



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: D. S. MAJANJA J.)

CRIMINAL CASE NO. 5 OF 2015

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JOSHUA OSIO GUMBA.....1ST ACCUSED

KENNEDY OWITI GUMBA.....2ND ACCUSED

JOB OCHIENG GUMBA.....3RD ACCUSED

DANIEL KWAKA GUMBA.....4TH ACCUSED

STEPHEN OCHIENG GUMBA.....5TH ACCUSED

ZABLON OTIENO OWUOR.....6TH ACCUSED

RULING

1. On the night of 11th January 2015 a fire engulfed the house of George Olenyo Gumba (PW 1) and Roselyn Atieno Olenyo (PW 2). The deceased, S A (“the deceased”), a child aged 6 years, was in that house. She was the niece of PW 1 and PW 2. According to her mother, Joyce Anyango Gumba (PW 4), the deceased had left to go and spend the night at her uncle’s house. Goretti Atieno Obuya (PW 4), the daughter to PW 1 and PW 2 also confirmed that deceased was in the house on that material night. PW 1, PW 2 and PW 4 testified that when the fire started everyone ran out but the deceased, who was asleep, was left behind and could not be rescued due to the raging inferno. Her charred remains were recovered the next morning by amongst others, IP Lawrence Kiilu (PW 3). According to the post mortem done by Dr. Lawrence Sikuku, the entire body sustained 100% burns which he identified as the cause of death.

2. Following the fire, PW 1’s brothers, **JOSHUA OSIO GUMBA, KENNEDY OWITI GUMBA, JOB OCHIENG GUMBA, DANIEL KWAKA GUMBA** and **STEPHEN OCHIENG GUMBA** and one **ZABLON OTIENO OWUOR** were all charged with the deceased’s murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They pleaded not guilty. The 5th accused, **STEPHEN OCHIENG GUMBA**, jumped bail and the case against him was stayed while the other accused proceeded to make their defence.

3. **Section 203** of the *Penal Code* defines murder in the following terms, “Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” Thus the prosecution must prove, beyond reasonable doubt, the fact and cause of death, that the death was caused by the unlawful act of the accused and that the unlawful act was done with malice aforethought.

4. As I have found, the fact and cause of death of the deceased was clearly established. The cause of death was as a result of a fire caused to the house of PW 1. PW 3, who was also the Investigating Officer, requested the Ministry of Public Works to inquire into the cause of the fire. About 7 days from the incident he collected a piece of wire from the gate where the connection was made to the main Kenya Power and Lighting Company power line. He sent the wire to the Government Chemist for examination but no response was forthcoming. His investigations also confirmed that a year prior to the incident power had been disconnected from PW 1’s house. However, in cross-examination PW 1 admitted that power had been connected to his house from the gate but denied that the connection was illegal.

5. The Ministry of Public Works official who visited PW 1’s home on 21st January 2015 noted that the power supply to the home had been disconnected and that the supply to the home by an underground cable had been improvised and was dangerously exposed. He observed that

the installation at the home had been done by unqualified personnel using substandard material. In the report dated 22nd January 2015, Philip Owade concluded as follows;

I am of the view that if power was on, on the fateful day, there is a high probability that electric fault might have been the cause of the fire and is likely to have happened in the ceiling roof. Please note that all doors, windows and burglar proofing are steel and the eaves are totally sealed which eliminate any possibility of fire emanating from outside.

6. In other words, the conclusion of the expert was the fire was likely caused by an electric fault and that the fire could not have emanated from outside. In order to implicate the accused, the prosecution had to show that the fire was caused by a voluntary act and that the accused had access to the house. To support this version of the case, PW 1 testified that on the material night he heard an explosion and when the fire started he saw and smelt petrol flowing in the corridor. PW 2 also recalled that when she was woken up at night, she could smell petrol. PW 3 took samples from the ashes to the Government Chemist. Unfortunately, the exhibit memo was not produced nor result from the Government Chemist.

7. If the evidence disclosed that there was a high possibility that the fire was caused by an electric fault and could not have emanated from outside, the possibility of the fire being caused by the accused pouring petrol in the house was consequently excluded. In order for the prosecution to succeed in tying the accused to causing the fire, it had to disapprove beyond reasonable doubt that the fire was not caused by the electric fault as opined by the expert. In my view, the prosecution cannot put the court in a position where it is required to select two equally plausible theories as to how the fire was caused. This would only mean that there was reasonable doubt as to whether the unlawful act of causing the fire could have been done by the accused.

8. I therefore find and hold that the prosecution failed to establish the cause of the fire to the standard of proof required. I have no option but to acquit the accused of the murder of **S A**. Their sureties are hereby discharged from these proceedings except the surety for the **5th accused, STEPHEN OCHIENG GUMBA**.

DATED and DELIVERED at KISUMU this 10th day of April 2018

D.S. MAJANJA

JUDGE

Mr Ochuka, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.