



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 35 OF 2010.

REPUBLIC PROSECUTOR

VERSUS

J W BACCUSED

J U D G M E N T

1. The accused, **J W B**, is charged with three counts of murder, contrary to section 203 read with section 204 of the penal code, in that on the 9th June, 2010, in Kwanza District, he murdered FN, D NW and L B.

The case for the prosecution was that in the month of January, 2010, the accused disagreed with his wife (i.e. D, the second deceased herein) thereby prompting her to leave the matrimonial home for her mother's home where she took refuge.

2. Later, D left for Nairobi after allegedly being threatened by the accused. She returned to her mother's home on 7th June, 2010, and on the following day, the accused took their three children to her using a motor cycle taxi operator. One of the said children was the third deceased, LB. They remained with their grandmother, **F NW (PW1)**, from that day. However, on the material 9th June, 2010, the accused allegedly proceeded to that home with the intention of beating the deceased D.
3. He (accused) was told to see the father of D who was in Eldoret and discuss the matter. He allegedly vowed and threatened to take revenge and left the home at about 5.00 p.m.

At about 7.00 p.m., while the deceased D, her mother (PW1), her sisters **ENW (PW2)**, and **B N W (PW3)** and others were in the kitchen taking supper, the accused allegedly re-appeared at the scene and entered the kitchen while holding a jerry can said to contain petrol which he splashed on D and ignited it.

4. The ignition resulted in a fire which consumed the kitchen amid attempts by the occupants therein to flee from the danger and attempts by the accused to lock the burning structure from the outside. Ultimately, most of the occupants escaped the inferno with minor and serious injuries. Good Samaritans rushed them to hospital in Kitale and thereafter to the Moi Teaching and Referral Hospital in Eldoret. D, together with the deceased FN and L B passed away while undergoing treatment.
5. The incident was reported to the Police **Cpl. Galana Bakari (PW4)**, and his team proceeded to the scene and found an ambulance ready to take the victims of the fire to hospital. He noted that the house was destroyed by the fire and that among the nine victims, one of them, a child, was

burnt beyond recognition. He gathered that the accused was responsible for setting the house on fire due to a quarrel between him and his wife.

6. The Patriarch of the ill-fated homestead, **RW M (PW5)**, received the necessary information while in Eldoret. He later identified the bodies of the deceased for post mortem purposes.

Dr. Godfrey Obala Wamukoya (PW6), produced the necessary post mortem reports (P. Exh. 1 & 2) which showed that the deceased F and D died from cardiorespiratory failure and acute respiratory distress syndrome secondary to 100% and 80% body burns respectively.

7. **P.C. Paul Ngesa (PW7)**, investigated the case and in the process gathered that the accused had disagreed with the wife who then returned to her parent's home where she was later followed by the accused who failed to convince her to return to their matrimonial home. He became annoyed and threatened to do a bad thing. It was then that he went away and later returned to set the house on fire.

P.C. Ngesa, completed the investigations and preferred the present charge against the accused.

8. The accused denied the charges and stated in his defence that on the material date he was called on phone by his late wife to take their children to her. He arrived late at her parent's home and due to customs he could not enter the homestead. He stood a distance away while conversing with his mother-in-law. His late wife declined to move close to him and demanded that he returns with his parents. He then left and went away.
9. On the morning that followed, he was confronted by a group of four people who included a police reservist. They informed him that he was needed at the police station over an incident which had occurred at the homestead of his in-laws. He was locked up at the police station and interrogated in the presence of his mother-in-law on allegation that he had set her house on fire and burnt the people therein including his late wife. He was then charged with the present offence which he did not commit.
10. The accused contended that his late wife normally had difficulties after giving birth and could have been suffering from the resultant depression thereby setting her family's home on fire.

There was no witness called to testify in support of the accused's defence.

11. The learned defence counsel, **M/s. Kibe**, in her closing remarks submitted that the prosecution failed to prove its case to the required standard and out of the seven (7) prosecution witnesses, none was an independent eye-witness. That, PW1, 2 & 3 were close relatives and PW1 being the only eye witness, indicated that there was "bad blood", between her family and the accused due to marital problems between the accused and his late wife.
12. Learned Defence Counsel, further submitted that the "**bad-blood**" necessitated that an independent eye witness be called to testify but this was not done. There was thus no independent witness to state that the accused was seen at the scene or near the scene of the crime despite the fact that neighbour's arrived at the scene during the incident.
13. Learned Defence counsel, contended that forensic evidence was not availed by the prosecution to prove the cause of the fire and that the jerry can allegedly containing petrol was not produced in court. There was thus no evidence to prove that the accused brought inflammable material at the scene.

In response to the foregoing, the Learned Prosecution counsel, **Mr. Kakoi**, indicated that the prosecution was relying on the evidence on record.

14. From the evidence and the submissions, the cause of death and the circumstances under which the

deceased persons died are factors which were not disputed. Indeed, it was proved that a fire erupted in a house occupied by the deceased and others and that the fire was deliberately caused by the criminal act of an individual. The resultant affect was the destruction of the house and burn injuries to the occupants including the three deceased. Unfortunately, the injuries caused to the deceased proved fatal.

15.The basic issue for determination is therefore whether the accused was responsible for the unlawful act with intention to cause the death of the deceased persons.

The defence raised is a denial and an indication that the accused was nowhere near the scene of the crime at the material time and could not therefore have been responsible for the unlawful act. He suggested that his late wife normally suffered from depression and this may have led her to set her family's house on fire.

16.However, evidence by F (PW1), E (PW2) and B (PW3), placed the accused at the scene of crime on the material date and time and strongly indicated that he was the person responsible for setting their house on fire with the intention of burning them to death or otherwise and in particular his late wife with whom he had disagreed over marital issues.

The witnesses (PW1, 2 and 3) thus suggested that what happened was a clear case of domestic violence gone awry. These witnesses are in-laws of the accused. They know him very well and even if he had disagreements with his late wife there was no evidence showing that there existed "bad blood" between them and the accused.

17.They (PW1, 2 and 3) all stated consistently and categorically that the accused arrived at their home on the material date on two occasions (i.e. at about 5.00 p.m. and at about 7.30 p.m.) and that it was on the second occasion that he arrived with a jerry can containing liquid petroleum which he splashed on his late wife and in the house and set it on fire using a matchstick. F (PW1) and E (PW2) indicated that there was an attempt by the accused to close the house door from the outside when the fire erupted but this was thwarted by F.

18.The three witnesses (PW1, 2 & 3) indicated that neighbours arrived at the scene after the accused had fled from the scene. According to P.C. Ngesa (PW7), he (accused) was arrested later by members of the public and handed over to the police.

Under section 203 of the penal code, a person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

19.Any intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not would constitute the necessary malice aforethought for murder.

Herein, the evidence by the prosecution has credibly and cogently established that although the intention by the offender was to cause the death or do grievous harm to the late wife of the accused, the unlawful act of setting the house on fire resulted I the death of not only the said late wife but also the late Faith and the late Lucky.

20.Despite the accused's defence which portrayed him as a very innocent person being maliciously incriminated by his in-laws due to his strained relationship with his late wife, the evidence against him was strong and credible enough to portray him as a "**cold blooded**" killer who was out to seek revenge for being rejected by his wife by eliminating her and all those who were out to frustrate his macabre mission. What he stated by way of his defence was clearly discredited and lodged by the prosecution evidence which was complete in establishing his guilty beyond reasonable doubt even in the absence of the jerry can that he used to carry the liquid petrol into the material house. It was not in dispute that the inflammable agent was indeed petrol.

21.It is for all the foregoing reasons that this court must find and hereby finds that the accused was

responsible for the unlawful act which caused the death of the deceased persons. He is therefore found guilty as charged in all the three counts of murder and convicted accordingly.

[Delivered and signed this 12th day of March, 2015.]

J.R. KARANJA.

JUDGE.