



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 26 OF 2011

REPUBLIC.....PROSECUTOR

-VERSUS-

GARAMA MLANDA WACHE.....ACCUSED

J U D G M E N T

1. **Garama Mlanda Wache** is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 7th September, 2011 at Dololo village, Magarini District, Kilifi County with another not before the court, he murdered **Kache Mangi**. The accused denied the charge and was represented by Mr. Lughanje.

2. The prosecution case was as follows. The deceased resided at Dololo Village. She was related to the accused as his step mother or grandmother. On 6/9/11 the accused and another person identified as Kazungu approached a trader by the name Jemimah Riziki Mwinyi (PW7) at her shop at Bate, some short distance from Dololo. They purchased some ½ litre of petrol from her. On the following day at about 4.00pm the deceased was in her house. Her grandchild Agnes Katana (PW 3) aged 13 years was also in the homestead going about her chores. She was attracted to her grandmother who was engulfed in a fire.

She tried to douse her with water and managed to put out the fire with help from neighbours.

3. The deceased, upon being interviewed named the accused and one Kazungu as the persons who threw a flammable liquid on her and set her ablaze. She was dehydrated by the time she reached the local dispensary at about 1.00am and died a few hours later while undergoing treatment. Death was due to cardio respiratory arrest due to 67% superficial burns. It was not until the next day that police came to the scene, to collect the body and commenced investigations. Eventually, the accused was arrested and charged.

4. In his defence the accused elected to give an unsworn statement. He stated that he was a resident of Dololo. That on the material date, he spent the day on his farm but on returning home at 5.00pm he was confronted by a mob which claimed he had been “named” as a suspect in the murder. He said he participated in the burial ceremonies held for the deceased and was arrested a month later.

5. There are no eye witnesses to the murder of the deceased as the first person to see the deceased engulfed in a flame was PW3. She did not see the assailants. The prosecution case against the accused is built upon the dying declaration of the deceased, as allegedly heard by several witnesses and the evidence of PW7 the lady trader.

The court must determine whether the accused did participate in the incident in which the deceased was doused with a flammable liquid and set ablaze.

6. The material incident occurred during the day, according to PW3, at about 4.00pm. Some of the early visitors to the home after the incident and who also interviewed the deceased include Karisa Mlanda (PW4) and John Sulubu (PW9). Both stated that the deceased named the accused and one Kazungu as those who set her ablaze. These witnesses did not waver during cross-examination. One of them, PW9 said he notified the area chief who similarly came and interviewed the deceased. The area chief Marafa is one Daniel Murimi Kithu (PW6). He testified that when PW9 called him he proceeded to the home after calling for help from the local AP Post. He was accompanied by Renison Chengo Karisa (PW5) the Assistant Chief. PW5 said he received the chief's summons to attend to the matter at 7.00pm.

7. The evidence of these witnesses is that the deceased was lucid and seated on a bed at that time. That she stated that the accused and another person had splashed upon her some flammable liquid which they ignited, causing her injuries. That indeed the deceased's injuries were due to burns is confirmed by the post mortem form. The body of the deceased had not only external burns but also there was evidence of soot and inhalation burns in the respiratory system. On the head, back, limbs and face there was peeling skin consistent with burns by a flame.

This evidence corroborates not only the statement of the deceased as to the cause of her injuries but also the evidence of PW3 that the deceased was engulfed in fire.

8. There is no dispute that the accused and the deceased were well known to each other as relatives and lived in the same village. Going by the accused's statement by the time the accused allegedly returned home from his work at 5.00pm, word was already out that he had been "named" concerning the assault on the deceased.

9. According to PW7, the accused and another man had purchased petrol from her on the previous evening. Although the said purchase took place late in the evening, the witness said she had two encounters with the two men. First, at 6.45pm when they came and she turned them back because she had no torch to enable her access the room where the petrol was stored. The men went away and returned within minutes with a torch. She then sold the petrol to them. She knew the accused as a local person and identified him in court. She said the accused spotted rasta hair at the material time. From her narration it would appear that the transaction occurred in the evening and she had conversation with the customers.

10. There was no suggestion that her evidence was fabricated or that she had reason to swear false testimony against the accused.

However it was suggested by the defence that an identification parade should have been conducted in respect of PW7 but the witness was already familiar with the accused hence no purpose could have been achieved. The fact that PW7 did not know the accused by name did not detract from her evidence of visual identification (recognition) of the accused in this case for three reasons. Firstly, the first time he saw the accused it was about 6.30pm and he returned 15 minutes later. Secondly, she conversed with him when he returned bearing a torch for her to use in the store where the petrol was stored. Thirdly, the witness is so disconnected to the actual murder and the parties involved that if she had not seen the accused, she had no reason to swear falsely against him.

11. In the case of **Joseph Muchangi Nyaga and Another –Versus- Republic (2013) e KLR** the Court of Appeal gave guidance as to the correct evaluation of evidence of visual identification.

“Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.....”

In my considered view, the evidence of PW7 passes the above test. Her first encounter with the accused was in daylight and on the second occasion, there was a torch and she had a conversation with the accused.

12. The admission of dying declarations in evidence is permitted under section 33 (a) of the Evidence Act. Such declarations would include statements made by a dying person or persons anticipating death or regarding circumstances of the transaction which resulted in his death. Dying declarations are admitted on the principle that they are made in such extreme or dire circumstances with the maker facing imminent death hence obligated to tell the truth (See **Chege –Versus- Republic (1985) KLR**). That principle notwithstanding, it is generally unsafe to base a conviction solely on a dying declaration without seeking material corroboration, and even though there is no rule to require such corroboration, the court must evaluate the evidence with caution, considering the circumstances of the attack and identification by the assailant.

13. From the description of the witnesses PW 4, PW 5, PW 6 and PW 9 the deceased had extensive burn injuries to her torso and face resulting from the attack. Most possibly she believed herself to be at the point of death due to the injuries. She was aged 90 years and indeed died several hours after the attack. She was attacked at 4.00pm in her house. It was day time.

Her named attackers were her grandchildren or close relatives who were people well known to her. She described how the attackers doused her with a flammable substance before setting her alight. As with PW7's evidence the statement by the deceased points to recognition of familiar persons which was said in **Anjoni Versus Republic (1980) KLR 57** to be

“more satisfactory, more assuming and more reliable than identification is a stranger because, it depends upon the personal knowledge of the assailant”.

14. The fact that the deceased was familiar with her assailants and that she was attacked in day time lends credence to her identification of the said assailants. She gave their names to several persons, which is indicative of consistency. Secondly, the dying declaration is strongly corroborated by the evidence of PW7 who just the evening before received the accused a customer who purchased some petrol from her. According to PW3 the deceased was engulfed in fire when she came out of her house. The post mortem report confirms that burns resulted from an open flame and even though the combustible fuel used was not identified through chemical analysis, the deceased herself said that a liquid was thrown at her before she was set alight. The extent of the burns on her body (67%) mostly superficial is suggestive of a wide spread of the combustible upon her person. It is unlikely that the fire could have consumed such a wide surface of her body without the aid of a flammable fuel.

15. The accused's defence that he was in his shamba all day is sorely tested by the dying declaration. Regarding his alibi, it is trite that an accused person who pleads an alibi does not assume the burden to prove it (see **Osiwa –Versus- Republic (1989) KLR 469** and **Ssentale –Versus- Uganda (1968) EA 365**). The burden of proving the prosecution case always lies with the prosecution. However, where an alibi is raised, the Court of Appeal held in **Karanja –Versus- Republic (1983) KLR 501** that:-

“in a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence or his alibi, if it amounts thereto at an early stage in the case, and so that it can be tested by those responsible for investigation and preventory suggestions that the defence was an afterthought”

16. PW4, PW5, PW6 and PW9 were some of the persons who visited the deceased at about 6.00pm on the material date and heard her declaration. In cross-examination of these witnesses the accused did not raise his alibi with them. In his own defence, there is no indication that he raised his alibi with the “mob” which confronted him at 5.00pm or the Assistant Chief when summoned. Besides, he states that in the cause of the day he had left the shamba to go home for lunch before returning to the shamba. The exact timings of the trips is not stated. The accused's alibi not having been canvassed earlier with witnesses

does sound like an afterthought.

17. Even then, the prosecution evidence in my view totally displaces the alibi proffered by the accused. It is not plausible in the circumstances of this case. The claim by the accused that he did not escape, like his co-suspect, is not by necessarily consistent with innocence in the context of this case, especially taken together with his unconvincing alibi. Despite PW7's evidence, the accused did not make any reference as to the purpose for the purchase of petrol on the previous day, or even suggest reasons why PW 7 would swear false testimony against him. Two men, including the accused purchased petrol on the eve of the attack of the deceased. Two men including the accused doused the deceased with a flammable substance and set the deceased ablaze. The fact that the accused stayed in the village while his co-suspect escaped in no way diminishes the strong prosecution evidence connecting him with the murder.

I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty as charged and convict him accordingly.

Signed thisday of.....2014 at Naivasha.

C. MEOLI

JUDGE

Delivered and signed at Malindi this 3rd day of March, 2015

SAID J. CHITEMBWE

JUDGE