



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 79 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

FRANK WAMBUA KALII.....ACCUSED

J U D G M E N T

1. **Frank Wambua Kalii**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **21st** day of **June, 2011** at around **11.00 p.m.** at **Mitila Village, Kyangunga Sub-Location, Mulango Location** in **Kitui District** within **Kitui County** murdered **Muthui Maundu** (Deceased).

2. Facts of the case are that the Deceased was a workman employed by PW3 **Rachel Nduku Malombe**. On the material night PW2 **Mwalimu Malombe** heard a commotion at the home of the Accused and a voice of a person calling out threatening to kill a person if he moved out of the house. He was scared therefore did not leave his house. The following day, the **22nd** day of **June, 2011** he went to report the matter to PW1 **Mutunga Muthoka** the village elder who went to find out what transpired that night only to find the Deceased's mortal remains in a composite pit having been burnt. The police were notified of the incident. PW7 **No. 233147 C I Doris Night Chemos** visited the scene and caused the body to be removed to the mortuary. Investigations were carried out, the Accused was arrested and subsequently charged.

3. When put on his defence the Accused denied having known the Deceased before. He testified that he lived away from home. On the **21st June, 2011** he left Athi River going home. He arrived at **10.00 p.m.** and slept at **10.30 p.m.** At **3.00 a.m.** he heard a bang on the door. He went to check on what was happening. The door was hit thrice and it gave way. He saw five (5) people. He was hit on the left hand and the head. He fell down, lost consciousness and regained the same at **5.00 a.m.** He went out to ease himself only to find his toilet having been damaged. There was smoke emanating from the hole. He saw a human head and he was shocked. He returned to the house and saw his wife coming from the bed. She stated that she hid under the bed during the incident and advised him to report the matter to the Chief which he did. The Chief however left the Assistant Chief to deal with the matter. The police visited the scene and arrested him.

4. At the close of the defence case, it was urged on behalf of the Accused that there was no direct evidence of what really happened. It was therefore a case of circumstantial evidence citing the case of **Tumuheire vs. Uganda (1967) EA 328, 331 U** where **Lord Normand** stated in **Teper vs. Republic (1952) A.C. at Page 489** that:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

5. It was submitted that the requirement had to be satisfied before convicting the Accused. He also cited the case of **Kipkering Arap Koske and Another (1949, 16, EACA, 135, 136)** where it was stated thus:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

6. He called upon the Court to draw the conclusion that the Deceased was one of the thugs that attacked the Accused's home and as others fled, he accidentally flung into the composite pit hence sustaining the injuries that were noted by the Doctor. That the circumstantial evidence available is in favour of the Accused.

7. The State through the learned State Counsel submitted that the Accused's voluntary and wrongful act or omission showed that the Accused's action towards the Deceased constituted the physical component of a crime that culminated into his death. That his state of mind indicated his culpability that constituted the element of crime. That the Deceased was well known to the Accused hence had the malice to commit the heinous act.

8. Issues to be determined are whether;

- (i) Death occurred.
- (ii) The Accused committed the unlawful act which caused the death of the Deceased.
- (iii) The Accused had malice aforethought.

9. The Deceased's body was found in a composite pit at the home of the Accused. PW6 **Doctor Patrick Mutuku** conducted an autopsy on the body and concluded that the Deceased died as a result of the injury he sustained on the head. This was a fact of death.

10. There was no eye witness to what transpired. Therefore the evidence on record is circumstantial in nature. I do note what was submitted in the matter by the defence and the authorities cited. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal held that:

“1) In order to justify on 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.”

In the case of **Abanga alias onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated principles upon which a conviction can be founded on circumstantial evidence. It had this to state:

“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) 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.”

11. The Prosecution adduced evidence that the Deceased was an employee of PW3 and he lived within her homestead. The Accused their neighbor worked away from home but per his evidence he arrived on the material night. The wife of the Accused who may have been the eye witness to what transpired was not treated as a witness.

12. However, on record there is the evidence of PW2 who heard a person calling out in a loud voice on the fateful night at about **11.00 p.m.** The person made utterances threatening to kill whoever moved out of the house. This was evidence of voice identification. In the case of **Choge vs. Republic (1985) KLR I** the Court of Appeal held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence however, care and caution should be exercised to ensure that the witness was familiar with the Appellant's (Accused's) voice and recognized it and that conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who said it. (**See also Karani vs. Republic (1985) KLR 290**).

13. PW2 stated that he knew the Accused since his childhood. He was familiar with his voice such that he could not be mistaken as to the identity of his voice intonation.

14. In his defence the Accused narrated what transpired after he arrived home but he did not comment on the evidence adduced by PW2.

15. The Accused's explanation was that while in the house he was attacked by five (5) people who broke the door to his house. When PW1 visited the home of the Accused, he explained that a person had broken his door and entered his house and that they struggled. He showed him the pit in which the Deceased's body was still burning. PW7 the Investigating Officer observed the broken door but stated that the Accused did not make any report of the attack.

16. From the foregoing PW2 must be believed when he states that he heard the Accused person vowing to kill a person who came out of the house. This was evidence that he was the aggressor. No doubt he did sustain some injuries. He was issued with a P3 form that was filled by **Doctor Mutuku**, he had scratch marks on the neck, a swollen right shoulder joint, a cut wound on the posterior aspect of the right shoulder and a bruise on the skin of the left palm.

17. The Deceased was found in a pit burning. A postmortem conducted on his body revealed burns on the lower limbs with skin charred on some areas and broken bulge, multiple bruises on both sides of the neck, bruises on the face and head, bruise of the left ear. The head had a crushed skull bones at the top and there was obvious destruction of the brain tissue. The Doctor concluded that the cause of death was the head injury secondary to blunt trauma. This was evidence of the Deceased having been battered prior to being set on fire. Circumstances that prevailed point at the Accused as opposed to any other person as the person who inflicted injury on the person of the Deceased. Therefore

circumstantial evidence is consistent with his guilt as opposed to his innocence.

18. The issue to be addressed is therefore whether he acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought thus:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

19. Evidence adduced does not establish any of the elements above. What is evident is the fact that while the Accused was outside the house he believed there was somebody inside the house an act that prompted him to act violently, this was a form of provocation.

20. **Section 208** of the **Penal Code** defines provocation thus:

“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of selfcontrol and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”

The act of the person having been inside the house of the Accused was wrongful such that it deprived him of the power of self control.

21. **Section 207** of the **Penal Code** provides thus:

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

22. In the case of **Republic vs. Hussein s/o Mohamed (1942) EACA 66**, the Court of Appeal stated that:

“... Once legal provocation as defined in our code has been established and death is caused in the heat of passion whilst the accused is deprived of self control by that provocation, the offence is manslaughter and not murder....”

23. A consideration of evidence adduced reveals that the Prosecution did prove beyond any reasonable doubt that the existence of the unlawful act that did cause the death of the Deceased, therefore I do find the Accused having committed the offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code** for which I find him guilty and accordingly convict him.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 18th day of September, 2018.

L. N. MUTENDE

JUDGE