



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO.11 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ISAAC WANJALA SAENYI.....ACCUSED

JUDGEMENT

1. The accused Isaak Wanjala Saenyi faces the charge of murder of his wife Metrine Nakuminja Munialo contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the 8th of September 2012 at Misanga Trading Centre in Bungoma North District within Bungoma County the accused murdered Metrine Nakuminja Munialo.

2. The Prosecution called a total of 13 witnesses whereas the accused gave an unsworn statement and did not call any witness.

3. In brief the Prosecution Case is that on the 8th of September 2012 the deceased wanted to attend a relative's funeral but the accused refused, a quarrel ensued with the accused beating the wife who ran to a neighbour with the accused pursuing her, after discussions the two returned to their home where the accused doused Petrol on the deceased and their one year old child burning them. The child and the deceased were burnt extensively and succumbed to death due to the same.

4. The Prosecution mainly relied on circumstantial evidence and the deceased mention of the incident to her father and the doctor.

5. PW1 Peter Munialo Malia the deceased father recalled that on 9/9/2012 the accused mother went to his house and informed him that his daughter had sustained severe burns and was hospitalized in Cherangani hospital in Kitale and doctors would not treat her there. He visited the hospital and found that his daughter was burnt, her eyes could not open though she could speak. His grand child and the accused were also admitted with burns. The accused was burnt a bit on the legs. He was advised to take his daughter and the grand child to Moi Referral hospital in Eldoret. The child succumbed before the transfer. His daughter was however transferred.

That he had a conversation with his daughter who informed him that her husband beat her, she ran to the neighbours where he followed, and on returning home the husband poured petrol on her and the child while they were asleep. His daughter died on 12/12/2012. He buried her as the accused had not officiated their marriage.

6. PW2 Jane Rose Nakhungu Munialo mother to the deceased stated that on 8/9/2012 she was away attending a funeral which her daughter ought to have attended but did not later she received information from her daughter in-law of the message brought to their home of the deceased having received burns. She left for Cherangani hospital where she found her daughter who was burnt the whole body and had no skin. They were advised to take her to Eldoret Moi Referral hospital. Her daughter communicated with the doctor on the cause of the burns. The daughter had informed the doctor that her husband refused her to attend a relative's burial as a result quarrel ensued when she ran to a friend's place. The accused followed her and on persuasion by her friend she returned when the accused poured petrol on her and left forcing the daughter to throw the child and ran out as she was already burning, she then fell in water, screaming attracting a crowd. That the daughter died after a month while still in hospital undergoing treatment.

7. PW3 David Wanyama Munyangu, PW4 Moses Wafula Zakaria and PW8 Edna Wafula were near the scene of crime. PW3 was a watchman at a nearby school, PW4 was also a watchman and the landlord to the accused, PW3 heard screams from the deceased, he ran to her rescue and rescued the child who was inside the burning house. On his way he had met the accused coming from the same direction and was burning. While at the scene a crowd formed and they got a motor vehicle and took the deceased and the child to hospital. On his part PW4 received a call from his wife that the accused had burnt their house. Shortly thereafter he saw the accused on a motor bike with his trousers burnt and heading to Makutano dispensary, he stopped him but the accused went to Brigadier Patrol Base. He followed and escorted him to Ebenezer medical clinic where he found the witness found his wife with the child. The child was badly burnt. The two could not be treated at the clinic and he helped look for a vehicle so that they could be taken to Kitale. When they got to Cherangani hospital in Kitale they found the deceased who was equally badly burnt. He spoke to the deceased told him that she had been burnt by her husband. The

deceased was concerned about her child, she also narrated the incident that occurred in the night and how she had gone to the neighbours and the accused followed her. PW8 on her part heard screams and went to the scene. She saw PW4 rescue a child who had burnt. She got a bike and took the child to hospital. She had not seen the deceased at the scene.

8. PW9 Brenda is the lady whom the deceased ran to after a quarrel with the accused. It was her testimony that the deceased went to her house at 7p.m. the husband (accused) followed in toe. The deceased complained that the accused had not allowed her to attend her relative's burial, that the husband who was a boda boda rider carried other women on his bike and would not carry the deceased and that she had been beaten. The witness arbitrated and calmed the two down and the two left. She learnt of the incident the following morning. It was not her first time to talk to the two who had domestic issues.

9. PW7 Chief Juma Okiring received report of the incident, he took police Officers from Brigadier Camp to the scene of crime. They found a burnt house, which had been broken into and things all over the place. They saw Jericans with petrol. The house was in two parts. The front was a shop. The back is what had burnt. The occupants he learnt had been taken to hospital.

10. PW10 Cpl. Joseph Sagala previously of Brigadier police recalled that on 9th September, 2012 while in the office he received a call from PW1 regarding the incident. Accompanied by another Officer they went to the scene where they found a burnt house. They noticed three small jericans of petrol some used. Later he assisted arrest the accused.

11. PW11 PC Joseph Mulinga of Kiminini police station recalled that on 11th October, 2009 he was detailed to get a report from PW1 who informed him how the accused burnt his daughter, later he attended the post mortem, he also attended the scene of crime and took statement from other witnesses as an investigating Officer. During his investigations he learnt that the accused poured petrol on the deceased and fire spread as there was a tin lamp which blew up burning all the three. He took the containers recovered from the scene to the Government chemist, visited the hospital and read the doctor's notes including a narrative that the husband had burnt the deceased after a domestic quarrel. He later charged the accused.

12. PW12 Cpl. Benjamin Wechuli produced pictures taken of the scene of crime and the deceased.

PW6 was Doctor Paul Kipkorir Rono of Moi Referral hospital who produced the post mortem report which stated that the deceased had died while undergoing treatment at the Moi referral hospital. Further that the body was burnt on the hands, legs, chest, neck and the head and the cause of death given as burns and pneumonia. On cross examination, he said that the pneumonia came about due to the burns.

PW13 Laban Ombali Mogena a Government Chemist from Kisumu. He received three (3) 1 litre plastic containers from Kiminini police under escort on 29/1/2013 under the name Isaac Saenye. After analysis containers A & B were confirmed to have contained petrol and C had traceable amount of petrol. It was also his report that petrol is highly inflammable.

13. Having been found to have a case to answer the accused was placed on his defence. He gave an unsworn statement as follows; He is Isaac Wanjala Saenye. The deceased were his wife and son. On 8th September 2012 at about 10p.m. while he was asleep a fire broke out in his house. They used to sell petrol and kerosene.

And about 5 litres of petrol was at the back where they lived and as fire broke each one of them ran for their life. He burnt on the face, hands and legs. That as he left the house he came out with the child and asked the deceased to seek for help. He denied burning the wife. It was his testimony that he did not know the cause of the fire.

14. Most of the witnesses testified to the fact of the deceased death. The same was fortified by the evidence PW6 who produced the post mortem report.

15. Several witnesses saw the accused leaving the scene of crime burning. PW3 heard the cries of a woman and on the way as he followed the screams he met the accused burning and on a motor bike. He helped take the deceased to hospital. He knew the occupants of the burning house as he worked as a watchman in a nearby school. Likewise PW4 saw the accused on a motor bike burning, he had received a call over the incident from his wife. He was the accused landlord, he helped take the accused to hospital.

16. Apart from the above the deceased even on her dying bed, with the extensive burns spoke to several people and gave an account of what happened. Her story to all those she spoke to was consistent; that her husband poured petrol on her and their child and since there was a tin lamp within, it blew up burning all of them.

The deceased spoke this to her father PW1, her mother PW2, the doctor PW6 and indeed PW4. Her words, in my view were a dying declaration which was corroborated squarely by the evidence of the witnesses who saw the accused come from the scene of crime burning and indeed the actions of the accused.

PW9 witnessed the quarrel the deceased and the accused had just before the burning incident. From the actions of the accused it is so evident that the accused with malice aforethought poured petrol on the deceased and their child with the intention of burning the deceased and as fate would have it he got the fire as well.

17. In Stephen Muhiria Kiganga Vs R Criminal Appeal No.305 of 2011 (in Nyeri). The Court of Appeal cited with approval.

Pius Ja Sungu S/O Akumu V R (1954) EA CA 333 the Court of Appeal stated;

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been

considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.

...It is not a rule of Law that in order to support a conviction there must be corroboration of a dying declaration. (R V Eligu A/o Odei & Another (1943) 10 E.A. C.A. 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.

In the instant Case there was no issue as regards identification as the parties knew each other well and were together when the incident occurred.

18. In the cited case of **Stephen Muhiria Kiganga** the Court of Appeal equally with approval cited the case of **Daniel Muthee V R C.A No.218 of 2005(UR)** as regards to malice aforethought as follows

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a 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. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two Courts of murder was proved beyond any shadow of doubt.”

19. Likewise in the instant case it was clear that the accused doused her with petrol, why would he have done that if indeed he had no intention of burning her. His actions were very unusual! There was a tin lamp near where the accused poured petrol and he ought to have known that his action would harm the deceased and the child. This action was certainly laced with malice.

20. In his defence, though the accused denied dousing his deceased wife and child with petrol, his said defence gives him away. He left his burning wife and child, he ran off in order to save his life asking his severely burnt wife to seek for help. His attitude was wanting. I do not believe the defence though, that he had asked the wife to seek help, he must have left the two to burn to death as he sort to save his life.

21. The defence evidence did not dislodge or discredit the overwhelming evidence of the Prosecution, which was proved beyond all reasonable doubt. I therefore find that the accused was guilty of the offence as charged and convict him accordingly.

DATED and DELIVERED at BUNGOMA this 1st day of February, 2018

ALI-ARONI

JUDGE