



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 13 OF 2019 [MURDER]

CORAM: HON. R. E ABURIL J

REPUBLIC.....PROSECUTOR

VERSUS

EDITH NDUTA KARANJA.....ACCUSED

JUDGMENT

1. The accused person herein **EDITH NDUTA KARANJA** was charged with the offense of murder contrary to section 203 as read with section 204 of the Penal Code Chapter 63 Laws of Kenya. Particulars of the Information dated 2nd August 2019 signed by Mr. David M. Okachi, Senior Principal Prosecution Counsel on behalf of the Director of Public Prosecutions are that on the 27th day of July, 2019 at around 1630Hrs at Siaya Female Probation Hostel in Siaya Township within Siaya County, she murdered one KKA.

2. The accused person pleaded not guilty to the charge and the matter was settled down for trial. The prosecution called a total of (12) twelve witnesses including the complainant mother to the deceased child in support of their case

3. At the close of the prosecution's case, the accused person was placed on her defense. She elected to give sworn evidence vehemently denying the charge. She did not call any witness.

The Prosecution's Case

4. **PW1 JAO** testified on oath and stated that on the 27th June, 2019 at about 4.30pm, she was on duty to cook on that day together with Nduta and Martha at Siaya Probation Hostels. That in Dormitory No. 1 at Siaya Probation Hostels, she stays with Nduta, Ann and Martha. That after cooking, she took the chapattis to the dormitory drawer, leaving behind the accused person who was making cakes popularly known as 'ángela.' She then noticed that her child KK was hungry so she went to feed her with porridge and took her to the dormitory to sleep and put her on her baby coat. That when she reached out she realized that she had forgotten one part of the child's pair of socks so she returned to the dormitory to pick it. At that moment, she saw Nduta standing and holding onto PW1's baby coat. That the accused got shocked and turned on seeing PW1. That PW1 asked the accused as to what she was doing and at that time there were other children sleeping in the dormitory. These were the child to Nduta and Ann who were on their respective mother's beds. That as PW1 left the dormitory she did not talk to the accused. there was no one in the dormitory and that the window next to her bed was open.

5. That after five minutes, PW1 heard a loud scream from Ann Mali shouting, "Judy Judy Dorm inaungua mtoto anachomeka." That PW1 then rushed to the dormitory and met a huge smoke and a ball of fire on her bed. She managed to rescue her child who was in bed whose mattress had caught fire and was burning. She saw the accused person's child in his baby coat. The Hostel Managers Millicent and Eunice assisted PW1 to escort her child to Siaya County Referral Hospital where her child was admitted for treatment with burns on the neck, right side of the face, right leg and. That she was admitted in hospital with her child until 29th July, 2019 when the baby succumbed to the burns.

6. According to PW1, while they were in hospital with the child and before she died, she was crying saying "*mami mammi nduta choma mimi huku meaning Mummy Mummy, Nduta burnt me here.*"

7. PW1 further recalled that she had been at Siaya probation Hostel for seven months. That she found when Nduta was already a resident. She stated that whenever she could disagree with Nduta, the latter used to abuse her. She recalled that on the 22nd of July, 2019 they were on duty with Nduta to cook and that in the evening they disagreed with Nduta and that Nduta got angry as she wanted everyone to get out of the kitchen. That at that point Nduta threatened her that she will do something bad. On her part she didn't do or say something bad to Nduta as she had nothing bad against anyone in the Hostel.

8. On being cross examined by Mr. Oduol counsel for the accused person, the witness reiterated her evidence in chief and stated that when she rushed to the Hostel upon being alerted by Ann Mali about the fire in the dorm, she did not find any other person there. She also stated

that there were security checks at the Hostel gate.

9. **PW2 BAO** testified that she was the mother to PW1. She stated that on the 27th day of July 2019 she was at Busia where she works at the Referral Hospital when she was called by the Manager of Siaya Girls Probation Hostel Madam Grace who informed her that that her grandchild had been burnt. On 28th July 2019 she traveled from Busia to Siaya Referral Hospital where she found PW1 and her child admitted in hospital. She saw the child was burnt on the right side of the hand, face and thighs. That while in hospital with the child, the child used to cry all the time of pain and calling her '*bibi, mimi chomeka*' –*grandma, iam burnt and Bibi, Nduta Choma mimi-grandma, Nduta burnt me.*' That on 29th of July, 2019 she was at Siaya Referral Hospital where she identified the body of her grandchild KK to the doctor for purposes of postmortem on the 30th July, 2019.

10. In cross examination by Mr. Oduol Advocate, PW2 stated that she was present at Siaya County Referral Hospital from 28th to 20th July 2019 and that the deceased child was talking until 11 am on 28th July but later she was only screaming.

11. **PW3 Brenda Kawira Maoke testified that** on 27th July, 2019 at around 4.30 pm she was at Siaya Girls Probation Hostels where she had been resident for 9 months and that together with Jane Muthoni they were digging behind Nduta's Hostel. That she peeped inside the Hostel through the window and saw Edith Nduta lying on her bed and playing with her baby. That she also saw three other children; J A's child, Ann Mali's child and Nduta's child. They were all sleeping. That Nduta talked to Muthoni and after sometime PW3 went in front of the building and proceeded upstairs to look for her child whom she found sleeping. That Nduta also went to clean the kitchen and that on reaching upstairs PW3 heard people shouting that Nduta's Dormitory was on fire. She rushed to the dormitory and took her child outside. That they then helped to put off the fire by fetching buckets of water. That J's child was burnt and that she was taken to hospital. She reiterated her testimony in chief adding that she had seen the other children also sleeping in the same dorm and that she heard Ann Mali screaming and telling J A to go and rescue her child from the dorm which was burning. She stated that she had been at the Hostel for 5 months.

12. On being cross examined, PW3 stated that when the fire broke out, she heard screams to the effect that Nduta's dormitory was burning.

13. **PW4 Ann Mali**, stated that on the 27th July, 2019 at around 4.30pm after taking lunch she went to the Dormitory No. 1 where they occupy with Edith Nduta, Martha, and J to put her child to sleep. That there was no one in the dormitory. That she then went out to go and plait Madam Jackline's hair and thereafter she returned to the dorm to check on her child. That was met by a huge smoke and fire and that she rescued her child inside the dormitory. That she did not know whether there were other children inside the dormitory. She rushed outside with her child and shouted that the dormitory was on fire and also asked J where her child was. That J rushed to rescue her child who was burnt and later on taken to the hospital for treatment and succumbed to the injuries on 29th July, 2019. She reiterated her testimony in chief on being cross examined.

14. **PW5 Dorothy Achieng Onyango** testified that she had been at Siaya Girls Probation Hostel for ten months, she recalled that on 27th July, 2019 at around 4pm she was in her Dormitory No. 2 with Jane Keziah who was setting her net as she was folding her clothes. That she saw Jane Muthoni and Brenda Kawira standing behind Nduta's hostel for about 30 minutes. That Muthoni could occasionally come to her window and play with PW5's child as she goes back behind Dormitory No. 1. That Jane and Muthoni then left, and barely after 10 minutes, she heard a child cry and then heard Ann Mali shouting "Judy Judy mtoto wako ako wapi, anachomeka" meaning she was asking Judy where her child was as she was burning. That together with Jane Keziah they dashed outside and that's when she learnt that it was J's child who had been burnt in the fire. She reiterated her testimony in cross examination.

15. **PW6 Dr. Biko Opidi** Medical Officer, Siaya County Referral Hospital testified that he was the doctor who conducted postmortem on the body of KK of the 30th July, 2019 at the County Hospital, upon the body of the deceased being identified to him by Juliana Tanga and Benta Atieno. He produced the postmortem report as exhibit 2. He indicated that he formed the opinion that the deceased died of extensive burns all over the various parts of the body with multiple organ failures and anemia. He stated in cross examination that the child inhaled burns which caused multiple organ failure.

16. **PW7 Martha Murugi Mvurya** testified that on the 27th July, 2019 at around 4pm she was in the company of J and Nduta who were all on duty at the kitchen cooking. That on her part she was making food for the children while Edith and J were cooking for the adults. That as they went about their chores, she saw Ann Mali going to the hostel building. Moments later, Ann Mali rushed out screaming calling on her colleagues to go and remove the child as there was fire in the dormitory. That She was surprised as she later learnt that J A's child got burnt in the incident that was in dormitory 1 which she stays. That Nduta and J also ran to rescue their children who were all in the burning cubical. That fire was on J's bed. They managed to quench the fire using water.

17. She reiterated her testimony in chief on being cross examined by Mr. Oduol counsel for the accused.

18. **PW9 Jane Muthoni Kiminza** testified and stated that on the 27th July, 2019 at 4.30pm she was at the Siaya Girls Probation Hostel premises with Brenda Kawira behind the hostel weeding. She saw Edith Nduta inside the dormitory lying on her bed and with her child on her laps. She stated that Edith Nduta called her and inquired of PW9 as to what PW9 was doing behind the dormitory. She asked Edith what she was doing but Edith told PW7 that she was babysitting her child so as to sleep in order for her to go and wash the kitchen. That there were two other children in the dormitory who were asleep. That she then proceeded to the front part of the hostel and at the water tank she met Nduta who had left the dormitory proceeding to clean the kitchen.

19. That she then went to her dormitory which is just adjacent to Nduta's and came out and at that point she heard someone shouting that there was fire in the dormitory. She found out that it was Ann Mali who was now carrying her child. Nduta and J also ran into the hostel to rescue their children. That Madam Jackline then told them to get water to quench the fire. That later on she learnt that J A's child was badly injured. In cross examination by Mr Oduor Advocate she denied seeing smoke at the window when they were weeding.

20. **PW9 George Martin** Ouma testified that on 22nd May, 2019 he was on duty at the Siaya Girls Probation Hostel and that J and Nduta were also on duty. That Nduta took her child to the clinic and returned in the evening. That when Nduta came he wanted her to clean the dishes and asked J to serve food and take to the guard but Nduta refused stating that she was not the only one in the kitchen. That Nduta also refused to wash the dishes which resulted in an exchange between the two girls.

21. That on Monday, 29th July, 2019 he returned from the weekend and was informed that there was fire incident in J's dormitory and that J's child was burnt. He later learnt that the child died while being treated at Siaya Referral Hospital. In cross examination he stated that he did not observe what could have caused the fire in the dormitory

22. **No. 66783 Corporal Simon Likonyi** based at Scenes of Crime Investigations at Siaya DCI and a gazette officer vide gazette Notice No. 10284 dated 15/12/2006 testified as PW10 and recalled that on 29/7/2019 at 10.30am he was requested by sergeant Mang'oli together with PC Bett of the DCI Siaya to go to the Siaya Girls Probation Hostel and attend to an incident of fire where a baby is alleged to have been burnt. That they proceeded and met the Hostel Manager Grace Achieng Ajunga and caretaker Jackline Wekesa who took them to the two storey female hostel and to the cubical 1 where they were informed that Baby KK child of J A was burnt while sleeping on the mother's bed, while her mother was attending to other duties. That he took seven photographs which he then produced as exhibits 1a to 1g and his Certificate of production dated 18/9/2019 was also produced as exhibit 1h. In cross examination he confirmed that the fire had spread to the adjacent bed and that the walls were also burnt.

23. **Martin Gatibaru Karubare** an incharge of Siaya Business Unit Kenya Power and Lighting Company Ltd testified as PW11 and stated that he was called by the manager at the Siaya Girls probation hostel on the 30th July, 2019 to go and establish the cause of fire and if the same resulted from an electric fault. That he proceeded there and checked the meter box and the 3 phase connection which was intact.

24. He indicated that the fire had burnt the down beddings, clothing, two electrical florescence lamps and holders within the dormitory. He also recommended that there was need to ascertain the circumstances surrounding the fire accidents and to investigate the electrical installation between the consumer interphase unit and the burnt room. He compiled his report which he produced as exhibit 3.

25. In cross examination, he stated that he was not a fire expert. In reexamination he stated that although he was not a fire expert, he could tell if the fire originated from a faulty electric system or overloading or if the connection was loose or if iron box or electric heaters were left on. He ruled out electric fault being the cause of the fire.

26. **PW12 PC Moses Bett** the Investigating Officer in this case testified that on 29th July, 2019 together with CPL Simon Likonyi they visited Siaya Girls Probation Hostel and interrogated the occupants. He established that KK a child belonging to J A who was sleeping on her mother's bed was burnt and later succumbed to the injuries at Siaya County Referral Hospital while undergoing treatment. He restated what he gathered from the witnesses who testified earlier and what they told him. After investigations were complete, the accused Edith Nduta was arrested and charged with the offence of murder. In cross examination he stated that he learnt that the kitchen was secured round the clock

The Defense Case

27. In her sworn defence, the accused person Edith Nduta Karanja testified as **DW1 and denied committing the offence. She stated that** on the 27th July, 2019 at about 4.30pm she was with Martha Murugi and J A in the kitchen and on duty. That after cooking, J A, PW1 took the Chapattis to the dormitory to keep the same in the cupboard. That moments later J A came to their dormitory No. 1 and in their cubical found her there in the cube and holding a baby cot. That in the cubical there were other children namely her child AM, EM and KK on their mother's respective beds. That at the back of her dormitory there was Brenda Kawira and Jane Muthoni who were standing at the window of their dormitory until when she left. That when she got out of the dormitory she found Brenda Kawira and Muthoni at the tank. That after a short while Ann Mali left the dormitory shouting at the entrance "*Judy mtoto wako ako wapi, anachomeka,*" and that at that time she had no child. That she immediately dashed to the dorm whereby J A was the first to rescue her child as she followed her closely. She then met a huge smoke at the entrance and fire and ran back to madam Jacky who told her to go in and get her child. She went in and rescued her child. That they later went back into the cubical and that's when she found out that J's child was burnt.

SUBMISSIONS

28. The defence counsel filed written submissions urging this court to find that the prosecution had failed to prove the offence of murder against the accused person to the standard required of beyond reasonable doubt to warrant a conviction. Counsel urged the court to acquit the accused person.

DETERMINATION

29. I have carefully considered the prosecution evidence and the defence. I have also considered the submissions and case law as well as statutory law availed to this court by the defence counsel.

30. In my humble view, the only issue for determination is whether the prosecution have proved their case against the accused person beyond reasonable doubt to warrant a conviction.

31. Section 203 of the Penal Code provides that:-

"Any person who of malice aforethought causes death of another personally an unlawful act or omission is guilty of murder." Section 206 of the Penal Code on the other hand sets out the circumstances which constitute malice aforethought. In light of the above provisions, the prosecution in this case must prove;-

(a) The death of the deceased and the cause of that death,

(b) That it is the accused herein who caused that death by either an unlawful act or omission and;

(c) That is causing the death of the deceased, the accused had malice aforethought.

32. In a murder trial, the following questions must be answered to prove a charge of murder against the accused person beyond reasonable doubt:

(a) The death of the deceased and its cause

(b) Was malice aforethought proved on the part of the accused?

(c) Is there direct or circumstantial evidence to place the accused as having caused the death of the deceased?

33. **On the question of the death of the deceased and its cause, the** death of the deceased child KK is not disputed by both the prosecution and the defence. The deceased was a child to PW1 JAO. According to the post-mortem report produced in evidence and produced as an exhibit by one Dr. Biko Opidi the child succumbed to the injuries on the 29/7/2019 at 02.05Hrs which injuries included extensive burns with inhalation causing multi organ failure and anaemia.

34. The time of the fire outbreak that burnt the deceased has been put between 3.00pm and 4.30pm by various witnesses. Between this times, there were various activities going on at Siaya Probation Hostel by the various occupants. J A (PW1) stated that when she got into the dormitory she found Edith Nduta in the dormitory standing at the window while holding onto her baby cot and that the window next to her bed was open.

35. The deceased mother one JAO stated that when she got to the Dormitory No. 1 where they slept with Nduta and Martha, she found Edith Nduta in the dormitory and in their cubical together with Ann Mali's child and Martha's child sleeping on their respective mother's bed.

36. PW5 Dorothy Achieng Onyango in her testimony stated that at around 4pm she was in her Dormitory No. 2 with Jane Keziah. That she saw Jane Muthoni and Brenda Kawira standing behind Nduta's hostel for about 30 minutes. That Jane Muthoni could occasionally come to her window and play with her child as she goes back behind Dormitory No. 1. That Jane and Muthoni then left, and barely after 10 minutes, she heard a child cry and then heard Ann Mali shouting "*Judy Judy mtoto anachomeka.*"

37. Ann Mali, stated that on at around 1pm after taking lunch she went to the Dormitory No. 1 where they occupy with Edith Nduta, Martha, and Judy to put her child to sleep. That there was no one in the dormitory. That she then went out to go and plait Madam Jackline's hair and thereafter decided to go back to the dorm to check on her child. It's then that she met a huge smoke and fire and that she rescued her child inside the dormitory. That she did not know whether there was other children inside the dormitory. She rushed outside with her child and shouted that the dormitory was on fire and also asked J where her child was.

38. The accused person Edith Nduta Karanja indicated that on the 27th July, 2019 at about 4.30pm they were with Martha Murugi, JA and her in the kitchen and on duty. That after cooking, she took pancake and left to the dormitory to keep the same in the cupboard. That moments later J A came to their Dormitory No. 1 and in their cubical found her there in the cube and holding a baby cot. That in the cubical there were there children her child Arnold Melvin, Edi Muthea and KK on their mother's respective beds. That at the back of her dormitory there was Brenda Kawira and Jane Muthoni who were standing at the back of their dormitory until when she left. That when she got out of the dormitory she found Brenda Kawiri and Muthoni at the tank. It was then after a short while that Ann Mali left the dormitory shouting at the entrance "*Judy mtoto wako anachomeka,*"

39. The prosecution's case is that the accused caused the fire with malice aforethought that in turn burned the deceased, which injuries the deceased succumbed to. This is solemnly anchored on the fact that shortly before the fire incident broke out, it was Edith Nduta who JA the mother of the deceased had left in the Dormitory No. 1 and in their cubical. The prosecution also called Martin to show that on an earlier occasion, PW1 and the accused disagreed. PW1 also gave evidence to the effect that she had disagreed with the accused who had threatened PW1 with consequences. Her, together with PW2 her mother testified in addition that the deceased child who was in pain at the Siaya County Referral Hospital for two days before she died was crying and telling them that Nduta had burnt her. This is suggestive of a dying declaration by a two year old child whose speech was not yet fully developed. Such evidence must be treated with caution.

40. The law on dying declarations in Kenya was laid down in the case of **Pius Jasunga s/o Akumu v R (1954) 21 EACA 331** which was cited with approval in the case of **Okale v Republic [1965] EA 556 Okale v R (supra)** was in turn followed in **Aluta v Republic [1985] KLR 543** where it was held at page 547 paragraphs 5-10 thus:

"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration".

41. It is important to highlight that there was no eye witness to the fire incident that led to an unfortunate and regrettable death of the innocent child KK.

42. PW1, J A, the mother of the deceased child and PW2, Benta Atieno, the grandmother of the deceased told the court that prior to the

deceased's death at the hospital she stated that she had been burnt by Edith Nduta. According to PW1 and PW2, the child said: "**Nduta choma mimi.**" That evidence was adduced by close relatives of the deceased child and in the absence of the accused person. Further, there was no police officer on sight to take down the statement of the child if at all she said so in hospital, considering the serious burns sustained.

43. I take further caution because PW1 and other witnesses who were in the hostel on the material day all stated that the children were sleeping in their respective baby cots and if that was the case, the question is what time did the deceased wake up and see the accused burn her? In my humble view, the deceased's purported dying declaration made to PW1 and PW2 needed corroboration. That corroboration is missing.

44. **On whether malice aforethought was proved against the accused, I must first and foremost outline what constitutes malice aforethought as stipulated in section 206 of the Penal Code. Here, the case of REPUBLIC V MICHAEL MURIUKI MUNYURI [2014] eKLR is instructive and it was stated:**

"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.

45. Malice aforethought is the deliberate nature to cause great grievous harm or death. In law the intention to kill or cause grievous harm or death or an attempt to act in a manner that creates likelihood of death or grievous harm. In **ERNEST ASAMI, BWIRE ABUANG ALIAS ONYANGO VS REPUBLIC, NAIROBI COURT OF APPEAL CRA.NO. 32 OF 1990**, the court inferred malice aforethought when considering of the brutal killing of the deceased which was well calculated and planned by the defendant. The meaning of intention in this case seemed to involve conscious acts implemented to seek or achieve a definite result of causing death or grievous harm.

46. In the instant case, PW9 George Martin, a cook at Siaya Probation Hostel told the court that on 22nd May, 2019 he was on duty at the Siaya Probation Hostel and that J and Nduta were also on duty. That Nduta took her child to the clinic and returned in the evening. That when Nduta returned, PW9 wanted her to wash the dishes and asked J to serve food and take to the guard but that Nduta refused stating that she was not the only one in the kitchen. That Nduta also refused to wash the dishes which resulted in an exchange between them that made her to get angry. He stated that it was the only incident in which he encountered the two exchange or have issues between J PW1 and the accused person herein.

47. JAO, PW1 on her part stated that on the 22nd July, 2019 when they had an exchange that made Edith Nduta angry, Nduta swore to do something to her that will be bad. Nduta on her part stated that she had no issue with JA save for the fact that she was angry because they refused to leave the kitchen when she wanted to clean the same. Most importantly, both stated that they had no unresolved issues with each other.

48. The prosecution attempted to demonstrate that the relationship between the accused and J A deteriorated and that the alleged threat to the deceased's mother that she would do something bad was actually executed by burning the bed where J's child was sleeping occasioning her fatal injuries. In her defense, the accused stated that she had no issue with the complainant and that they had not engaged in any exchange since the 22nd July, 2019 and further both stated that on 27th July, 2019 at the kitchen on that material day they had no issue with one another. None of the prosecution witnesses who was with the accused and deceased's mother, PW1 on the material day witnessed any quarrel or misunderstanding between them.

49. In a further attempt to prove that the fire did not start accidentally and that it might have been started by the deliberate act of someone, more so the accused who had access to the kitchen and the source of fire among other who may not have occasioned the fire at the dormitory, the prosecution called PW11 an officer from Kenya Power and Lighting Company who stated that on the 30th July, 2019 he visited Siaya Probation Hostels upon being invited to ascertain the cause of fire and if the same resulted from an electric fault. That he checked the meter box and the 3 phase connection which was intact. He stated that the fire had burnt the beddings, clothing, two electrical florescence lamps and holders within the room.

50. He also recommended that there was need to ascertain the circumstances surrounding the fire accidents and to investigate the electrical installation between the consumer interphase unit and the burnt room. He however indicated in the cross-examination that he was not a fire expert.

51. In my humble view, malice aforethought can be inferred if it is not obvious. However, in this case, what I find are strong suspicions that the person who may have lit the fire that burnt the deceased was the accused. Suspicion however strong cannot sustain a conviction. The prosecution must prove their case against the accused beyond reasonable doubt. Where there is doubt, that doubt must go to the benefit of the accused person. I find that malice aforethought has not been proved against the accused person beyond reasonable doubt.

52. On whether there is **direct or circumstantial evidence to place the accused at the scene**, it is undisputable that the prosecution's case against the accused person was purely circumstantial to the extent that none of the prosecution's witnesses who testified witnessed how or by whose acts the deceased died. For circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence precisely points to the accused person, and to no other person, as the perpetrator of the alleged offence. In **ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990** the Court stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

53. The prosecution in the present case must prove its case against the accused on the standard of proof beyond any reasonable doubt. It must also prove that the accused herein caused the death of the deceased and or that it was those resultant injuries inflicted on the deceased by burning the bed she was laid on, that she had the necessary motive to cause death or grievous harm to the deceased.

54. In **SAWE v REPUBLIC [2003] KLR 364** the Court of Appeal held that that:

“1. In order to justify circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
4. ... 5. ... 6. .. 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

55. There is reasonable doubt that the accused could set on fire J’s bed where the child KK was sleeping and expect that child to burn and not the accused person’s own child who was also in the same dormitory and adjacent to the bed of the deceased child, unless the prosecution demonstrates that the accused person had intended to set the whole dormitory on fire and to kill all the children who were sleeping therein at that time, which they failed to prove.

56. There was also Ann Mali’s child in the Dormitory No. 1 cubical and therefore if at all the accused had the malice to kill the child by burning he child could have been a victim of the fire or even the choke from the huge smoke.

57. PW1, PW5, PW7 and PW8 testified that the window adjacent to Nduta’s cubical where the three children were sleeping was open, and according to PW1, when she went to lay her child on the bed the window next to her bed was open. PW7 and PW8 confirmed that they were behind Nduta’s dormitory weeding. PW5 stated that she saw PW7 and PW8 standing at the window for about 30 minutes. In her defence the accused told the court that immediately she left the hostel, Muthoni was still behind her hostel and by the window. It was also Muthoni’s testimony that barely after she left and moved to the entrance of the dormitory precisely 10 minutes later, she heard the fire alert incident.

58. The prosecution did not call any fire expert to analyse the source and or cause of the fire. In my view, this was a fatal omission. It cannot be ruled out that any other person other than Nduta could have set the dormitory on fire. This is so because the window was open and the deceased’s bed was adjacent to the wall at the window which was accessible from outside.

59. Furthermore, the investigating officer did not find any sign of weeding or digging at the rear part of the dormitory as alleged by PW7 and PW8. The question is, what were the two girls doing at the back of the dormitory and why were they peeping inside the window from outside and at the rear part of the dormitory? Why did they ask Nduta as to what she was doing in the dormitory yet they could see her playing with her baby in the dormitory and on her bed?

60. There are in my view, many loose ends in this case which were not tied or sealed by the prosecution evidence as adduced.

61. In **MUSILI TULO v REPUBLIC, CR. APP. NO. 30 OF 2013**, it was held that to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, to the exclusion of all others, without any reasonable doubt.

62. In my humble view, in the instant case, it has not been shown that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of her guilt. There are other co-existing circumstances weakening the chain of circumstances relied on.

63. The upshot is that I find and hold that the prosecution have failed to prove the charge of murder against the accused person Edith Nduta, beyond reasonable doubt as required by law.

64. Accordingly, the accused person Edith Nduta Karanja is found not guilty of the offence of murder and she is hereby acquitted of the charge of murder under section 306(1) of the Criminal Procedure Code. Unless otherwise lawfully held, Edith Nduta Karanja is hereby set free.

Dated, signed and Delivered at Siaya this 3rd Day of December, 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr. D. Okachi, Senior Principal Prosecution Counsel

Mr. Oduol Advocate for the Accused

Accused person

CA: Brenda and Modestar