



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 3 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

MWIKALI MUNYAO *alias* JANET.....ACCUSED

JUDGEMENT

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of Laws of Kenya.
2. Particulars being that on 10/2/2017 at Mithine village, Kibwezi Sub-County, Makueni County murdered **Muteti Kiseli**.
3. She pleaded not guilty and matter went into trial.
4. The prosecution called a total of 5 witnesses.

Prosecution's Case:

5. After *voire dire* **PW1** aged 16 years testified on oath to the effect that he was 16 years old in Form 2. The accused is his mother and the deceased his father.
6. On 10/2/2017 at night while asleep his mother woke him up and borrowed a matchbox and he gave out and she went away. After a few minutes he heard screams from parents' house. Then he saw his father burning lower part of his body running towards his grandmother's house. Him (PW1) and his sister followed their father.
7. The parents' house was burning. He saw his mother coming out and asked her what it was and she said the house was burning. She ran into the bush. At grandmother's place the grandmother told him to go and call uncle Mulinge. His father told him to go and save the things in the burning house. The father was taken to hospital and later he learned from his grandmother that his father had died.
8. On cross examination he said that he saw his mother come out of the burning house and ran away. He said he had heard the parents quarrel and even seen his father beat the (PW1) his mother before the day of the incident. She had run away from home severally due to the beating by his father. He said that the principle cause of the parents' fights was father's neglect to support them. The deceased would stay 2 to 3 months without coming home from his place of work in Taveta. In the material night he did not hear parents quarrel. His father was burnt the whole body.
9. **PW2 Kavuli Kiseli** mother of the deceased testified that, on 10/2/2017 at night while in her house asleep she heard screams and opened the door to check what was going on. She saw the deceased burning who said accused poured paraffin on him. He had serious burns all over his body. He was naked. She called one Elija to assist in taking his son to hospital. He was taken to Kibwezi and then referred to Kenyatta National Hospital where he passed on later.
10. On cross examination she said she saw her son burnt. She said she never witnessed her son and accused quarrel. She denied her son neglected his family. He used to give money to his family. However one time accused had ran away due to their quarrel with deceased after he ordered her to farm while pregnant.
11. On re-examination she said that his son said accused burnt him.
12. **PW3** after *voire dire* testified on oath that she was child of the couple (accused and deceased) and in Standard 7. She was 14 years. She said that on the material day she saw her father burn from front part. The grandmother PW2 took *lesso* and wrapped him on the front part. He was taken to hospital.

13. On cross examination she said she saw both parents that night appearing annoyed. The deceased asked accused why not serve food but accused told him to ask the children. She said she had seen them quarrel previously. Their mother used to run away after quarrel.
14. On the material night accused did not cook but PW3. When the mother went to the bedroom where deceased was, she (PW3) heard screams then she (PW3) saw fire in their room. Then saw her father come out burning. PW3 followed him.
15. On re-examination she said when grandmother asked deceased who burnt him; he said it was the accused.
16. **PW4 Elijah Ngolya Kiseli** testified that on 10/2/2017 at 2.30 am while asleep he received call from PW2. She told him that her son had been burnt. He proceeded to the scene and found the deceased at his mother's place covered by lesso and in a lot of pain. He PW4 could see burns.
17. Deceased told him that he was burnt by the mother of the children. He found other people at the scene including deceased's mother and his 3 children. They took him to Mtito Andei and later Kenyatta National Hospital where he passed on.
18. On cross examination, he said the deceased and accused had issues and accused used to go to her parents.
19. **PW5 Force No. 76760 Corporal Kennedy Muringa** the Investigation officer testified that he was then attached to DCIO Office Mtito Andei. On the material night at 16 hrs while in office he was informed by Sgt Ngure to accompany him to Muthine village for a matter reported of assault. The report was by Muteti Kiseli via his mother Tabitha Kavila. It was reported that he had sustained serious burns after attack by his wife.
20. At the scene they found a burnt house. He recorded statement of the children of the deceased on 12/2/2017. Later they learnt the deceased had died. On 14/2/2017 postmortem was performed and cause of death was indicated to be due to the severe burns.
21. The accused had run away and after a tip off they managed to arrest her after a while. The postmortem was done by Dr. Masika of Kibwezi Hospital. PW5 produced the postmortem as exhibit 1 by consent of defence and prosecution counsels.
22. After the close of the prosecution case, the court was called to make a ruling the accused was found to have a case to answer and she was put on her defence.
23. In her sworn statement as DW1 she testified that at the date of the incident they had married with deceased for 15 years. In course of time the relationship deteriorated between them. This was because the deceased started coming home late. He could stay from home even for 2 nights. Whenever DW1 questioned him, he would assault her. Thus she used to run away from home.
24. On 10/2/2017 deceased came home at 2 am drunk and demanded food. Accused went out to collect matchbox from her children. She placed food on burning stove to warm. Meanwhile she asked him why he was late in coming home. He said he should not be questioned. She told him that it was a fair question. He said she should never ask him such question. He said he would not eat food.
25. He then took stove and as he was attempting to throw it out of the house, she held it and they struggled and it fell on the bed. He started beating her. She pushed him and he fell down on the bed and she dashed out. The incident was in the bedroom where she was warming food. She ran away to her parents' place in Mtito Andei. She was arrested later at her aunt's place.
26. After a while she was told she committed murder. She did not know that her husband had died. She said she had not planned to kill her husband. It was deceased who started the fight.
27. On cross examination, she said when deceased threw the stove it landed on bed and set the place ablaze. The children were asleep. She ran away after she pushed him and he fell on the bed. It was at 2 am when fight ensued.
28. After pushing him she ran away as she thought when he rose up, he would beat her. She used to run to her parents whenever she was beaten. She emphasized that she never planned to kill the deceased.
29. The accused closed her case without calling any other witness. The parties agreed to put in written submissions but by time of drafting judgement on 26/8/2019 no party had filed same. Thus court proceeded to write judgement without benefits of parties' submissions.
30. After going through the evidence on record, the court finds the issues are;

(i) Whether the ingredients of murder were proved beyond reasonable doubt?

(ii) If above in negative, is the offence of manslaughter been established by evidence on record?

31. In the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR the court held that the elements of the offence of murder are as follows:

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

32. The postmortem produced by the investigating officer by consent of the prosecution and defence indicated that the cause of death was due to the severe burns. The fact of death is not contested thus the first ingredient of offence of murder was established to the required standards.

33. As to whether the cause of death was due to unlawful act occasioned by the accused, the court finds that the accused herself says she pushed deceased who fell on the fire burning their bed, she ran away and never even returned to check what happened to him nor did she attempt to save him from the burning fire. The pw1,2,3and 4 heard deceased say that he was burnt by the accused, Thus the court holds that the second ingredient of murder has been established,

34. As to whether there was malice aforethought, **Section 203 of the Penal Code** provides:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

35. **Section 204** provide that:

“Any person convicted of murder shall be sentenced to death.”

36. **Section 206 on Malice aforethought** states:

“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;

37. In the material night, PW1, 2, and 3 confirmed that while asleep, they heard screams in the couples (accused and deceased) bed room before seeing deceased come out running PW2 house burning .The accused was also seen by PW1 running out of the bed room and before vanish into the bushes she told him that the house was burning.

38. PW3 had noted the on the material night both parents appearing annoyed and even exchange words. According to the accused, the deceased attempted to throw the stove which was warming food out just because he was questioned for coming home late (2am).She held the stove and as they struggled over same, it fell on bed and fire ensued. The deceased started beating her and she pushed him down and he fell on fire and he started burning .This gave her opportunity to run away. She went to her parents that night and she never know whether deceased died. She ran away as she feared deceased would beat her the moment he rose from the burning bed.

39. PW1, 2 and 3 confirmed that the couple used to have matrimonial problems including fights. PW1 and accused stated that neglect of family by deceased and lateness at home by him occasioned matrimonial problems. The PW1 witnessed previously deceased beat their mother (accused) and she would run away from home due to the beatings.

40. He is of the view that the couple fought as a result of deceased coming home late while drunk and after he was questioned for his lateness. In the course of the fight the accused pushed him down whereof he fell on burning bed. Instead of helping the drunkard husband from fire or even call for help, she ran away and left him to his devices burning. This was cruel on her part but did not amount to malice aforethought as there was no prove she had planned to inflict grievous harm or kill her husband.

41. However her behavior of abandoning him burning and disappearing without help was callous and cruel and inexcusable. If she feared beating in event he rose up, she could have called for help. In any case how would he continue fighting her when he was burning?

42. Thus court finds that the offence of murder was not proved beyond reasonable doubt but the lesser offence of manslaughter.

43. Thus the court makes the following orders;

i) The accused is found guilty and convicted of the offence of manslaughter.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE