



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CRIMINAL CASE NO 3 OF 2017

BETWEEN:

THE REPUBLIC

AND

DOREEN KATHAMBI

J U D G M E N T

1. The Accused herein, DOREEN KATHAMBI, has been charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63 of the Laws of Kenya**. 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.”

2. The particulars of the offence are alleged to be that the Accused did on 23rd February 2017 cause the death of ZAKAYO THEURI MUTHURI (hereinafter referred to as "the Deceased") by unlawfully assaulting the Deceased on 18th February 2017 at or around 9.00 am in Njukini Town, Taveta Sub County, Taita Taveta County resulting in his death.

3. In the circumstances the onus is on the Prosecution to prove the following elements of the Offence:

- (1) The death of the deceased.
- (2) The death of the deceased was unlawful.
- (3) That the death was caused by the Accused
- (4) That the action taken by the Deceased was unlawful (actus reus) and
- (5) That in causing death there was malice aforethought on the part of the Accused (mens rea).

4. The evidence that was heard and/or received by the Court in relation to the demise of the Deceased came principally from the Investigating Officer and the Medical Officer who conducted the autopsy and completed the Post Mortem Report. Firstly, it was confirmed that the Deceased was indeed Zakayo Theuri Muthuri who was aged 28 years and had a wife and two children at the time of his death. That was confirmed by himself when he was first admitted into hospital and then by his Father and Brother after his demise. In addition, following the assault that led to his death he was able to communicate with the Police Officers with whom he had contact. The cause of death is recorded in the Post Mortem Report as (a) respiratory failure and (b) hypovolemic shock. Dr Machi who completed the said Report explained his findings. He told the Court that the trachea of the Deceased was reddish and inflamed/swollen (oedematous). The trachea is the pipe by which air enters the lungs. The lungs were bluish. That indicates that there was an absence of oxygen demonstrating that the lungs were not properly aerated. Therefore it is fair to conclude that the Deceased died because he could not breathe properly. The reason for that was because he was set on fire. Secondly, as a result of the fire the Deceased suffered 2nd Degree and 3rd Degree burns which the Medical Officer explained meant that he was so badly burnt that his skin was completely burnt through to the flesh, in some parts the flesh too had been burnt. One particularly bad example was his right hand which had been “de-gloved” which meant there was no flesh remaining as a consequence of the burning. The Defence case has not disputed that evidence. Therefore this Court finds conclusively that the Deceased met his death as a consequence of being set on fire. How then did this tragic state of affairs come to pass?

5. The Court was told that there were eye witnesses to the immediate aftermath of the assault. The Court heard the evidence of Maurice

Otieno Okatchi, (PW-1) an inhabitant of Njukini Village. He said he knew the Deceased because he had a kiosk where he sold miraa. The Witness positively identified the Accused as the Wife of the Deceased as well as the only other person at the scene of the crime. The Witness also confirmed that the Accused and Deceased had a home about two hundred metres from their kiosk in Njukini location. The Witness told the Court that he was in Njukini at about 10 am on 18th February 2017. He said he was with a Mulei Nzioka. They heard screams and saw Melei Nzioka's house burning. When they reached about 100 metres from the kiosk they saw that it was not the house burning but a person. The Deceased was in flames. He was just outside the kiosk and the Accused was standing in the door of the kiosk about three metres away. The Witness said he heard the Accused taunt the man who was on fire. She said he should stop complaining because she could/would have killed him completely ("wacha unasema unakufa, ningekuua kabisa"). The Witness told the Court there was no other person in the vicinity. He also told the Court that he saw the source of the fire. It was a paraffin stove. It was still on fire. Although the stove had fallen apart, the wick was still intact and on fire. The Accused said the woman had burnt him. The Stove was produced into evidence as MFI-1.

6. The Witness also described the effects of the fire/burning. He told the Court that the Deceased was on fire. The Accused had made no effort to put out the fire. He and his companions did so. They then saw that the Deceased was burnt all over his body except his head. The post mortem confirmed 60% burns. He said some parts of the clothing were completely burnt but others were not. The Witness and his companions removed the clothing that was stuck to the Deceased's body. The burnt clothing was introduced into evidence as MFI-2. The Witness said the fire was extinguished using soil and the Deceased was covered using a lessa. It seems members of the public had congregated at the scene because PW-1 said they were going to lynch the Accused causing alarm to her child. Police Officers, including Major Aden of the Administrative Police Camp and they escorted the Accused away. At that stage the Deceased was still alive and he was taken to the hospital. Under cross-examination PW-1 confirmed that they heard the commotion and went to the scene of the crime. They had been informed by a passerby that Mulei's house was burning so that is where they went. The witness also explained that his principal interest was to save the Deceased rather than identify the passerby. He also confirmed that it was the Deceased who had been set on fire and not the kiosk. The fire was not inside the premises he said. He also confirmed that the stove and the sufuria were outside the kiosk. The Witness also confirmed that in the sense that the Deceased had used the term "mwanamke" meant "wife" and not "woman".

7. The Court also heard from the Father of the Deceased. He confirmed that the Deceased was his second child and that he was married to the Accused. He confirmed that they had two children and that the Deceased was a businessman selling miraa in Njukini. He said he travelled to Njukini from Lare in Meru because he was informed by his wife that the Accused and Deceased had a fight and one of them had been arrested. He said he was not given any details. When he arrived at Njukini he went to the kiosk and there was no-one there. He was informed that the Accused had been arrested. The Witness states that he went to the Police Station and "found the Accused". That suggests she was arrested and kept there. He says he had a long conversation with her. He provides the following details of their conversation:

- (a) That his son was badly injured
- (b) That he had been taken to KCMC Hospital, Moshi, Tanzania.
- (c) That She had thrown the stove and hit the Deceased but had not expected that he would be badly injured.

The following day, the Witness (PW-2) said he and his other son went to see the Deceased in hospital. He says he was in the Intensive Care Unit. He says he had bandages all over his body and that the injuries were burns from the stove.

8. It is clear from the above that the Deceased met his death in a grisly manner that was not accidental but caused by a person or thing. The Person charged with causing that death is the Accused herein who was his wife. The evidence before the Court implicates her and links her to the chain of events that led to the death of her husband. It is for this Court to evaluate whether that evidence discharges the burden of proof on the Prosecution. The Prosecution must prove its case to the standard of being beyond reasonable doubt.

9. The evidence of PW-1 is that the Accused was the only other person at the scene of the crime. The Deceased was alive and on fire. The Accused took no steps to assist the Deceased although he was obviously suffering. The Deceased is also reported as having said that it was his wife who set him on fire. On the same day the Accused was saved by Sergeant Adam and taken to the Police/AP Post after he rescued her from the mob. Sergeant Adam S. Jarso No 99021912 was called as Prosecution Witness No 3. He positively identified the Accused saying that he knew both her and the Deceased because he used to purchase cigarettes from their shop which also sold miraa. He says he heard the screaming while on patrol. He observed that the Deceased was burnt and covered with the lessa. The fire had been put out. He observed burns stretching from the neck to the waist. He personally observed the green stove and the sufuria. He also formed the impression that the stove looked like it had been thrown because it had come apart. The stove was still smoking. Under cross-examination, with the assistance of Defence Counsel, PW-3 told the Court that the kiosk looked like the place where the family cooked because there were cooking utensils around. He also said a neighbor who was their landlord (Mulei) informed him that the Accused and Deceased had been having a domestic issue from the night before into the morning. He said they heard the screaming at about 10.00 am. He said the Accused was shouting at members of the public.

10. PW-5 was the investigating officer. He told the Court he worked with the CID Taveta. He was deployed by the OCS Aden. His evidence was that his investigations started with him being told by Sergeant Adam that there had been a domestic scuffle between the Accused and the Deceased and had been burnt. He says he was also informed by the people at the scene that the Deceased and the Accused had been having a domestic dispute from the night before and when they woke up, they continued fighting. He also observed the Stove and the burnt clothes. The Accused was interrogated by the Investigating Officer at the Chief's Camp.

11. In the course of the interrogation the Accused was reported to have said that the Accused and the Deceased fought about food and money. Their argument stretching into the night. In the morning when the Deceased woke up and there was a physical confrontation. The Accused presented a version of events where the Deceased hit her with blows and the stove she had fell done, the stove then burst into flames. The Investigation Officer also gave evidence that he was given another version of events where the Accused had thrown a sufuria of water over the Deceased before she threw the stove at him. Those persons have not recorded statements. The Deceased however is said to have confirmed that version of events. When he was questioned/interrogated at Njukini Clinic the Deceased is reported to have said that the Accused (1) poured boiling water over him and (2) threw the stove at him. He also told the Investigating Officer that the Accused had threatened him before that. The Investigating Officer also learned from the Chief and some Village Elders that they had been involved in

solving domestic issues between the Accused and Deceased prior to this incident. The eye witnesses reported the Accused threats to kill if the Deceased survived his injuries. The Investigating Officer's observation of the Accused was that she had a "high temper" on the date of her arrest. She was charged with grievous harm. She subsequently calmed down and wanted to pray/ask for prayers. The Record does not show whether those prayers were for herself or her injured husband. The Investigating Officer told the Court that in relation to the Deceased he saw the stove, the burn clothes and the burns on the body. In relation to the Accused he said that she had "no injuries" and "no bruises". In relation to Exhibits the paraffin stove was introduced as Exhibit 1 and the burnt pieces of clothing as Exhibit 2. The sufuria was never found. The paraffin stove was dismantled at the scene and still contained the soil (in its lower portion) used to put out the fire.

12. On 24th January 2018, the Prosecution called Corporal Elijah Orengo No 61017. He says he first saw the Accused at the AP Post Njukini. She had already been arrested that was on 18th February 2017. The Witness gave evidence that alongside the OCS he was informed by the Accused that there were constant squabbles. Also that she had burnt her husband and she would ensure that she killed him. When the Deceased was interviewed he confirmed his name and said that he had been burnt by his Wife, the Accused. Corporal Orengo informed the Court he had earlier knowledge of the domestic disputes between the Accused and the Deceased because the Accused came to them to complain about her husband. Under cross-examination, he said he did not see any visible injuries despite the complaint being made that she was slapped. Neither did he find it necessary to record that incident in the occurrence book. Under cross-examination the Witness confirmed that in relation to the incident that led to the death of the Deceased, the Accused did not complain that she had been beaten. She said that the Deceased was demanding food at night and tea in the morning when he had not given her any money. The detail provided was that she was boiling water for breakfast.

13. This trial was part-heard before Hon Lady Justice Kamau. Following her transfer the trial was taken over by the Court as currently constituted at the request of the Parties. The evidence was complete so the proceedings were typed and submissions filed. This Court ruled that there was a Case to Answer. The Accused did not give any testimony. She gave an unsworn statement on 5th December 2018. The Accused did not call any witnesses.

14. What the Accused told the Court is that she remembers the date in question, 18th February 2017. She said it was a Saturday, she said that when she awoke they "had breakfast nicely as a family.". She then took the Children to the shop and the husband went to change his clothes. She heard screaming. She left the Children and ran to the house and found he was on fire. She poured water over him using a karahi. She also sought to suggest that the Accused was taking drugs and was in possession of an amulet made in part of skin and blood. She sought to suggest that the amulet caused the fire. She says the Court should believe her because she loved her husband and has children and now she is poor. She denied there was any domestic altercation.

15. The Submissions on behalf of the Prosecution were filed on 5th February 2019. The Submissions on behalf of the Accused were filed earlier on 30th January 2019. They appear in parts to be identical to the submissions filed in support of the Application for No Case to Answer – in particular the conclusions.

16. The Prosecution's case is that the particulars of the offence are demonstrated by the evidence before the Court. It is argued that the statements made by the Deceased while he was in hospital to various police officers – and before the Court as evidence should be treated as dying statements. They are therefore admissible under Section 33 of the Evidence Act Cap 80 which provides;

17. It is clear from the evidence of PW-1 – which was not shaken by cross-examination, that the Deceased was aware of the seriousness of his injuries and had an expectation that they would cause his death. They did. In addition the Prosecution invites the Court to treat the statements made to PW-6 as a dying declaration. There is no argument put forward by the Accused in Submissions why that approach should not be taken. The Accused has failed to put forward any contradictory evidence. An unsworn statement from the dock does not amount to a testimony.

18. This Court further notes that the statements attributed to the Deceased put in evidence by individuals who are in positions of responsibility. It is also noteworthy that the Deceased was consistent in what he said each time. Each time he was clear that he had been set on fire. Each time he blamed the Accused. The Accused has challenged that with an unsworn denial. That denial must also be measured against previous admissions and confessions made by the Accused to the investigating officers. She was not willing to go on oath whether to correct or resile from those statements.

19. The Court has read through and considered the Submissions filed on behalf of each Party. The Accused seems to rely on the version of facts she now presents and the testimony of her father-in-law that he was surprised and did not believe her capable of killing her husband. That estimation does not provide any factual evidence. It was simply his opinion, then.

20. The evidence is clear and cogent. The Deceased was set on fire, the fire was caused by him coming into contact with a paraffin stove. The trajectory of the fire (and as a consequence the burns) was upwards from the upper legs to the lower surface of the chin. The Accused has not placed before the Court any evidence on how a piece of skin and/or drugs can cause a stove to levitate. In the circumstances, the Court finds that the fire was lit and then thrown at the Deceased by human intervention.

21. The oral evidence the Court heard was (1) the Accused was in the immediate vicinity immediately after the Deceased was set on fire, (2) she did not demonstrate any alarm or inclination to assist him, (3) she was heard to threaten that she would ensure his demise. Taken individually each detail is circumstantial evidence, however, taken together they provide a coherent version of events. In addition, PW-1 heard and therefore perceived that the Deceased was blaming the Accused. The Deceased then repeated those accusations up to the time he died. He did not change his mind when his death was imminent.

22. The Accused admitted (1) lighting the fire, (2) boiling water, (3) having an altercation with the Deceased immediately before he was set on fire. She now presents a very different picture. That version is completely implausible and not capable of being believed. Also circumstantial is the fact that the Accused and the Deceased had earlier had domestic squabbles.

23. The Accused has not put forward any positive Defence. Despite raising the issue of domestic fights in cross-examination, she has not put forward any positive whether it be self-defence or provocation. The Court has not heard who was the aggressor during the earlier squabbles but in this case it is clear that it was the Accused. In the circumstances, there can be no reasonable doubt that the Accused caused the injuries leading to the death of the Deceased.

24. As to the requisite intention. The Accused threw a stove containing a flammable liquid (paraffin) over the Deceased. The liquid was on fire. Such an act can only have one consequence. Therefore, at the very least the Accused had the requisite intention to cause the Deceased serious harm. Thereafter she was heard to lament that she did not succeed in killing him. The Court need not go that far. Under Section 206(a) of the Penal Code which provides:

it is enough that the Deceased had the intention to cause grievous harm. Setting a person alight using a flammable liquid can have only one outcome, that outcome is what the Accused intended.

25. The Prosecution also puts forward the incidences of domestic violence as motive. However, it seems to this Court that a dispute over money could equally be a motive. However, the Court has heard no evidence as to who was the aggressor in previous incidences and therefore that cannot form part of the findings here.

26. The Court finds that the Accused did assault the deceased with a flammable liquid which was on fire. That caused serious injuries which led to his death. The Court also finds that the Accused intended to cause grievous bodily harm as well as death to the Deceased. In the circumstances, this Court finds the Accused guilty as charged.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 16th day of October 2019

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Anyumba

Accused