REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 37 OF 2009

REPUBLIC

VERSUS

GEORGE MURIUKI WAHOME.....ACCUSED

JUDGMENT

On 10 July 2009 the accused was arraigned on a charge of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. It was alleged that on 28 June 2009 at Njathaini village in Nyeri District within Central Province he murdered AW. He entered a plea of not guilty as a result of which the state presented a total of eight witnesses to prove its case against him.

Of these witnesses, Margaret Nyambura Wahome (PW1), testified as the last person to have seen the deceased alive. On the material day at about 1 AM she was asleep when the accused who is her first-born son arrived home and started hurling insults at her. Her neighbour, Beatrice Wangui (PW2), whose house was about 50 metres away from Nyambura's was apparently awakened by the noise; she intervened and calmed the accused down; she went with him to her house. When he came back, he announced that he was going to sleep but not before he threatened to hurt Nyambura. Fearing for her life, Nyambura sought refuge in Wangui's house. She together with Wangui went back and locked Nyambura's house from outside. Inside that house was the deceased sleeping.

It was while they were at Wangui's house that they heard the door to Nyambura's house being hit with stones. They decided to go back and bring the deceased but while on their way, they noticed that Nyambura's house was on fire. As they reached the house, they found the accused standing by; he denied that he had started the fire. He left as neighbours attempted to put it out. The deceased was burnt to death. She was Nyambura' s late sister's daughter and was aged 10 at the time of her demise.

Wangui testified that Nyambura went to her house to report that the accused was disturbing her. She wanted Wangui to assist her resolve the problem. Wangui accompanied her back to her house; she managed to calm the accused down and even persuaded him to go to bed. After a few minutes Nyambura went back to her house and told her that the accused was still causing problems. They both decided to get the deceased so that they could all sleep in the Wangui's house. On their way back they saw Nyambura's house on fire. She heard the accused deny that he had set the house on fire.

One of the neighbours who responded and rushed to Nyambura's house when it caught fire was Joseph Kinyua (PW4). He found the accused at the scene. He called the police when he arrived at the scene; they did not, however, come. Later police officers from Kiamariga police station came and retrieved the deceased's remains from the burnt house. Like the second witness, he heard the accused deny that he had burnt the house down since he was also asleep.

Dr Kevin Murage Ndiragu conducted the post-mortem on the deceased's body which was identified to him by the deceased's relatives, Grace Wairimu (PW3) and Alex Kamindi Kigweru (PW5). They stated that the body had been burnt beyond recognition though Kigweru witnessed its removal from the burnt house. According to the pathologist, the body was so burnt that it was impossible to tell the gender or race of the deceased; neither could he assess that post-mortem changes. Most of the organs were either charred or absent altogether. He made the opinion that the cause of the deceased's death was multiple organ failure secondary to severe burns. In answer to questions put to him during cross-examination, the pathologist testified that he was not certain whether the deceased died before or after the burns.

Dr Owino examined the accused and established him to be normal and did not have any history of a mental illness. His report to this effect was produced by Dr Njoroge since Dr Owino had died several years before.

The Assistant Superintendent of Police Charles Ochieng Odhiambo (PW8) testified that on 28 June 2009, between 2 and 3 AM, he was at Kimariga police station when he was informed by a councilor that a house was on fire at Njithaine village in Ruguru location. He was further informed that a child who was sleeping in that house had perished in the fire. He proceeded to the scene and found a timber house burnt down. The accused was in his house which was about 20 metres from the burnt house. According to him, the accused was very drunk and

sleeping. The officer established that only three people lived in that compound; the accused, his mother and the deceased. The deceased's body was taken to Karatina hospital mortuary while the accused was arrested and taken to Kiamariga police station.

The accused gave a sworn testimony. He denied murdering the deceased. On the material date, so he testified, he had been working at a neighbour's home; he then went drinking at a local bar. Thereafter he went back home. He couldn't remember what happened because he got home drunk and slept. He was, however, aware that the deceased lived with his mother and that Wangui was their neighbour.

Whenever any person is tried for the offence of murder, this court ordinarily evaluates the evidence against him in light of the definition of this offence in section 203 of the Penal Code; according to this section *'a person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder'.*

Previously, the punishment of this offence was prescribed in section 204 of the Code but that part of the law has since been declared to be unconstitutional for the reason that it prescribes death as the mandatory penalty for the offence of murder and leaves no room for the trial court to exercise its discretion and mete out a sentence that would be proportionate to the circumstances of the case. See the Supreme Court decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

The ingredients of the offence of murder are, first, the death of a person; second, that the death is as a result of an act or omission of another person; third, that the act or omission was unlawful; and, fourth, that the person who did the unlawful act or omitted to act had malice aforethought.

This latter ingredient is the mental element of the offence 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 is also captured in section 206 of the Penal Code which prescribes the circumstances under which malice aforethought may be deemed to have been established. If it will be found necessary, I shall return to it later.

There is sufficient evidence that one AW perished in a fire in the wee hours of 28 June 2009. Her aunt's evidence that she left her sleeping in the house before the house was set ablaze was not controverted. Her charred remains were retrieved from the burnt house by police officers from Kiamariga police station in the presence of among other people, the investigations officer, Joseph Kinyua (PW4) and Alex Kamindi Kigweru.

Coupled with this evidence was the pathologist's opinion that the deceased died of multiple organ failure as a result of severe burns. He produced uncontroverted evidence to the effect that he certified the death. Thus, the fact of death of a person was, in my humble view, proved to the required standard. Proof of the rest of the ingredients was, to a great extent, based on indirect or circumstantial evidence. It was indirect because the cause of fire from which the deceased died was not established; it was also not established whether the fire was a deliberate act of arson or was intended to cause the death of the deceased or cause her grievous harm.

The accused was the most probable target of suspicion mainly because of his conduct immediately before the incident; he had subjected his own mother to unwarranted insults and threats to the extent that she feared for her life and had to seek refuge in a neighbour's house. Apart from the deceased, the accused was the only other person in the compound when the house was burnt. He was also found near the burning house. The question is whether these facts are sufficient circumstantial evidence upon which a safe conviction can be sustained.

The answer to this question calls for examination of the law on circumstantial evidence. **Section 164** of the **Evidence Act, cap. 80** makes reference to this sort of evidence and states as follows:

> **164. Circumstantial questions to confirm evidence**
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> **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.**

Thus, proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, will be a basis upon which the court can rely as a proof of the occurrence of the fact in issue. Where the circumstances are proved beyond any shadow of doubt, the court may convict in the absence of direct evidence. But circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of the accused. The 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 part of the accused. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting Wills **on Circumstantial Evidence,** held as follows:

> **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.**

In **Simon Musoke versus Republic**, this principle was expanded to the extent that an inference of guilt can only be made when there are no other co-existing circumstances that would weaken or destroy that inference; the court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

> **It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.**

I have already set out what one would consider as inculpatory facts from which an inference of the accused's guilt may be drawn; in short, they constitute the accused's unruly conduct before the fire started; the threat to his mother; the fact of being the only person in the compound at the material time and, being found at the scene.

But there are other co-existing circumstances which, in my humble view, leave room for explanation that the fire may not necessarily have been started by the accused. In the first place, it was not established how the fire may possibly have started; as much as it could be started from outside the house, it is also possible that it may have started inside the house. The house, according to the evidence was a timber house and the source of light was a kerosene lamp. There was no evidence that there was a separate kitchen detached from the house; it is thus logical to presume that Nyambura cooked from the same house. The point is there are several possibilities of the cause of the fire that leave reasonable doubt that it is only the accused who could have started it. These possibilities are, no doubt, co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused.

The possibility that the accused may have started the fire cannot be ruled out; however, in a criminal trial such as this, a court of law does not base its decision on possibilities; the prosecution must prove its case beyond all reasonable doubt. On this point I adopt Lord Denning's passage in **Bater versus Bater (1950) 2 ALL ER 458 (at page 459)**and which was cited with approval by the Court of Appeal in Andrea Obonyo & Others versus Republic (1962) EA 542; the learned judge said this:

> **It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.**

The gravity of the offence with which the accused is charged cannot be underestimated; it attracts a death sentence upon conviction. The seriousness of the offence and the penalty it carries placed on the prosecution a heavier burden of proof; it did not matter that only circumstantial evidence was available; irrespective of the nature of the evidence, the prosecution was bound to discharge this burden. In my humble view it fell short of discharging it to the required standard. Accordingly, the only option open to me is to acquit the accused. He is hereby acquitted and set at liberty unless he is lawfully held.

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

Ngaah Jairus

JUDGE