



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 19 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JAMES OMOKE NYANDORO.....ACCUSED

JUDGMENT

1. **JAMES OMOKE NYANDORO** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that, on the 20th April, 2018, at Botabori sub-location, Gucha South Sub-county in Kisii County within the republic of Kenya murdered **NICODEMUS OYUGI MOBISA** (“the deceased”).

2. The prosecution case was that the accused found the deceased, an 8-year-old boy, stealing in his shop and then set him on fire in order to discipline him. After the accused denied the charge, the prosecution called 3 witnesses to prove its case. The fact and cause of death was not disputed as the post mortem form was produced by the investigating officer without objection. Dr Benjamin Ndebele who conducted the post mortem on the deceased’s body, concluded that he died from complications arising from 56% burns on the body.

3. The deceased’s mother, Wilkister Mora Mobisa (PW 1), recalled that on 20th April 2018 at around 3.30pm, the accused called and told her that her son had done something wrong. They both proceeded to the accused’s shop. The accused told her that the deceased went through the metal door and stole from the shop. The accused then opened the metallic door as PW 1 sat near the corridor. The accused’s son brought the deceased to the room. The accused then asked him to fetch a rope with which he tied the deceased. The accused placed a carton box on the deceased head and poured paraffin from a container and then set him alight with a matchstick. PW 1 reacted by removing the carton from the deceased and throwing it on the floor. This did not stop the fire as the deceased’s clothes were already drenched in paraffin.

4. PW 1 further testified that the deceased ran and hid behind her while she picked the carton box and threw it back to the accused person who poured more paraffin and threw it back at her. At this point, many people who had gathered outside the shop, started raising alarm and breaking into the shop. PW 1 and the deceased managed to get out of the shop when the accused opened the door. The deceased was rushed to Etago Hospital where his condition was stabilised before being transferred to Kisii Level 6 Hospital where he died on 21st April 2018.

5. PW 1’s mother, Alice Mong’are (PW 2), testified that she had gone to the accused shop at about 4.00pm to purchase airtime. The accused asked his son to get a rope with which he tied the deceased and pushed him to a corner. The accused put a panga on the table and asked PW 2 to leave the shop whereupon he closed the door. As PW 2 was standing outside the shop she smelt paraffin, she went and stood by the window to observe what was happening in the shop. PW 2 saw the accused put a box on the accused head and light it up. She raised an alarm and the people responded to it. She then saw PW 1 run out of the shop with the deceased.

6. The investigating officer, Corporal Louren Ouya (PW 2), confirmed that he received witness statements and exhibits which were recovered by officers from the office who were first at the scene. The exhibits included a yellow jerrican of paraffin and a smaller plastic container, the deceased’s shoe and clothes.

7. The accused (DW 1) denied the offence in his unsworn statement told the court that on 20th April 2018, he took his wife to hospital and at around 4.00pm, he received information that he had been robbed. He went to the shop and found many motorbikes outside. He was informed that a thief had been caught and taken to hospital. He went to the police station to report the incident but was arrested.

8. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death and third, that the accused committed the unlawful act with *malice aforethought*.

9. As the cause of death is not in dispute, the issue that calls for consideration is whether the accused committed the unlawful act that led to the deceased's death. The testimony of PW 1 was clear on how the accused directed his son to tie the deceased, put a carton on his head, poured paraffin on him and then set him on fire. This evidence was corroborated by that of PW 2 who was in the shop initially but went outside but nevertheless proceeded to observe what happened all point positively to the fact that the accused is the one who set the deceased on fire and that the deceased died directly as a result of the fire, the nature of treatment notwithstanding. I heard both witnesses testify and I am satisfied that they were telling the truth and their testimony remained unshaken on cross-examination. Further nothing was suggested to them in cross-examination that would imply that PW 1 and PW 2 had harboured a grudge or ill-will against the accused to cause them to lie.

10. Counsel for the accused while relying on the case of *Bukenya & Others v Uganda* [1972] EA 549 submitted that failure to call crucial witnesses was fatal to the prosecution case. He pointed out that the failure by the prosecution to call Gladys Moi to testify entitled the court to draw an inference that her testimony would be adverse to the prosecution case. In this case the nature of the evidence was not established and the issue was not put to PW 3 in cross-examination to confirm the nature of her evidence nor did the accused name her in his unsworn statement. I am satisfied that the testimony of PW 1 and PW 2 was direct and it established the accused's culpability hence I am unable to draw an adverse inference as submitted.

11. Counsel for the accused also submitted that the prosecution failed to produce the report from the Government Chemist showing that the cause of fire was paraffin. I agree that the prosecution did not give evidence why the report from the Government Chemist was not produced. However, I find that the evidence adduced by the prosecution is adequate and established, through the evidence of PW 1 and PW 2, that the accused poured paraffin on the deceased. Paraffin is a common substance and even if the substance was not, it was flammable substance which when poured on the deceased caused the child to sustain burns on 56% of his body and die as a result. This chain of events from the time the accused poured the paraffin is unassailable and is not diminished by failure to produce the Government Chemist report.

12. The accused's defence suggested that the deceased was set on fire by a mob after he was found stealing from the accused's shop but this defence was put to rest by the direct testimony of PW 1 and PW 2. I therefore find that the prosecution proved beyond reasonable doubt that the accused did the unlawful act which caused the death of the deceased.

13. I now turn to the issue of malice aforethought which constitutes the *mens rea* for murder. In establishing the felonious intent for murder, the court is entitled to look at the actions of the deceased before, during and after the act, the nature of weapon used and how the injury was inflicted. **PW 1 and PW 2 testified that the accused tied up the deceased. PW 1 recalled that he poured paraffin from a 20 litre jerrican to a smaller container. Having locked PW 1 and the deceased in the shop, the accused set the carton on fire. When PW 1 removed the carton, the accused caught it, poured more paraffin and threw it back at her. He also refused any entreaty from PW 1 to resolve the issue. PW 1 recalled that "I asked James what my son had done so that we can resolve the issue. He did not respond."**

14. All the evidence points to a deliberate act by the accused to inflict injury on the deceased. The accused **must** have known that by pouring paraffin on the deceased and setting him alight, in circumstances where the deceased had been restrained would lead to his death or at the very least result in grievous harm to the deceased. I am therefore satisfied that the prosecution proved malice aforethought under **section 206(a)** of the *Penal Code*.

15. I am satisfied that the prosecution proved its case against the accused beyond reasonable doubt. I therefore find, **JAMES OMOKE NYANDORO** guilty of the murder of **NICODEMUS OYUGI MOBISA** and I convict him accordingly.

DATED and DELIVERED at KISII this 5th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Nyangwencha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.