



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 17 OF 2013

LESIT, J

REPUBLIC.....PROSECUTION

VERSUS

FREDRICK NJENGA NJUGUNA.....ACCUSED

JUDGEMENT

1. The accused person is charged with murder contrary to section 203 as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

“FREDRICK NJENGA NJUGUNA: On the 25th day of December 2012 at 7:30am at Muchatha Village within Kiambu county murdered PAUL NJUGUNA NJENGA”

2. The prosecution called a total of 9 witnesses

3. The summary of the prosecution case was that the accused set his son’s house on fire burning his son who was asleep in the house.

4. PW1 Martin Njoroge Mbithe testified that on 25th December 2012 at 7:00pm he was asleep when he heard screams coming from the accused place who is a neighbour. PW1 went out and saw smoke coming out of the accused compound. The accused was screaming asking for help. PW1 jumped over and went to the scene where he found PW2 the accused brother at the scene. The fire was inside the deceased house which was made of iron sheets. PW1 testified that he saw sparks on the meter box which was in the accused house and asked the accused to switch it off. PW1 stated they broke the window panes and poured water inside the burning house and it took them half an hour to put out the fire.

5. PW1 testified that he saw another flame inside the house and then decided to pull the iron sheet so that they could put off that flame. PW1 testified that it is then when he saw the body of the deceased. PW1 stated that they went to the Assistance chief who is a neighbor who came to confirm the report. She instructed them not to touch anything and called the police who took the body away.

6. The evidence of PW2 James Mutonga Njuguna was similar to that of PW1

7. PW4 Hilda Njoki Thiani testified that on 25th December 2012 at around 8:00am while she was on her way to church, she met a group of people coming from the accused place and also saw smoke coming

from the deceased house. PW4 testified that she went to the scene and on arrival she peeped through the window and saw a dead body lying on the bed and a burning tyre near the bed. A few minutes later the police arrived, took photos and carried the body away. PW4 testified that she later learnt that the accused was arrested. She went to the Police Station where she was told to give a cash bail of Ksh. 20,000/= to bail the accused out of which she did.

8. PW4 testified that the accused was later arrested and when she went to claim her cash bail the OCS told her to bring witnesses so that she can have her cash bail refunded back of which it was refunded soon after the witnesses had recorded their statements.

9. PW5 Rose Wambui Njuguna testified that on 25th December 2012 at 7:30am Paul Njuguna Njoki not a witness in this case knocked at her door and informed her that there was a house on fire. PW5 testified that she went to the scene where she found neighbors putting off the fire. PW5 stated that the accused was at the scene; he was drunk and was talking as the others were putting off the fire. PW5 testified that the accused was using insulting words regarding the incident of the previous day. PW5 stated that the accused said that his son the deceased had abused him the previous day.

10. PW5 testified that she asked the accused who burnt the house and he said he was the one who burnt the house since the deceased had abused him. PW5 stated that she asked if there was anyone in the house but the people at the scene said they did not know. PW5 testified that she instructed them to remove an iron sheet of the wall so that they could gain access to the house. PW5 stated that one iron sheet was removed and that is when they found the deceased lying dead in bed. PW5 stated that she immediately called Karuri police station and a few minutes later OCS Baraza came to the scene. It was PW5 testimony that the accused had misunderstanding with the deceased.

11. PW6 NO. 2322742 CPL Edward Baraza testified that on 25th December 2012 at 8:00am he was at Karuri Police Station when he received a call from PW5 informing him of a fire within the trading centre. PW6 testified that he immediately proceeded to the scene. PW6 stated that when he arrived at the scene he was shown the house which had been burning, the fire had already been put off but there was still some smoke. The burnt house was locked from inside. At the scene there were buckets of water, white gumboots, black plastic container with a black liquid in it. There was black substance liquid spilled on the window. PW6 stated that he noticed that 2 iron sheets had been removed from the wall. PW6 testified that he later found out that the accused was being held by AP`s from Muchatha at their camp. PW6 testified that he collected the black plastic jerry can, burnt debris and gum boots from the scene. PW6 stated that he called the accused to change his clothes which were later taken to Government Chemist together with a black plastic jerry can, burnt debris and gum boots that he had collected from the scene

12. PW6 testified that at the AP camp the accused appeared confused and at some point he said that the deceased had become a nuisance to him. PW6 stated that he was instructed by the DPP to investigate the cause of fire and whether it was caused by an electric fault. PW6 testified that he called Kenya Power but he did not get any report to that effect.

13. PW7 Dr. Dorothy Njeru a pathologist testified that on 28th December 2012 while on duty at City Mortuary, she received a request by No. 60315 Police Officer Robert Ochoke to carry out a post mortem on the body of the deceased. PW7 testified that the body had burn wounds on the whole body. The burns were 2nd and 3rd degree burns. On further examination PW7 testified that she saw soot in the nostrils and in the tracheal. PW7 testified that she formed the opinion that the cause of death was 110% burns.

14. PW8 No. 231162 CIP Ernest Maringa testified that on 25th December 2012 at 12:00pm he was at Muchatha when he received a call from P.C John Wanyonyi instructing him to take photos of the scene. PW8 testified that he went at the scene of crime and took photographs which he produced as P.Exhibit 6. He also prepared a certificate to that effect dated 21st January 2013 and also produced it as P.Exhibit 7.

15. PW6 Dr. Catherine Zera Mugambi a Government Chemist testified that on 2nd January 2013 she received some exhibits from Police Officer No. 53278 P.C Nyambuga from Karuri Police Station,

Kiambu county. The exhibits they received were a black 5 liters jerry P.Exhibit 1, a pair of grey trousers P. Exhibit 2. White short sleeved T-shirt with bloodstains P Exhibit 3, A pair of gumboots which were muddy P. Exhibit 4 and fire debris.

16. PW9 was requested to ascertain the whether the liquid substance in P. Exhibit 1 was flammable; whether there was any flammable substance in P. Exhibit 2,3,4 and in the fire debris. PW9 testified that he examined the exhibits on 12th February 2013 by applying an analytical technique called ultra violet spectroscopy. The findings were that petrol which is a flammable petroleum product was detected in exhibit 2,3 and in the fire debris; that P. exhibits 1 and 4 did not contain any fire exhilarant; and that the petrol traces found in p. exhibitS 2,3 and the fire debris were not of big quantities.

17. PW9 testified that petrol is a fire exhilarant and highly volatile such that it is easy to evaporate into the environment. PW9 stated that if exhibit 3 was within the range of fire it could have burnt. It was also the testimony of PW9 that exhibit 2 and 3 were partly burnt and that the black jerry can had no liquid in it though the exhibit memo indicated it had a liquid.

18. The accused person was placed on his defense after close of the prosecution case. He opted to give a sworn statement. The accused stated that on 23rd December 2012 was the last time he saw the deceased. He stated that they had lunch together and had a lengthy discussion as Christmas was approaching.

19. The accused stated that on 25th December 2012 he woke up at around 8:00am. The accused then went to look for a young man called Ben, the accused did not find him but left a message with Ben`s housemates. The accused stated that he went back home and proceeded to go round his plot to ensure there were no spaces for his chicken to sneak through. The accused stated that after going round his plot he went to the chicken pen which was direct to the window of the deceased sitting room. He stated that he saw smoke coming from the window of the deceased sitting room. That he decided to have a look but before reaching the window he heard an explosion. The accused stated that he suspected it was an electric fault. He then rushed to the house to switch off the main switch and thereafter the accused started to scream as the fire was massive.

20. The accused stated that when he looked out he saw PW1 his neighbor and PW2 his elder brother. They were the first to arrive at the scene. The accused stated that he drew water from his house to put off the fire while PW1 and PW2 screamed and the neighbours came with water to put off the fire. He stated that he asked PW1 to remove the iron sheet so that they could access the house and that is when PW1 saw someone inside the house. The accused stated that PW6 arrived immediately after PW1 informed them that he was someone inside the house. PW6 then said she had called the police who were on their way to the scene. The accused stated that when the police arrived he was arrested and taken to Karuri Police Station. The accused also stated that the clothes he had worn during the incident were taken by the police officers. The accused referred to the prosecution exhibits and demonstrated that P. Exhibit 2 his trouser and P. Exhibit 3 his t-shirt were not burnt. The accused also stated that P Exhibit 1 Jerry can did not belong to him

21. I have carefully considered the entire evidence adduced by the prosecution and the defence and the submissions by the defence counsel. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt.

22. The charge is that of murder contrary to **section 203** of the **Penal Code**. That section stipulates:

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

23. The deceased died of 110% burns. The prosecution must show that it is the accused who started the fire, that burnt the deceased and from which the deceased succumbed and died. The prosecution must adduce evidence to establish that at the time the accused started the fire he had formed the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.

24. There are facts which are undisputed. There is no dispute that the accused was at the scene when the incident occurred. It is not in dispute that the accused is the father of the deceased. There is no dispute that at the time of the incident the accused helped to put off the fire.

25. Having considered the evidence adduced against the accused in this case, the accused defence and the submission of his counsel I find that the issues for determination in this case are:

i. Whether the prosecution had proved that the accused started the fire that caused the death of the deceased.

ii. Whether the prosecution proved malice aforethought.

iii. Whether the prosecution proved the motive for the attack.

iv. Whether the evidence adduced by the prosecution was credible.

26. There is no dispute about what caused the death of the deceased. PW7 Dr. Dorothy Njeru who performed postmortem examination on the body of the deceased recorded her results in a report which she produced as P.Exhibit 5. In her evidence in court and according to her findings in P. Exhibit 5, she found that the deceased died as a result of 110% burns. Meaning that the body was completely burnt both on the surface and in the airway. The significant and most important finding was that the deceased had 2nd and 3rd degree burns on the body which she stated are very serious burns. It is therefore clear that the death of the deceased and the cause of death were established by the prosecution.

27. Regarding the issue whether the prosecution evidence is credible, the prosecution is relying on the evidence of PW5, PW6 and PW9. PW5 testified that when she arrived at the scene she found neighbors putting out the fire. The accused was drunk and he was talking as others were putting off the fire. PW5 testified that the accused was using insulting words referring to an incident they had with the deceased the previous day. PW5 stated that the accused said that the deceased had abused him the previous day and that he confessed to having started the fire. On cross examination PW5 admitted that she did not record that the accused was drunk in her statement to police.

28. PW5 testified that the accused was just going around the scene but did not participate in putting off the fire. The evidence of PW1 and PW2 on the other hand was to the effect that the accused helped to put off the fire and that he even switched off the electricity at the main switch. The accused in his defence equally stated that he helped to put off the fire and switch off the electricity at the main switch.

29. The evidence of PW5 is not corroborated by anyone and in fact it differs completely with that of PW1 and PW2 who were the first at the scene. I find PW5 was lying against the accused and that her account of the events of the material morning were a fabrication. It is difficult to understand what her motive was. However I noted that PW5 was the area Assistant Chief, was also a neighbor of the accused but more importantly she was a cousin to the accused.

30. PW6 the investigating officer in this case testified that the accused was in a state of confusion and that the accused told him that he had some differences with the deceased. The differences were not disclosed. Even then, being a father and son, differences are expected and the presence of such does not prove that the accused started the fire.

31. PW6 testified that he was instructed by the DPP to investigate the cause of fire and find out whether it was caused by an electric fault. PW6 stated that he called the Kenya Power to investigate but he never did a follow up neither did he receive any report from Kenya Power. From his evidence it is clear that the cause of fire was never established. I find that the prosecution has not adduced evidence to show what the cause of the fire was nor that the accused started the fire. I find that the prosecution failed to establish the cause of the fire and more importantly there was foul play.

32. The evidence of PW9 who testified that she received exhibits for analysis in her evidence stated that

petrol which is a flammable petroleum product was traced in P. exhibits 2, 3 and in the fire debris. PW9 testified that if P. exhibit 3 was within the range of fire it could have burnt. It was also the evidence of PW9 that P. exhibits 2 and 3 were partly burnt.

33. The defence countered this allegation by PW9. In his defence the accused lifted the two exhibits in court, which the prosecution availed in court that morning and it was clear to the court that P. exhibits 2 and 3 were not burnt. From the evidence of PW9 and the exhibit before court it is evident that PW9's findings on P. exhibit 2 and 3 was not correct as the findings were not supported by the exhibit themselves. I find that to that extend the evidence of PW9 was not credible.

34. I have also considered the evidence of PW4 who testified that she bailed out the accused at the Police Station with KSH. 20,000/=. When the accused was later arrested she went to claim her money and she was instructed she would only get the money back after she availed witnesses to record statements. This amounts to coercion and raises the question whether the witnesses were willing to testify or whether they stated the truth in their statements.

35. The accused denied having started the fire that caused the death of the deceased. It was upon the prosecution to adduce evidence to show it was the accused that started the fire. In doing so the prosecution relied on the evidence of PW5 who stated that the accused confessed to starting the fire and burning the house. PW1 and PW2 who were the first to arrive at the scene do not allude to the fact that the accused confessed to having started the fire. Indeed the account of event according to their evidence clearly shows that the accused person was very much involved in the efforts to put off the fire. To that extend the evidence adduced by the prosecution as to the accused conduct at the scene of the fire incident was controversial.

36. The prosecution was relying on circumstantial evidence. In the case of **ABANGA alias ONYANGO V. REP CR.A NO.32 of 1990(UR)** the learned Judges of the Court of Appeal set out the principles to be applied in testing circumstantial evidence. They set them out thus

'It is settled law that when a case rest entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn must cogently and firmly established.

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

iii. 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'

37. Having analyzed the evidence adduced before the court I find that the prosecution evidence has failed to meet the laid out principles pertaining to circumstantial evidence.

38. Regarding whether malice aforethought has been proved. Section 206 Penal Code states 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. 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.”

39. The accused saw fire emanate from the deceased house, he immediately tried to put off the electricity and called for help. His conduct is a clear indication that the accused did not have malicious intention. The action of the accused person clearly shows that he did not have any intention to cause death or grievous harm to the deceased.

40. Having carefully considered the evidence by both sides in this case, I find that the prosecution has not proved its case against the accused person beyond any reasonable doubt. I accordingly give the accused benefit of doubt and acquit him of murder contrary to **section 203** of the **Penal Code**, under **section 322** of the **CPC**.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF OCTOBER, 2016.

LESIIT, J

JUDGE