



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 46 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CYRUS NYAMWEYA ONDABU.....ACCUSED**

**RULING**

[1] The accused person, **Cyrus Nyamweya Ondabu**, was arraigned before the Court on **8 May 2013**, charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of the charge are that, on the **19 February 2013** at Langas Estate in Wareng District within Rift Valley Province, he murdered **Alice Mogire**. The accused denied that charge and the Prosecution called four witnesses in proof thereof; and upon being placed on his defence, the accused gave a sworn statement of defence and called one witness, a family friend, to demonstrate that he could not have committed the alleged offence.

[2] The brief summary of the Prosecution case is that the accused and the deceased were husband and wife; and that, at the material time, they were residing as tenants of **PW3, William Okoth**, in Langas area within Eldoret Town. Thus, **PW3** testified that on **19 February 2013**, at about 4.00 a.m., he heard some noise from the house of the accused and on going there, he saw smoke billowing from the house and that the deceased was crying out in pain inside the house. He further stated that, jointly with other neighbours who responded to the deceased's cries, they tried to open the door but could not as it was locked from inside; and so they resorted to breaking one of the glass panes to be able to see what was happening inside the house. **PW3** told the Court that he saw the accused holding the deceased onto a motorcycle; and that her clothes were aflame. He added that, upon their intervention, the Accused opened the door; whereupon the deceased came out crying saying that the Accused had poured petrol on her and set her ablaze. He then escorted both the Accused and the deceased to Langas Police Station along with the partly burnt motor cycle.

[3] **Dr. Eunice Temet** of Moi Teaching and Referral Hospital testified on **5 June 2017** on behalf of her colleague of **Dr. Cynthia Kibet**, who examined the deceased on **19 February 2013** before her death. She explained that **Dr. Kibet** was unavailable as she was away in the United States of America for further studies; and that she had worked with her for 3 months and was therefore familiar with her handwriting and signature. She accordingly produced the P3 Form that was filled and signed by **Dr. Kibet** in respect of her examination of the deceased, **Alice Mogire**. The report, marked the **Prosecution's Exhibit No. 1**, shows that the deceased sustained extensive burns on her head and neck and third degree burns on her cheeks and neck, thorax and abdomen as well as the anterior aspect of the chest extending to the lower abdomen. She also had third degree burns on both of her upper limbs up to the fingers as well as on her buttocks and thighs. In the opinion of **Dr. Kibet**, the injuries were caused by fire; and in her assessment the deceased suffered 80% third degree burns, amounting to grievous harm.

[4] **Dr. Benson Macharia, PW2**, a Pathologist based at Moi Teaching and Referral Hospital, also testified on behalf of a colleague, **Dr. Francis Ndiangui**, who has since resigned from the Hospital. He mentioned that he had worked with **Dr. Ndiangui** for 14 years and was therefore familiar with his handwriting and signature. He told the Court that **Dr. Ndiangui** conducted an autopsy on the body of the deceased herein on **11 March 2013** at the Moi Teaching and Referral Hospital's Funeral Home. **Dr. Ndiangui's** findings were that the deceased had sustained third degree burns on the thighs, abdomen, back, both arms, face and part of the scalp. In his estimation, the deceased suffered 70% burns with signs of loss of blood. Internally, the only finding was the inflammation of the lungs. Hence, **Dr. Ndiangui's** finding was that the cause of death, which occurred on **4 March 2013**, was anaemia and septicemia due to the burns. The Postmortem Form was produced by **PW2** as **Prosecution's Exhibit 2**.

[5] **PC Samson Chepkulei, PW4**, was the investigating officer, having taken over the matter from the initial investigating officer, **PC George Kagire** upon the latter's transfer. He produced the motor cycle as **the Prosecution's Exhibit No. 3**.

[6] In his sworn statement of defence made on **11 July 2019**, the accused confirmed that he was then residing in Langas as a tenant of **PW3**; and that the deceased, **Alice Mogire**, was his wife with whom he had cohabited for 10 years. He further told the Court that he was then working as a *boda boda* operator for a living. Regarding the incident, his account was that the deceased woke up at 4.00 a.m. as she would normally do, to commence her daily chores; and that while he was sleeping, he heard her screaming and woke up only to find the motor cycle

ablaze in the sitting room. The accused testified that he found the deceased lying on the floor and the motor cycle had fallen on her leg; and she was also burning and screaming for help. He then tried to rescue the deceased in the course of which he also got burnt. He then screamed for help and neighbours responded; and that when he opened the door, the deceased managed to get out of the house and was taken by the Police to Moi Teaching and Referral Hospital for treatment.

[7] The accused contended that his relationship with the deceased was a good one; and that at no time did they quarrel or fight; and therefore that he had no reason to kill her. According to him the fire was purely an accident. He accordingly impugned the evidence of **PW3** positing that he lied because of a grudge between them over late payment of rent. He called, as his witness, **Eric Otundo Nyagaka (DW2)** whose evidence was that he had known the accused and his wife, **Alice Mogaka**, as family friends for over 5 years. He added that from his interactions with them, he knew that their relationship was good, and that as a couple they loved each other.

[8] At the close of the Defence Case, learned Counsel for the accused, **Ms. Biwott**, filed her written submissions herein dated **18 July 2019** impugning the evidence of **PW3** in particular, for the reason that he was reluctant to attend court and that at some point a warrant of arrest had to be issued against him, yet he said he works as a welder in Barngetuny Plaza area, not far from the Eldoret High Court premises. Counsel urged the Court to believe the accused's version that he had a good relationship with his wife and therefore did not have the requisite malice aforethought to cause her death. She relied on **Section 206** of the **Penal Code** and the case of **R. vs. Kipkering Arap Koske & Another** [1949] 16 EACA 135 to support her arguments.

[9] **Section 203** of the **Penal Code, Chapter 63** of the **Laws of Kenya**, pursuant to which the accused was charged provides that any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show are: **the fact of death**; that the death was **caused by the Accused** by an **unlawful act**; and **malice aforethought** on the part of the Accused Person. This was succinctly stated in **Republic vs. Andrew Omwenga** [2009] eKLR, thus:

**"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-**

**(a) The death of the deceased and the cause of that death.**

**(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[10] There is no dispute as to the fact of death of **Alice Kerubo**, the Deceased herein. There was credible evidence by **PW3** in whose premises the accused and the deceased lived, that on the morning of **19 February 2013**, at about 4.00 p.m. the deceased got burnt in a fire that inside the house they were occupying. **PW3** explained that he was also residing on the same property at Langas and that he immediately got out of his house and raised alarm to alert the other neighbours of the occurrence as soon as it came to his attention.

[11] Additionally, the Prosecution called both **PW1** and **PW2** who confirmed that the deceased was admitted at Moi Teaching and Referral Hospital following serious burns estimated by the two doctors to be about 70% to 80%; and in particular, **PW1** produced a P3 Form that was filled by **Dr. Kibet** on the same date of **19 February 2013** at about 9.30 a.m. It was marked the **Prosecution's Exhibit No. 1**, and it shows that the deceased sustained extensive burns on her head and neck and third degree burns on her cheeks and neck, thorax and abdomen as well as the anterior aspect of the chest extending to the lower abdomen. She also had third degree burns on both of her upper limbs up to the fingers as well as on her buttocks and thighs. That evidence accords well with the evidence of **PW2** as to the cause of death of the deceased, which occurred on **4 March 2013**; namely anaemia and septicemia due to the burns. The Postmortem Form was produced by **PW2** as **Prosecution's Exhibit 2**.

[12] Accordingly, the Prosecution presented cogent evidence as to the fact of death of the deceased herein and the cause of that death. Indeed, the accused did not dispute this evidence; his contention being that the fire was purely an accident. Having so found the pertinent issue to resolve is the question whether the Prosecution has proved beyond reasonable doubt that the deceased died as a result of the unlawful act of the accused person; and if so, whether he committed the unlawful act with malice aforethought.

[13] The inculpatory evidence is basically from **PW3**, whose testimony was that on **19 February 2013**, at about 4.00 a.m., he heard some noise from the house of the accused and that he woke up and went there to ascertain what the problem was. He added that, as he approached the accused's house, he saw smoke billowing from the house and the deceased was crying out in pain inside the house. He further stated that, he alerted the neighbours of the occurrence, and that with their assistance they tried to open the door but could not as it was locked from inside. They had to break one of the glass panes to be able to see what was happening. More importantly, **PW3** told the Court that he saw the accused holding the deceased on a motorcycle; and that her clothes were aflame. This, therefore, is the most direct evidence about the occurrence.

[14] Since **PW3** did not see the accused start the fire, or set the deceased ablaze, it is manifest that the Prosecution evidence was basically circumstantial evidence, in respect of which it was held in **R. vs. Kipkering Arap Koske & Another** [1949] 16 EACA 135, by the Court of Appeal for Eastern Africa thus:

***"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."***

[15] In response to the accusation that he was responsible for the fire, the accused offered his own version of the evidence, contending that the explanation given to him by the deceased was that, she was pulling the mopping cloth when the motor cycle fell on her and that there was

a burning stove nearby which then ignited the fire that burnt her. The accused contended that, as he was still asleep at the time, he did not know how the fire started. The question then, is whether the Prosecution evidence completely displaces the accused's version and whether it rules out any other inference as to the guilt of the accused.

[16] Although the accused told the court that he had a good relationship with the deceased and therefore had no reason to burn her, the evidence of **PW3** was that, when they went to the rescue of the deceased, the accused declined to open the door; and that they were constrained to break one of the window panes to enable them peep inside the house to see what was going on. He further stated that he then saw the accused holding down the deceased onto the burning motorcycle. And although the accused alleged a grudge as the motivation for the inculcating evidence that **PW3** gave, it is noteworthy that in the P3 Form marked **the Prosecution's Exhibit 1**, the deceased was interviewed at the time of examination on **19 February 2013** at 6.20 a.m. and she personally furnished the history to the effect that the husband had attacked her unprovoked and poured petrol on her body before setting her alight and then left her burning. This ties in well with the evidence of **PW3** that when the accused ultimately opened the door, the deceased came out crying saying Cyrus, the accused, had poured petrol on her and set her ablaze.

[17] Clearly, it cannot be that this aspect of the Prosecution case was just a figment of the imagination of **PW3** to settle scores with the accused. It is noteworthy too that it was on that basis that the accused was immediately arrested and charged with assault. The Postmortem Form likewise shows the same history, namely, that the deceased was set ablaze by her husband at their residential house at Langas and died while undergoing treatment at the Moi Teaching and Referral Hospital on **4 March 2013**. It is also noteworthy that the accused was cross-examined at length as to why he did not immediately open the door to facilitate assistance by neighbours; or why he did not simply lift the motor cycle form the leg of the deceased if that was the impediment to her rescue. Those questions did not elicit satisfactory answers, yet they are in respect of matters that were within the special knowledge of the accused for purposes of **Section 111** of the **Evidence Act**. In the premises, and for the reasons set out herein above, I am satisfied that it was the accused that, out of conscious deliberation, poured petrol on the deceased and set her ablaze; clearly an unlawful act on his part.

[18] It is not lost on the Court that what the deceased stated as to the cause of her death is something that ought to be treated with caution. Thus, **Section 33(a)** of the **Evidence Act**, states thus:

**“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.”**

[19] And in a discussion of the above provision, the Court of Appeal expressed its view, in **Philip Nzaka Watu vs. Republic [2016] eKLR**, thus:

**“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements ... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”**

[20] It is manifest from the above that ample corroboration was furnished by way of the direct evidence of **PW3** demonstrating beyond reasonable doubt that the accused is wholly to blame for the grievous injuries that his deceased wife suffered. On whether the Accused had malice aforethought when he committed the unlawful act complained of herein, it is the law that what needs to be proved by the Prosecution is any of the circumstances set out in **Section 206** of the **Penal Code**. That provision states thus:

**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.**

[21] In the case **Nzuki vs. Republic [1993] KLR 171** the Court of Appeal had occasion to interpret the above provision and it held that:

**"...murder is the unlawful killing of a human being with malice aforethought. 'malice aforethought' is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result...Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:**

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

**It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."**

[22] Consequently, in the case of *Daniel Muthee vs. Republic*; Criminal Appeal No. 218 of 2005 (UR), it was held that:

**"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."**

[23] Similarly, when the accused deliberately set the deceased on fire; pinned her down onto the motor cycle to ensure she continued to burn while turning a blind ear to the pleas by the neighbours for him to open the door, he evinced his intention to cause the death of the deceased or to otherwise inflict grievous harm on her. He certainly knew that there was a risk of death or grievous harm ensuing from his acts, noting that the deceased suffered 80% burns as a result.

[24] It is for the foregoing reasons that I find all the ingredients of the Charge of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code proved against the Accused beyond reasonable doubt. He is accordingly found guilty and is hereby convicted thereof pursuant to **Section 306(2)** of the **Criminal Procedure Code**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY OF DECEMBER, 2019**

**OLGA SEWE**

**JUDGE**