



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HCRC. NO. 21 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MANGATI KUUMA.....ACCUSED**

**J U D G M E N T**

1. **Mangati Kuuma**, the Accused, is charged with the offence of **Murder** Contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the **4<sup>th</sup>** day of **June, 2012** at **Kikuu Sub-Location, Mwitika Division, Mutomo District in Kitui County**, jointly with others murdered **Cosmas Kyendi Munyao** (Deceased).

2. Facts of the case are that on the **4<sup>th</sup>** day of **June 2012**, the deceased was dragged out of the house amidst accusations that he had stolen a goat from the sister of the Accused. He was set ablaze. The area Assistant chief was informed who in turn reported the matter to the police. Investigations carried out culminated into the arrest of the Accused.

3. To prove the case the prosecution called six (6) witnesses. **PW1 Kasele Munyao**, the wife of the deceased stated that she went home on hearing screams and found the Accused and one **Mwosya Nzonga** dragging the deceased out of the house alleging that he had stolen a goat. They pulled him out of the compound as she followed them. The Accused left briefly and returned with a goat. People gathered and set him ablaze, an act that made him sustain serious injuries.

4. **PW2 Mwanja Munyao** was at his home when he heard screams. He rushed to the scene to find the Accused and one **Mwosya Nzonga** pulling the deceased, his father. It was alleged that he had stolen a goat and he was set ablaze.

5. **PW3 Daniel Mutinda** the **Assistant Chief**, Mutitu Subcounty found the deceased already dead.

6. **PW4 NO. 230219 C I Samuel Kibyego Kogo** caused the body to be removed from the scene. It was taken to the mortuary.

7. **PW5 NO. 88264 P.C. Jeremiah Seme** investigated the case. He visited the scene and found the body that was burnt beyond recognition. He recorded statements from witnesses. **PW1** and **PW2** identified the Accused who was arrested but he did not recover any exhibits.

8. **PW6 Dr. Patrick Mutuku** conducted the Post Mortem on the body that was burnt beyond recognition. He formed the opinion that the cause of death was severe burns.

9. When put on his defence the Accused stated that the deceased, his uncle, went to his house without any invitation while drunk. They stayed until 3.00 a.m. There were other people present. Thereafter the deceased slept, woke up at 6.30a.m. and left alone. Other visitors also left. He (Accused) drunk tea and slept. He was woken up at 12.00p.m by **Kula Kaino** who informed him that the deceased had been arrested by people following allegations that he had stolen a goat. After giving him the information he left. Later, he returned and they went to the scene where they saw the Deceased's burnt body and the goat. He denied having participated in the act of burning the deceased. He denied the allegation that he dragged the deceased out of the house or having taken the goat to the scene. He denied having celebrated after the incident as stated by the Assistant Chief. He admitted that the goat was for his younger sister but denied having burnt the deceased.

10. The Accused called his wife **DW2, Anna Kasese Mangati** as a witness. She stated that they had visitors at home. That the deceased later joined them and stayed. He left at 6.00a.m. and the Accused went to sleep until 1.00p.m. Thereafter she saw Kula arrive on a motorcycle. He enquired whether they had lost a goat. She told him that Mbithe her sister-in-law was looking for her goat. He asked her to wake up the Accused and she complied. Kula informed them that the deceased had been caught with the goat. Kula left together with the Accused who later returned and told her that the deceased had been burnt. In September 2012 the Accused was arrested.

11. **DW3 Mwosya Nzanga** denied having murdered the deceased.

12. **DW4 Joshua Kula** stated that he was told by **Bwangwa Sammy Kisengese** that the deceased had been caught with a stolen goat which had a mark of **Mangati Kuuma**. He asked him to deliver the message to his family. He complied and subsequently took the Accused to the scene. They found the deceased already burnt.

13. It was the submission of the defence that the Accused gave a detailed account of how he spent his night and how the deceased left his home in the morning. That DW4 is the one who took him to the scene where he found the deceased burnt. That his evidence was corroborated by that of DW2 his wife. That no neighbor was called to corroborate the allegations of PW1. That DW3 Mwosya Nzanga testified in court and was not arrested; and allegations by the prosecution witnesses were not sufficient to prove the case.

14. The state in response submitted that the Accused person was placed at the scene of the crime for burning the deceased following allegations of stealing.

15. Issues to be determined are whether;

**(i) Death occurred**

**(ii) The Accused committed the unlawful act which caused the death of deceased.**

**(iii) He acted with malice afterthought.**

16. After the incident the matter was reported to the police who moved to the scene and removed the mortal remains of the deceased to the mortuary. Eventually a post mortem was conducted by **PW6 Dr. Patrick Mutuku** who concluded that the cause of death was severe burns. A **death certificate NO. 303238** was issued. This was proof of the fact of death.

17. The prosecution called evidence of eye-witnesses. PW1 was attracted by screams emanating from her home, she was at her kiosk nearby when she heard the piercing cry. On arrival at her home she saw the Accused and another dragging the deceased out of the house. They pulled him out of the compound as she followed them. She witnessed as the Accused and another set the deceased ablaze and witnessed as he burnt to death. PW2 found the Accused and another dragging his father the deceased out of the house. He followed them and on trying to intervene they threatened to set him a flame therefore he ran away leaving his mother at the scene.

18. In his defence the Accused argues that he went to the scene after the act and denies having participated in the act of burning the deceased. His wife DW2 did not go to the scene of the incident, DW3 his alleged accomplice according to the evidence adduced by prosecution witnesses and a distant relative to the deceased stated that he just heard from people that the deceased had been burnt. He denied the allegation that the police were looking for him as a suspect in the matter. **DW3 Joshua Kula Kailu** testified that he acted on information received and when he went to the home of the Accused he was at home and by the time they went to the scene of crime they found the burnt remains of the body of the deceased. However, on cross-examination he denied having been present at the time of the act of burning. It is in evidence that the incident happened near the home of the deceased therefore the fact whether or not the Accused was at the scene of burning at the time the act took place would not have been within the knowledge of DW3.

19. It is urged that the version of the Prosecution's story is full of lies because no single neighbor was called to corroborate the story of PW1. It has been demonstrated that the deceased was a common thief in the area. It is confirmed that as a result of the incident many people gathered to witness the burning incident and there was a dead goat available. Those who were sympathetic to the deceased like PW1 and PW2 were threatened with dire consequences, it was alleged that they threatened to set them aflame as well. The **Assistant Chief PW3 Daniel Mutinda** who visited the scene testified.

**DW5 NO. 88264 PC Jeremiah Seme** the Investigation Officer moved to the scene where he found a group of people having gathered. He asked those who witnessed the act to go and record statements but only PW1, PW2, PW3 and another who died thereafter turned up.

20. The Accused was not arrested soon after the act, the offence was committed on the **4<sup>th</sup> day of June 2012** and he was not arrested until three months later in **September 2012** having been arraigned in court on the **4<sup>th</sup> September 2012**. PW5 stated that after he caused statements to be recorded from witnesses he forwarded the file to the state counsel and in the meantime the Accused absconded. When they learnt of his return on the **4<sup>th</sup> September 2012** they arrested him. The Accused denied vehemently having absconded.

21. **DW2** one of the alleged perpetrators of the act that resulted into the death of the deceased testified in court and adduced in evidence a copy of sale agreement that he witnessed before **An Assistant Chief, one Daniel M. Mutuvi** per the stamp impression appearing thereon, dated **27.03.2016**. It was not demonstrated if the purported agreement was made before PW3 who was aware that he was a person wanted for the offence. PW5 stated he was given the names of DW3 and Mulati Kuuma as persons who were with the Accused but he was transferred thereafter. What was apparent is that after his transfer nobody seem to have followed up the case in an endeavour to have other suspects arrested.

22. It was urged by the defence that failure to call potential witnesses showed that they would have been adverse to the prosecution's case. The case of **Bukenya –Vs. Uganda (1972) EA 549** was relied upon. In the stated case the court held that:

***“(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.***

*(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*

*(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”*

23. This is a case where the prosecution called two (2) eye- witnesses to the act who described the manner in which the deceased was lynched and gave the names of his assailants. These were competent witnesses whose evidence was not challenged materially. In the circumstances their evidence could not be alleged to have been barely adequate. Failure by the police to pursue DW3 and cause him to be charged could not be seen as a circumstance that exonerates the Accused from what he did. In the premises, I find that the accused was one of the persons who committed the unlawful act that caused the death of the deceased.

24. The issue to determine is whether he acted with malice aforethought. **Section 206 of the Penal Code provides 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.”*

25. It has been stated that malice aforethought in the *mensrea* for the offence of murder whose presence or absence makes the court determine if the unlawful act perpetrated by the Accused amounts to murder or otherwise (**See Bonaya Tutui & Another V. Republic (2015) eKLR**).

26. In the case of **Nzuki V. Republic (1993) KLR (9)** the court stated that:

*“Malice aforethought is a term of art..... Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the accused:*

*(i) The intention to cause death*

*(ii) Where the accused knows that there is a serious risk that death or grievous harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of these acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from the conduct is not by itself enough to convert homicide into a crime of murder (see also *hymen V. DPP (1975) EA 55*).”*

27. At the point of dragging the deceased out of the house, the allegation against him was that he had stolen a goat that belonged to the Accused person’s sister, Mbithe. The carcass of a goat was at the scene of crime. PW1 stated that it was taken there by the Accused. Whether or not the deceased was a common thief the question to be posed is whether the Accused and another were justified in taking the law into their hands by meting out a punishment that resulted into his death. As correctly submitted, the police did not investigate the allegation of the deceased having stolen the goat, but even if that were the case, a suspect ought to be arrested and taken to the police for purposes of investigation to establish whether or not an offence is committed. Acting by lynching the person is an unlawful act that is contrary to the law of this land.

28. Looking at the nature of injuries sustained, they were serious. The body burnt beyond recognition. The skin of the face, chest, abdomen, legs and hands were partly burnt. The chest cavity organs and abdominal organs were visible. The lungs were charred. Intestines were partly burnt. The skin on the head was charred. Dragging the deceased out of the house and ultimately setting him ablaze was an act that was deliberate, therefore he was seized of the knowledge that at least grievous harm would ensue. This was proof of the practice of presence aforethought.

29. From the foregoing it is apparent that the prosecution has proved its case against the accused beyond any reasonable doubt. I find him guilty and accordingly convict him as charged.

30. It is so ordered.

**Dated, signed and delivered at Kitui this 13<sup>th</sup> day of November, 2018.**

**L. N. MUTENDE**

**JUDGE**