s/o Okumu versus Republic (1954) 21 E.A.C.A** 331. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who had found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.

The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty.

In discussing the admissibility of the deceased's statements, the court held as follows:

> ***In Kenya the admissibility of a dying declaration does not depend, as it is England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.***
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> ***In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to the dying decelerations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England.***
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> ***The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from the 7th edition of Field on Evidence has repeatedly been cited with approval.***
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> > ***The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and...the particulars of the violence may have occurred circumstances of confusion and surprise calculated to prevent their being accurately observed…The deceased may have stated***

his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them.

Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R v. Ramazani bin Mirandu (1934) 1 E.A.C.A 107; R v. Muyovya bin Msuma (1939) 6E.A.C.A 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

And whether corroboration is necessary in order to sustain a safe conviction solely based on a dying declaration, the court had this to say:

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. v. Eligu s/o Odel &Another 1943) 10 E.A.C.A 90; re Guruswami (1940) Mad. 158, and there may be 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 a dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. R v Said Abdulla, (1945) 12 E.A.C.A 67; R v Mgundwa s/o jalo and others, (1946) 13 E.A.C.A 169, 171.).

In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.

As to the question of the sufficiency, admissibility and the weight to be attached to a dying statement; the court ruled as follows:

The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was un acknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (Waugh v The King, (1950) A.C 203) … It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).

Having considered the law on dying statements, I am persuaded that that the deceased's statement is sufficient proof of the cause of his death or the circumstances of the transaction which resulted in his death. My assessment of the deceased's statement coupled with the evidence of the police officers who arrived at the scene soon after the deceased was burned is that as much as he was severely burned, the deceased was still conscious enough to relate when and how the fire was caused. He was able to state what motivated the accused to set him or his house on fire.

The learned counsel for the accused argued further that the statement ought to be disregarded because it was not signed. It is true that the statement is unsigned but it is logical to conclude that considering the state in which the deceased was at the time the statement was taken, he was not ideally disposed to sign the document or make any form of writing. According to police constable Kemei, the deceased's face was burnt and therefore he could not have personally recorded his own statement; for the same reason, he could not have been able to sign it. In any event, I understand the law to be that as long as the statement

is complete on its face in the sense that any objective reader is able to appreciate that it represents the deceased's account of what he wanted to say, it is admissible. Contrary to the submission by counsel for the accused, the date on which the statement was written is clearly indicated on the face of the statement; there is therefore no substance in the argument that the statement should be disregarded because it was undated.

Counsel also argued that the statement should be ignored because it was made in the absence of the accused and was not subjected to cross-examination. For obvious reasons the deceased cannot be cross-examined on a dying declaration but it was always open to the accused to cross-examine the officer who took and recorded the statement on any of its aspects save for matters that were not within his knowledge. In the present case, the accused's counsel had the opportunity to cross-examine and indeed did cross-examine the officer who recorded the deceased's dying statement. The officer's evidence after the rigorous cross-examination was not shaken and, at any rate, his answers did not create, in my mind, any doubt that the statement was a true representation of the deceased's utterances before he died.

As for the presence of the accused, the investigating officer testified that the statement was taken in the presence of the accused and when he was asked to respond all he stated was that the disagreement between him and the deceased was 'complicated'.

The statement should also not be looked at in isolation; its context and the background against which it was made corroborate, in my humble view, the assertion by the deceased that the accused orchestrated his death. There was evidence from the deceased's supervisor James Kariuki Njuguna (PW2) that the deceased had reported a fight between him and the accused on 4 August 2010, just two days before the accused set the deceased or his house on fire. The deceased also referred to this report in his dying statement in which he was categorical that the accused had assaulted him as a result of which he had sustained some injuries on his face. There was also evidence that the accused sent out an SOS to the police officers when he found himself in imminent danger of harm to his life. Police constable Paul Kemei (PW3) gave uncontroverted evidence that the deceased called him while he was at Mathari Patrol Base asking for help; his colleague, corporal Joseph Cheruiyot (PW5), whom he was with at the time of the call, corroborated this testimony and added that they responded to his distress call promptly although they arrived at the deceased's residence when his house had already been set ablaze.

The possibility that the deceased may probably have been mistaken as to the identity of his assailant is nil; the incident happened at 2 PM, in broad daylight. Apart from the deceased's statement, there was evidence from Wairimu Mwangi (PW1), constable Kemei (PW3) and corporal Cheruiyot (PW5) that only two people emerged from the burning house- the deceased and the accused. The accused himself admitted in his defence that besides the deceased, he was the only one in the deceased's house at the material time. His contention was not whether any other person could probably have started the fire; he put the blame on the deceased whom he accused of having 'thrown a jerrican of paraffin on him'.

When I consider the circumstances of the deceased's death and the evidence in its entirety, I am persuaded to come to the conclusion that although corroboration is not always necessary to sustain a conviction based on a dying declaration, there is, nonetheless, sufficient corroboration of the deceased's statement not only on the cause of his death but also on the motive behind it. The deceased may not have been aware of his imminent death at the time he recorded his statement, and I doubt anybody would, but, as it turned out, he died of the burns he sustained, two days after the fateful day. His death, the circumstances and cause of his death, the identity of his assailant and the place where he was injured before he succumbed in hospital are all matters that are interconnected and beyond peradventure.

I have not found anything in the accused's defence that would create a reasonable doubt in my mind that he murdered the deceased. It may be true, as he alleged, that him and the deceased were what he described as 'bosom friends'; however, their erstwhile friendship came to a halt and took an ugly turn when the deceased asked him to vacate his house. The contention that the deceased became wild when he realised that he had contracted HIV Aids apparently from the accused's sister was, in my humble view, hollow and at best an afterthought. I say so because the accused did not provide any proof that first, he had a sister; second, that the deceased and his so-called sister were in a relationship; that, the said sister

died of HIV Aids; and, finally, that the deceased had contracted the same decease. Once he made these allegations as the basis of his defence, section 107 of the Evidence Act placed the burden upon the accused to provide proof of his contentions; that section says:

> ***107. Burden of proof***
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> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
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> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

While the legal burden is always on the prosecution, the evidential burden in this regard was on the accused; he had the obligation to provide proof of his assertions. In my humble view, he did not discharge this burden to my satisfaction or at all.

I would reckon that if the deceased was so wild that he had to resort to self-destruction and perhaps harm the accused in the process, there is no reason why he should have called the police to his rescue.

Still on this question of the evidential burden of proof, it is also worth remembering that it was the accused's account that he had only gone to collect his belongings from the deceased's house when fire broke out. That again may as well be true but according to his own evidence he was accompanied by security officers. None of these alleged officers, however, testified in support of the accused's contentions; the logical conclusion that one can make out if this is that the accused was simply not telling the truth. In any case, if at all the accused needed security officers to collect his belongings, it would simply mean that the deceased and the accused were no longer bosom friends as suggested by the accused.

The evidence of the doctor who attended to the accused is equally crucial; according to the doctor, the accused told her that he had burnt himself and as earlier noted, the accused's statement to this effect is well documented. The statement by the accused to the doctor may be taken as part of the res gestae; it formed part of the fact in issue and explained the fact in issue which is the source of fire from which the deceased succumbed. Having been made immediately after the fact in issue, the utterance was, by and large, contemporaneous with the fact in issue. It was made without any premeditation but, rather it was spontaneous without a view to the consequences. It is admissible under section 6 of the Evidence Act which states as follows:

> ***6. Facts forming part of the same transaction***
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> ***Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.***

The final question for consideration is the intention or malice aforethought on the part the accused.

Malice aforethought is the mental element of murder and it is either express or implied; it is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130),** but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290).**

It finds statutory expression in **Section 206** of the **Penal Code** which prescribes circumstances under which malice aforethought may be deemed to have been established; this section reads as follows:

> ***206. Malice aforethought***
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> ***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.

If the deceased's dying declaration is anything to go by, the accused was unhappy that after he had assisted the deceased on numerous occasions, the deceased would turn against him and throw him out of his house. Contrary to the accused's suggestion, there was no evidence that he had been transferred from Nyeri to Machakos by any particular institution and that it is for this reason that he had kept his belongings in the deceased's house. A letter dated 1 May 2010 which he alleged was the letter of his transfer was, as I understand it, a letter recommending him for further studies in any particular institution and not a letter of transfer. The tenor of that letter also shows that as at 1 May 2010, the accused was not a member of the brothers of St. Joseph of the catholic archdiocese of Nyeri. But even if it was to be assumed that the letter was a transfer letter, the question that the accused did not answer was why he would still be in Nyeri in August 2010 when he ought to have moved as early as May, 2010, three months earlier.

All these inconsistencies go to show that the deceased's statement and the prosecution witnesses' evidence that the accused lived with deceased and became violent to the extent of harming the deceased when the latter asked him to leave to be more plausible.

In short, the prosecution proved beyond all reasonable doubt that in setting the deceased on fire, the accused had an intention to cause the death of or to do grievous harm to the deceased; or, he knew that in burning the deceased inside his locked house or burning the house when the deceased was trapped the fire would probably cause the death of or grievous harm to the deceased and was reckless whether death or grievous bodily harm was caused. In the alternative, by setting the deceased or his house ablaze the accused was intent on committing a felony. Either way, the prosecution proved beyond all reasonable doubt that the accused had malice aforethought and with that, the accused was culpable for the deceased's death.

I am, in the ultimate, persuaded that the state has proved its case against the accused beyond all reasonable doubt; accordingly, I find and hold that the accused is guilty of murder as charged.

Dated, signed and delivered in open court this 20th day of September 2019

Ngaah Jairus

JUDGE