



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 25 OF 2012

REPUBLIC.....PROSECUTOR

Versus

MIKELINA MWONTURA.....1ST ACCUSED

PAUL MURURU alias KILEBWA.....2ND ACCUSED

JUDGMENT

Circumstantial evidence

[1] **MIKELINA MWONTURA** and **PAUL MURURU** (“the accused”) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence being that on the 16th day of March 2012 at Ntoombo village, Kimachia location in Tigania West District within Meru County, jointly with others not before court murdered **JOHN NPAARU**. The prosecution called six witnesses to establish its case.

The evidence

[2] **PW1 D G** daughter to the 1st accused and deceased, who is 12 years old and in class 6 gave her testimony after the court was satisfied that the witness understands the meaning of oath and is intelligent enough to be sworn. She told the court that on Thursday 14th March 2002 her father and mother came home and went to their house and then they went to theirs. They used to live in separate houses which are about 10-15 meters apart. The next day she woke up early with her younger sister A. G for they had to go to school. She prepared tea which was ready by the time her mother, the 1st accused, brought the flask from her house of which she locked the door then went to get fodder for the cattle. **PW1** left the flask in the house where they sleep and went to school and came back at around 4.00PM. They waited for their mother who came and lit a fire in the *shamba* and told her younger child not to go where the fire was lit. She also did not go there. She thought her mother was burning rubbish. It was at 7.00PM and the fire was about 50 meters away from her parent’s house.

[3] They then ate supper and before going to bed the 1st accused told them that their father, who worked at Kimachia (casual work of digging) had left in the morning and had not returned. The next day, that was Saturday, they went to school but did not wake up her mother because it was 5.00AM. She did not see anybody that morning. They got back home at around 4.00PM and on the way she met her mother who said that she was going to search for their father who had not come back. She was going to Kimachia to see if he spent the night there. The 1st accused tried to call her father but it did not go through and so she decided to go to Kimachia; she went but did not get him. They waited for him in the kitchen but he did not come and they never saw him again.

[4] **PW2 Joseph Ronard Mutiga** the assistant Chief told the court that he recalls that on 20th March 2012 the father, brother and wife of the deceased reported the disappearance of the deceased for about 3 days. They also reported that they had seen something like a body in a bush which had been burnt. It had been seen by children who were looking for firewood and they suspected that it was the deceased’s body. He advised them to report the matter to the police. Before reaching the station people started calling him telling him that the deceased had been killed and that they are suspecting the wife. He called the OCS Nchiru and told him not to release the lady. He went to the scene and found people gathered there. From the deceased’s house it was about 200 meters on a slope and bushes and there was water down the slope. The owner of the *shamba* was N’gotua.

[5] The body was like a skeleton as it had been burnt and only part on the hand and leg was left. But you could see it was a person. The deputy OCS and police came and took the body. They went back to the deceased’s home to see if there was any evidence but they did not find any. They found blood stains outside the house which were just about 1 – 2 meters from the house and some logs which were there. The deceased’s wife was detained and the young children left behind. They decided to collect the properties that were maize, beans, goats and cattle to take to the deceased’s father’s home. When removing the things they went to the bedroom of the parents because the children had their separate house and they found a plastic bag which had clothes with a lot of blood which were under the bed. They also found an axe which had blood stains. It was a jacket, trouser, shirt and t-shirt. Those things were taken to the police station. He knows the deceased and

the 1st accused. They used to have disputes and he had presided over two of their cases. One time the 1st accused took all the goats and cattle and the deceased reported and the 1st accused returned them. Another time the 1st accused took beans and hid them at a neighbor's but they recalled them. He also knows the 2nd accused person. He was arrested later but he did not know how he was arrested. He had no home and used to loiter. He is not related to the deceased but he used to assist the 1st accused with work.

[6] **PW3 Dr. Belinda Hamisi** medical officer based at Meru Level 5 Hospital produced the post mortem report on behalf of Dr. Mutuku. The observations were that the bones and body parts were collected in a sack. Brown jacket totally burnt partially burnt. It was an African male, apparent age of 35 years but nutrition, physique and height were unable to be determined. Externally body was burnt beyond recognition. Skull bones were in pieces. Internally the body was burnt beyond recognition. No organs recognizable. The cause of death was severe burns 100%.

[7] **PW4 Gervasio M'Tarikia** father of the deceased testified that on 13th March 2012 he was informed that Npaaru was lost and he told the wife that he would be found. On Friday she went to Mikelina's home but he had not been found yet. Next Monday as children of Ithalie were looking for firewood in the farm of Mikelina they found Npaaru. They went with other villagers to see. The right hand was missing, eyes were missing and from the waist, the body part was missing. He saw the hand which was not burnt made him know that it was his son's hand. The first finger was not burnt and that is how he knew it was him. He saw the grayish jacket **MFI 1** he knew it for it was Npaaru's. He also saw a black shoe which he used to see him wear. He did not see anything else. He reported to the chief who referred them to Nchiru Police Station. They went with Mikelina. They went back with the police who looked around and they found blood. He saw a lot of blood in the sitting room and outside in the compound there was blood. It was behind the house in different places. They asked Mikelina whose blood it was and she said it was hers. From the house to the trench where the body was is about 30 steps – estimates 70 to 80 meters.

[8] After the police left they entered Mikelina's house where they found clothes which were blood stained and also an axe. Manases (**PW5**) then took it to them. Body was taken to Meru Hospital mortuary and later given the pieces to go bury but nobody identified the body. The 1st accused and deceased had been married for 10 years in peace and worked together. They had issues and they would report to the chief who would intervene and reconcile them. The chief went to look for 2nd accused after Mikelina informed him. He had hidden in Mikelina's toilet.

[9] **PW5 Manases M'nguli** testified that he used to have a motor cycle. He cannot recall the particular date but it was March 2012 when he heard that a body had been found in the bush in a trench, it was about 8 – 9.00AM. On his way to see what had happened is when he heard people saying it was Npaaru. He met the deceased's father (**PW4**), wife (**the 1st accused**) and brother (Paul Nchiru) at the assistant chief's home who referred them to the police. He took them there with his motor cycle. They then went to the home of the deceased. **PW5** followed them as they investigated. He later went to work but after an hour Francis Muthara called him and told him that he was required by **PW4**. He went and found him with family members. He found them with a sack with clothes which they said had blood and also an axe which he saw had blood. That the axe he saw is the one in court (**MFI 6**). He did not see the clothes neither did he know where they found the clothes. They called the chief who told them to take them to Nchiru Police Station. The 1st accused and deceased had no differences.

[10] **PW6 NO. 38749 Sgt Danson Njagi**he was not the investigating officer but came to Nchiru in 28th December 2016. The Investigating Officer, Cosmas Benda, passed away and the matter was taken up by Benson Wafula who was transferred in January 2018. **PW6** then he took over the file and exhibits from Benson Wafula. He had worked with Wafula for one year. He had not however met the late Cosmas. He had the original document file with him and also the statement of the IO. He reported to the court the content of the investigation file that: on the 20th March 2012 the 1st accused in the company of **PW4** reported a murder case at Nchiru Police Station. Cosmas left for the scene in the company of other police officers. When he got there he suspected foul play. He questioned persons who made the report and took some exhibits from the scene and photographed the scene. He removed the body and took it to the mortuary at Meru. He suspected the 1st accused was connected to the crime and arrested her. In the process the 2nd accused was arrested.

[11] According to the investigations file: on the night of 16/17th March 2012 the deceased was attacked by people in the house and was murdered. He found that the 1st accused said that the deceased left home in the morning of 16th but he never came back. The deceased was murdered in his house where the 1st accused resides. The 1st accused mentioned that her husband was murdered by the 2nd accused person and others not before the court. That connection led to the arrest of both accused. Blood stains were found in the house of the deceased which suggested that the murder was done in the house. The murder weapon was also recovered from the house of the deceased. That 1st accused admitted to have been in the homestead during the murder. Also one black leather shoe was recovered under a bed of the deceased hidden inside a sack of maize cereals. Within the homestead some clothes were burnt. Listed the exhibits: grayish jacket with blood stains (**P Exh 2**), 1 black leather shoe (**P Exh 3**), 1 stripped kinyasa (**P Exh 4**), white stripped shirt (**P Exh 5**), an axe (**P Exh 6**), green t-shirt (**P Exh 7**), stripped green and red shirt (**P Exh 8**), a white t-shirt (**P Exh 9**), black trouser (**P Exh 10**) and ashes of burnt items (**P Exh 11**). He declared that he does not know the accused persons. He produced the original report of the inspector recorded on 21st March 2012 at 8.30 AM (**P Ex 12**). He does not know where the photographs are or whether they were produced. Report from the government chemist was produced in the identity of the body but he does not have a copy.

[12] When put to their defence the accused gave sworn testimonies. **DW1 Mikelina Mwortura** testified that on 17th March 2012 her husband left for work at Kimaria where he worked as a casual laborer- a loader. She said that the husband did not come back until 19th March 2012 at night at about 2.00AM. After serving him food, she boiled water for their cow that was giving birth. The cow was mooing and she went outside to check only to see people in the cow shed. She could not recognize them as it was dark. She however enquired who they were but they slapped and kicked her and she fell down. She heard some loud noise in the main house. She wanted to scream but someone gagged and blind folded her and took her to the toilet. He also showed her the knife and warned that he will kill her if she screamed. She tried to speak but he hit her again on the cheek and ribs. She stayed in the toilet and they then took her to the house and told her to sleep. She was scared and so she just slept. The children were in the other house separate from theirs. The man kept checking whether she was asleep and locked her from outside. She waited until she was sure that he had left and peeped through an opening in her house and saw him going towards the river. Her husband was not on the chair and there were about three people that night. She did not see him again in the house and the people left.

[13] She woke up and informed her father in law of the incident but he chased her away and told her that she was disturbing him. He was not in good terms with the deceased. She reported the matter to the sub- chief but his wife told him that he was drunk and asleep and could not attend to her. She waited and informed him of the incident and that they took away her husband. He told her to go to Nchiru police station. The father and brother of the deceased came and they rode on a motorbike and went to the police station.

[14] She continued to testify that she was arrested and the police took her to her home where they started investigations. A body was found about 150 meters from her house in another person's land but she does not know the owner of the land for it was abandoned. She does not know where the police got the items for none was found in her house. The t-shirt was not the deceased's. She was not involved in the death of the deceased and they lived peaceably. She declared that she knows her co-accused for he lived within the same village albeit far from her home. She stated that she would not know whether her co-accused was involved in the murder. But her co-accused broke into her house when she was in police custody and took away all her properties. She told the court that her father in law, his children and the co-accused are the ones who took all her properties and sold them when she was arrested. She does not recognize the clothes produced in court. She denied conspiring or colluding with her co-accused to kill the deceased.

[15] **DW2 Paul Mururu** told the court that he comes from the same village with the deceased. He became aware of his death on 20th March 2012 which was a shocker. When he heard that his body was found in Ng'oru's shamba he left the canteen with Paul and Henry to the scene. That was about 10.00AM and the police came at 2.00PM and took the body. That his co-accused told the police that he killed her husband. He affirmed that he did not kill him and he does not know why he was arrested. That on 19th March 2012 he was working during the day. They were splitting timber in the forest all day for that month. They were many workers. The forest is about 2 kilometers from the deceased's home. Japheth Kirimi was working with him and that he will call him as a witness. Deceased was not his workmate.

ANALYSIS AND DETERMINATION

[16] I will be careful to evaluate the evidence adduced with judicious alertness in order not to miss the grace and power of the testimony of witnesses and the applicable law. Such is my duty. The evidence is already recorded and is part of the record. But what exactly should the prosecution prove to secure a conviction on a murder charge?

Elements of murder charge

[17] The accused is facing a charge of murder under Section 203 of the Penal Code which defines the offence as follows:-

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

[18] As a matter of law and arising from the above section, the prosecution must prove the following beyond any reasonable doubt:

- 1. The fact of the death of the deceased***
- 2. The cause of such death***
- 3. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and***
- 4. That the said unlawful act or omission was committed with malice aforethought.***

Of fact of death of deceased

[19] The body that was recovered herein was burnt beyond recognition and the question as to whether it is the body of the deceased or not falls for determination by the court. And as the accused have been accused of murder of **JOHN MPAARU**, emphasis on proof of the fact of death of the deceased is critical. See *Article 768 of Section 9 of Halsbury's Laws of England (3rd Edition)* that:

“Where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, the accused person should not be convicted either of murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to have been killed.” [underlining mine]

[20] In the circumstances of this case, I also find the following expression by **the New Zealand Court of Appeal in R vs. HARRY (1952) NZLR 11 (3rd Digest Supp), Oliver J.** to be important, that: -

“At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

[21] Therefore, even where the body is not found or only part of it has been recovered, fact of death would be proved on cogent circumstantial evidence. See the case of **DORCAS JEBET KETTER & ANOTHER vs. R [2013] eKLR** where the Court of Appeal stated as follows:

“ It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence.

[22] Applying this test, the body which was examined was burnt beyond recognition- the doctor, PW5 stated so. However, the Postmortem Report produced in court as Prosecution’s Exhibit 1, indicates that a request for examination as to the cause of death of John Mparu was made. The persons indicated to be able to identify the body were Gerifacio Tarikia and Paul Nduru. **Gervasio M’Tarikia** father of the deceased testified as **PW4**. He stated that he was at the scene where the charred body was found by children. He stated that the right hand was missing, eyes were missing and from the waist, the body part was missing. He saw the hand which was not burnt which made him know that it was his son’s hand. His evidence was that the first finger was not burnt and that is how he knew it was his son. He also saw the grayish jacket **MFI 1** which he knew belonged to his son, the deceased. He also saw a black shoe which the deceased used to see him wear. PW4 identified the body as that of the deceased. The Postmortem Report produced in court indicates that it relates to the body of JOHN NDARU- I suppose it is JOHN MPARU. The said Report as well as the description of the body given by doctor, PW5 renders supports the description given by PW3 of the body found at the scene. The circumstantial evidence and recognition of by PW3 of the hand and finger of the hand that had not been burnt as belonging to the deceased leaves no doubt that the body which was examined belonged to the deceased. And therefore, the deceased died. Accordingly, the prosecution proved the death of the deceased.

Of cause of death

[23] As a result of the examination of the body of the deceased, the doctor who performed the postmortem formed the opinion that the cause of death was: **“SEVERE BURNS 100%”**.

Was the death as a result of an unlawful act or omission by the accused person?

[24] This case is based on circumstantial evidence. Therefore, it bears repeating the principle on circumstantial evidence decided in **TEPER vs. R [1952] 2 All ER. 447** and as was restated by the Court of Appeal at Kampala in **SIMON MUSOKE vs. R [1958] EA 715**, that:-

...in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of guilt.

[25] In light thereof, has the prosecution proved beyond any reasonable doubt that the death of the deceased was as a result of an unlawful act or omission by the accused person? **PW1 D G** daughter to the 1st accused and deceased, who is 12 years old and in class 6 gave her testimony after the court was satisfied that the witness understands the meaning of oath and is intelligent enough to be sworn. She gave a vivid account of the events of 14th and 15th of March 2012. She stated, that on Thursday 14th March 2012 her father and mother came home and went to their house. The children went to theirs as they lived in a separate house from the parents’’. These houses were close to each other, i.e. about 10-15 meters apart. The next day she woke up early in the morning with her younger sister A G for they had to go to school. She went to her parents’ house and asked her mother to open the door and give her the flask. The mother told her to prepare tea as she brings the flask. Her mother brought the flask, locked her house and went to fetch fodder for the cattle. She prepared tea, put it in the flask and went to school. I suppose they partook of the tea and went to school. They came back from school at 4.00PM. After they finished washing the dishes, their mother (1st accused) came home and lit a fire in the shamba about 50 meters away from them. The 1st accused warned A G not to go near the fire. The child was angry as she wanted to go near the fire. PW1 did not also go near the fire. She thought her mother was burning rubbish. This was about 7.00pm. this fire will bear circumstantial significance given the fact that the deceased died out of 100% burns.

[26] After supper but before going to bed the 1st accused said to her that their father, who worked at Kimachia (casual work of digging) had left in the morning and had not returned. They then went to bed and left their mother in the kitchen. The next day, a Saturday- I presume this was on 16th March 2012- they went to school but did not wake up her mother because it was 5.00AM. PW1 did not see anybody that morning. As usual, they left the school for home at around 4.00PM. On the way she met her mother who said that she was going to search for their father who had not come back home. She said that she was going to Kimachia to see if he spent the night there. The 1st accused tried to call her father’s phone but it did not go through and so she decided to go to Kimachia but did not get him. They waited for him in the kitchen but he did not come and they never saw him again.

[27] **PW1** was categorical that on 14th March 2012 which was a Thursday, her mother and father came home and both went into their house which is separate from the children’s house. She was sure this was the last time she saw her father, i.e. on 14th March 2012. This fact was not controverted. From the evidence by PW1, the following day in the evening her mother informed her that her father left for work but had not returned from work and so she set out to look for him at his place of work at Kimachia.. PW1 succinctly narrated the frantic efforts her mother made to call her father’s phone in vain. The narration of these events is with certainty and coherence. There is nothing to suggest the account by PW1 was false or a fabrication of sort. There is therefore no reason not to believe the account given by PW1 in respect of the last day she saw her father at home and alive. PW1 also told the court of the claim by her mother in the evening of 15th March, 2012 that her father had left for home but had not come back. She even made frantic effort to call the deceased on phone. The 1st accused did not challenge the events of 14th, 15th and 16th March 2012 as was narrated by PW1. These events totally dislodge the account given by the 1st accused in her defence that the deceased left for work on the 17th March 2012 and returned on 19th March 2012 in the evening. We are not told whether the deceased returned home on 16th March or whether the 1st accused found him on 15th or 16th March 2012. The claim by the 1st Accused that the deceased left for work on 17th March 2012 would mean that he came home on 16th March 2012. But she chose to leave a gap hoping to cause doubt and confusion. PW1 was clear that she saw her father for the last time on 14th March 2012 when he came home together with her mother- 1st accused. Again, her claim that the deceased returned home on 19th March 2012 is aimed at rendering support to her defence. The 1st accused claimed that on 19th March 2012 they were attacked by some unknown persons who also took away the deceased. The 1st accused also claimed to have reported the matter to the Assistant chief. But the evidence of **PW2 Joseph Ronard Mutiga**

the assistant Chief, tells a different story. PW2 said that the 1st accused, her father in law and brother in law made a report to him on 20th March 2012; and the report was merely on the disappearance of the deceased for about 3 days. PW2 also stated that the three also reported that they had seen something like a body in a bush which had been burnt. According to them, the body had been seen by children who were looking for firewood and they suspected that it was the deceased's body. PW 2 advised them to report the matter to the police. If the claim by the 1st accused that they had been attacked the previous night and the deceased had been kidnapped was true, why didn't she make a specific report of the attack to the brother in law, father in law and the chief or the police? She waited for three days to lapse in order to make a report of mere disappearance. Another important piece of evidence: **PW4 Gervasio M'Tarikia** father of the deceased stated that the 1st accused merely informed him on 13th March 2012 that Npaaru was lost. He told her that he would be found. Clearly, the 1st accused did not tell anybody of the alleged attack and kidnap of the deceased. Such was a serious allegation which would prompt immediate reporting by the victim who includes the 1st accused- at least according to her defence. To the contrary, evidence show that she merely informed PW4 and made a report to PW2 of the disappearance of the deceased. Curiously, the date she informed PW4 of the disappearance of the deceased was before 19th March 2012 and this renders credence to the evidence of PW1. .

[28] More circumstantial evidence was adduced by PW4 that the police saw a lot of blood in the sitting room and outside in the compound there was blood. Blood behind the house was in different places. They asked Mikelina whose blood it was and she said it was hers. From the house to the trench where the body was about 30 steps – estimates 70 to 80 meters. After the police left they entered Mikelina's house where they found clothes which were blood stained and also an axe. Manases (**PW5**) then took it to them. The 1st accused and deceased had been married for 10 years in peace and worked together. Except, they had issues and they would report to the chief who would intervene and reconcile them. The chief went to look for 2nd accused after Mikelina informed him. He had hidden in Mikelina's toilet.

[29] PW2, further stated that, before reaching the station people started calling him telling him that the deceased had been killed and that they are suspecting the wife. He called the OCS Nchiru and told him not to release the lady. He went to the scene and found people gathered there. From the deceased's house the body was about 200 meters on a slope and bushes and there was water down the slope. The owner of the shamba was N'gotua. The body was like a skeleton as it had been burnt and only part on the hand and leg was left. But you could see it was a person. The deputy OCS and police came and took the body. They went back to the deceased's home to see if there was any evidence but they did not find any. They found blood stains outside the house which were just about 1 – 2 meters from the house and some logs which were there. The deceased's wife was detained and the young children left behind.

[30] According to PW2, the brother and father of the deceased decided to collect the properties in the house of the deceased, to wit; maize, beans, goats and cattle to take to the deceased's father's home. When removing the things they went to the bedroom of the parents and they found a plastic bag under the bed with clothes namely, a jacket, trouser, shirt and t-shirt with a lot of blood. They also found an axe which had blood stains. Those things were taken to the police station. He knows the deceased and the 1st accused. He said the two used to have disputes and he had presided over two of their cases. One time the 1st accused took all the goats and cattle and the deceased reported and the 1st accused returned them. Another time the 1st accused took beans and hid them at a neighbor's but they recalled them. He also knows the 2nd accused person. He was arrested later but he did not know how he was arrested. He had no home and used to loiter. He is not related to the deceased but he used to assist the 1st accused with work. This evidence was not shaken.

[31] The 1st accused chose not to challenge the evidence of her daughter especially on three important aspects namely;

- (1) That her father came home on 14th March 2012 and that was the last day she saw her father;
- (2) That she lit some fire in the shamba on 15th March 2012 and warned the children not to go near the fire.
- (3) That she made frantic efforts to reach her husband on 15th March, 2012.

Her choice of 17th and 19th March 2012 without reference to the two dates in the testimony of PW1 was merely a subtle manner of creating confusion. Her story is not believable

[32] According to the investigations file produced by PW6: on the night of 16/17th March 2012 the deceased was attacked by people in the house and was murdered. The investigation report show that the 1st accused told the police that the deceased left home in the morning of 16th but he never came back. But, their finding was that the deceased was murdered in his house where the 1st accused resides. The report further state that the 1st accused mentioned that her husband was murdered by the 2nd accused person and others not before the court. That connection led to the arrest of both accused. Blood stains were found in the house of the deceased which suggested that the murder was done in the house. The murder weapon was also recovered from the house of the deceased. That 1st accused admitted to have been in the homestead during the murder. Also one black leather shoe was recovered under a bed of the deceased hidden inside a sack of maize cereals. Within the homestead some clothes were burnt. These items were produced as exhibits: grayish jacket with blood stains (**P Exh 2**), 1 black leather shoe (**P Exh 3**), 1 stripped kinyasa (**P Exh 4**), white stripped shirt (**P Exh 5**), an axe (**P Exh 6**), green t-shirt (**P Exh 7**), stripped green and red shirt (**P Exh 8**), a white t-shirt (**P Exh 9**), black trouser (**P Exh 10**) and ashes of burnt items (**P Exh 11**). PW6 declared that he does not know the accused persons. He produced the original report of the inspector recorded on 21st March 2012 at 8.30 AM (**P Ex 12**).

[33] The evidence by PW6 corroborated the evidence by PW2, PW4 and PW5 in material respects. Their evidence shows that the murder weapon and other items belonging to the deceased were found inside the house where the 1st accused resided. The evidence by the prosecution squarely places the accused at the scene of murder- her house- on the material day. The 1st accused confirms she was in the house except she claims they were attacked and the deceased kidnapped. Her story is not believable at all. The evidence proves beyond any reasonable doubt that the 1st accused was complicit to the murder of the deceased. The evidence shows that the 1st accused, probably with others, committed the act of killing and burning the deceased. Remember the fire talked about by PW1 which was lit by the 1st accused. This is consistent with the fact that the deceased died of 100% burns. His body was burnt beyond recognition. See the post mortem report

produced by **PW3** confirmed **and evidence by PW4**. What a cruel act by a human being upon another human being? Such should be an avowed and demented design of greatest mischief; an outrageous "ambition" to do all possible hurt to fellow human.

[34] It is also my finding that the deceased came home on 14th March 2012 together with the 1st accused and was never to be found again alive. These facts lead to an irresistible conclusion that the 1st accused burnt the deceased thus caused his the death.

[35] I must admit that this case presents difficult scenario. But, I agree with the superior court that as a court of justice we should not send a wrong message to criminals they may kill a person in circumstances shrouded in mysteries and go scot free. Again, the law will never allow a person to kill and burn another in the hope that the victim will not be identified and evidence will be destroyed; and go scot free. Part of the burnt body of the deceased was found and has been identified to be that of the deceased. Therefore the circumstantial evidence herein places the 1st accused and the deceased in the house on 14th March 2012 and that is the last time the deceased was seen alive by his children. The seeming frantic efforts to search for the deceased at his place of work or through his phone were all pretences and aimed at providing a decoy to throw the trail off the route. I will apply the test as was stated by the Court of Appeal in **Dorcus Jebet Ketter (supra)** referring to their predecessor court in the case **Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135 :-**

"that in order for a court to convict an accused person based solely on circumstantial evidence;

(a) The inculpatory facts must be incompatible with the innocence of the accused,

(b) The facts must be capable of no other conclusion or explanation except the guilt of the accused."

From the evidence adduced I hold that:-

(a) The inculpatory facts are be incompatible with the innocence of the accused,

(b) The facts presented are capable of no other conclusion or explanation except the guilt of the 1st accused."

[36] Although the investigations report stated that the 1st accused person told them that the 2nd accused person killed the deceased, there was no evidence led toward the guilt of the 2nd accused. The chief stated that he went to look for 2nd accused after Mikelina (1st accused) informed him of his whereabouts and he found him hiding in Mikelina's toilet. The 1st accused person denied all these things and did not implicate the 2nd accused in court. I have doubts on the defence offered by the 2nd accused person and he may have something to do with the murder. But as I have stated, there is no evidence to link him to the murder. The 2nd accused person knew the deceased for they hailed from the same village said that the whole month he was working all day. From the evidence adduced no one really saw the 2nd accused commit the act. The 1st accused was the last person to see the deceased. In my mind the fact of the case points to the 1st accused as the person responsible for the death of the deceased. Consequently, making reference to **Section 111 of the Evidence Act**, her defence was merely to exonerate herself rather than telling the truth. Her evidence did not shake the strong circumstantial evidence of the prosecution. Accordingly, this court finds that the deceased met his death as a result of an unlawful act on the part of the 1st accused.

Was act done with malice aforethought?

[37] Did the 1st accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines malice aforethought as follows:-

"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)"

[38] The act of burning and causing 100% burns on the body of the deceased was a deliberate act to cause the death of or cause grievous bodily harm to the deceased. The death was planned and executed stealthily by the 1st accused and in an outrageous manner. She may have done it with others but the evidence points at her directly. In addition, the manner the body was disposed of was intended to destroy evidence and defeat justice. Such act, I have already stated, is cruel, an avowed and demented design of greatest mischief; an outrageous "ambition" to do all possible hurt to fellow human. From the foregoing, I am satisfied that the prosecution discharged its burden and proved beyond reasonable doubt that the 1st accused caused the death of the deceased.

[39] Consequently, I find the 1st accused, Mikelina Mwontura guilty of the murder of John Npaaru contrary to section 203 as read with section 204 of the Penal Code CAP 63 Laws of Kenya and convict her accordingly. I acquit the 2nd accused, Paul Mwaura of the charges of murder under Section 210 of the Criminal Procedure Code. He shall be released forthwith. Right of appeal explained. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of September 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Anampiu for both accused

Mr. Namiti for State

Accused 1 – I understand Kimeru

Accused 2 – I understand Kimeru

F. GIKONYO

JUDGE