



REPUBLIC OF KENYA

IN THE HIGH COURTS AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 66 OF 2013

REPUBLICPROSECUTOR

VERSUS

ERICK IMMBWANGA EKESA.....ACCUSED

J U D G M E N T

Introduction

1. The accused herein is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused Erick Immbwanga Ekese on the 25th day of December, 2013 at Makaburini Village, Municipality sub-location in Kakamega Central District within Kakamega County, unlawfully murdered Mohammed Mokoya.

The prosecution case

2. In an attempt to prove its case the prosecution called a total of four (4) witnesses. Joseph Njuguna a shop owner who testified as PW1 stated that on 25.12.2013 a young man went to his shop and purchased Kerosene and 2 cigarettes. After half an hour the young man went back to the shop in the company of a lady (PW2). The lady, Rahab Muthoni claimed that the young man came back with the kerosene which appeared polluted. PW1 checked the bottle and saw it had two layers. It was not the kerosene HE had sold to the young man. PW1 then asked PW2 how much money she had given the boy to purchase the kerosene and was informed that the young man was given Kshs.100/- but bought kerosene for kshs.80/= and two super march cigarettes. He gave the young man Kshs.12/= as change. An argument ensued and the young man agreed to refund the money. The two then left. while in the house PW1 heard that someone was burning. He went to check and found that it was the young man who was burning. As they were trying to fight off the fire the police came to the scene and carried away the young man who was alive. PW1 later recorded a statement with the police.

3. On cross examination PW1 explained that his statement was written by the police and he did not sign it. He maintained the story about the kerosene and how he tried to assist the young man from burning with the help of one Erick (Accused) and others.

4. PW2 Rahab Muthoni testified that she was the one who sent Mohammed the young man to the shop to buy some kerosene for her. Mohammed bought her kerosene which had two layers. When she asked him where he had bought the kerosene from, he took her to PW1's shop where she found out that Mohammed bought Kerosene worth only Kshs.80/= instead of 100/=.

5. PW2 further testified that the accused person herein then went to where they were having an argument and pressed Mohammed to tell the truth or they beat him up. Mohammed told them that he did not want any disputes and that he would return the money to Rahab. They decided to pour the 1st layer of the kerosene on the papers. Erick then tried to light the other layer with a match stick but it did not light. She told the court that another man poured the kerosene on Mohammed's shirt and when he tried to light the clothes they caught fire. He pointed out the accused who lit the young man's shirt.

6. PW2 reiterated her testimony on cross examination and maintained that it is Erick who poured the kerosene on Mohammed. On being shown the statement she recorded with the police, she denied that she was the one who wrote it. She also denied the signature on the statement. She maintained that the statement was written by the police. She went through the police file and claimed that she did not see the statement she had written.

7. PW2 added that in her statement she had stated that it was Eric who poured Kerosene on Mohammed and that it was him who lit the match stick.

8. PW3 Number 75979 Sgt Samwel Wenganyi from Kakamega Police Station who was on general duty on the 25.12.2013 testified that he was called and informed that someone had been set on fire in Makaburini area. They proceeded there and found the person who had been burnt and the culprit. They then took the victim to hospital where he was admitted and the one who had set him on fire was taken to the police station.

9. They inquired on what happened and they were told that the kerosene was contaminated and when the members of public tried to test it the accused poured it on the victim and lit it and it burnt the deceased

10. On cross examination, PW3 explained that he was the investigating officer in this case and he was the one who took the statements of the accused. He was not aware that the first two witnesses had denied their statements. He also did not see the accused pour kerosene on the deceased nor did he take the kerosene to the Government Chemist for analysis. He opined that the cause of death of the deceased was dry burning.

11. PW4 was Dr. Dixon Mchana who conducted a post mortem examination on the body of the deceased herein Mohammed Mukoya on the 09.01.2014 at Kakamega County General Hospital Mortuary. He filed the post mortem report and was of the opinion that the cause of death was extensive dry heat. He produced the post mortem report which was marked as Pexhibit1.

12. On cross examination by Mr. Shifwoka the Doctor explained that dry heat burns are caused by a naked flame from firewood and electricity. He further explained that he did not smell any fuel during the autopsy and there was no clothing shown to him. He added that the burns were limited to face hands and front part of the trunk and both lower limbs. He also stated that red lungs showed consumption or use of either cyanide or carbon monoxide. In the latter cases, it would mean incomplete burning of organic matter such as clothes, wood, grass and so forth

13. At the close of the prosecution case the accused was placed on his defence.

Defence Case

14. The accused gave a sworn statement and did not call any witness. He denied the charges against him. He testified that on the 25.12.2013 at about 3.00pm he had gone to PW1's shop to buy a soda when Mohammed the deceased came to the shop carrying paraffin. Mohammed was accompanied by PW2. The two complained about the quality of the paraffin to PW1. They were joined by other two people who requested PW1 for polythene bags to assist them check the paraffin. While in the shop he heard PW1 the shopkeeper saying deceased had bought paraffin worth Kshs.80/=, 1 match box and 2 cigarrates.

15. Soon thereafter he heard screams outside PW1's shop and when he went outside to check what was happening, he saw the deceased engulfed in flames. He then asked PW1 for water but instead of water

PW1 gave him a big trouser and PW1 came out with a piece of clothing to help in putting out the fire. They managed to put out the fire. He claimed that he was arrested because he was at the scene and after members of the public attacked him. He further claimed that he was not outside when the fire broke out. He also claimed that PW2 was outside with the deceased and she is in a better position to say how the fire broke out. Members of the public had attacked him and he tried to run away to save his life. He produced the statements of both PW1 and PW2 as evidence before the court.

16. The accused maintained that he did not murder Mohammed nor did he light the fire which burnt the deceased. He testified that he only assisted in putting out the fire. On cross examination he maintained his stand that he did not light the fire or murder the deceased. He also explained to the court that the fire was outside the shop about 6 meters away from the shop.

Submissions.

17. The accused filed his written submissions through his advocate Mr. M.C. Shifwoka. The gist of the defence submissions is that no case disclosed to warrant the accused's conviction on the offence in respect whereof he is charged. The submissions are based on four grounds being

- a. Uncorroborated eye witness evidence/account
- b. Unclear /uncertain date of alleged death
- c. Failure to identify body by PW2 who was said to have been the deceased's employer, the police or any of his relatives.
- d. Absence of Government Chemist Report.

18. The accused in his submissions urges the court to proceed and acquit him under section 215. The relevant section in this case is Section 322 of the Criminal Procedure Code and not Section 215.

Analysis and Determination

19. The facts of this case are straight forward. PW1, PW2 and the accused were together on 25.12.2013 when there was an argument or misunderstanding regarding the kerosene bought from PW1's shop by one Mohammed an employee of PW2. The arguments raised some commotion that attracted other people to the scene. According to PW2 who was at the scene, another person poured the kerosene on Mohammed's shirt and lit it; she pointed to the accused as the person who poured the kerosene on Mohammed. Both PW1 and PW2 recanted the statements they made to the Police claiming neither wrote nor signed the statement.

20. It is of interest and worth noting that the body of the deceased in this case was not identified. No explanation was given for the non-identification of the body. Mohammed was removed from the scene alive and taken to hospital by the police on 25.12.2013. PW3 has stated that he (Mohammed) was admitted at the hospital. The post mortem shows that the body was under the escort of No.45571 PC Owino who was never called to testify. It is therefore not clear whose body was taken for autopsy.

21. PW4's testimony on cross-examination is also of great importance. He opined that the deceased died of dry heat which he explained and also told the court that the heat was confined to the face, hands front part of the trunk and both lower limbs.

22. He further explained that he did not smell any fuel during the autopsy and there was no clothing shown to him. It is in doubt from the testimony of PW4 whether the autopsy was actually done on the same person who was burnt by kerosene.

23. I have also carefully analyzed the evidence by the prosecution witnesses and find that the evidence was not corroborated. PW1 and PW2 contradicted themselves on the events of the day. It is either they

were hiding/covering up something they knew or they were afraid to disclose something. The incident took place during the day and the shop owner could have easily known the person/persons who was/were near his shop that day. It was on Christmas day and it appears there were people who knew each other visiting the shop of PW1.

24. The testimonies of the prosecution witnesses have created more questions than answers to the puzzle surrounding the death of the deceased.

25. Consequently, it would be difficult to convict the accused person herein on the evidence adduced by the prosecution. The investigations into this case left a lot of questions which this court cannot answer. Records of the deceased during his treatment were not shown to the doctor even after the deceased had been admitted for 17 days.

26. I find that the prosecution has failed to prove that it is the accused person herein who murdered the deceased. The accused is therefore acquitted under section 322(1) of the Criminal Procedure Code as no offence of murder has been established against him. Unless there is another reason to hold him in custody, he is set at liberty.

Orders accordingly,

Judgment delivered, read and signed in open court at Kakamega this 18th day of January,2017

RUTH N. SITATI

JUDGE

In the presence of;

Mr. Shifwoka (present).....for Accused

Mr. Oroni (present).....for State

Mr. Polycap.....Court Assistant