



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 71 OF 2012**

REPUBLIC .....PROSECUTOR

VERSUS

PAUL KIMANI NJENGA.....ACCUSED

**JUDGEMENT**

**Background**

Paul Kimani Njenga, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The offence is alleged to have been committed on 4<sup>th</sup> September 2012 at Kamwembe Bar situated at Dagoretti Centre in Nairobi. The victim is Peter Gitau Kiarie, deceased.

I took over the hearing of this case following the transfer to another station of Honourable Lady Justice Florence Muchemi (Justice Muchemi). Justice Muchemi had heard seven (7) witnesses by the time she left. I have heard two (2) witnesses after which the Prosecution closed its case. With the consent of both parties the case proceeded before me from where Justice Muchemi had reached.

**Facts**

On 4<sup>th</sup> September 2012 at about 4.50pm, the accused and the deceased were in Kamwembe Bar in Dagoretti Centre taking *muratina* a local alcoholic drink. In the same bar were other patrons including PW2, Johnson Nguyai Kihuga, (Johnson) and PW6, Philip Gathua (Philip) as well as PW3, Margaret Nduta Mwai (Margaret) who was selling meat to the patrons. An altercation between the accused and the deceased occurred causing the accused to pour some inflammable liquid over the deceased and setting him ablaze using a match stick. The deceased on fire ran out of the bar burning while the accused attempted to escape. Some bar patrons chased and caught up with the accused while others assisted the deceased by putting out the fire. The accused was later handed over to the police while the deceased was taken to Kikuyu District Hospital and later transferred to Kenyatta National Hospital where he died while undergoing treatment. The accused was charged with this offence.

**The prosecution evidence**

In support of its case, the prosecution called a total of nine (9) witnesses. Three of the nine witnesses, namely Johnson, Margaret and Philip, were present at the Kamwembe Bar the scene of the crime. PW1, David Kiarie Njuguna (David), a nephew of the deceased was one of the relatives who identified the body of the deceased to PW5, Dr. Johansen Oduor (Dr. Oduor) who performed the post mortem. PW4, Kiarie George (Kiarie) arrived at the scene after the crime had been committed. PW7, Dr. Joseph Maundu (Dr. Maundu) examined the accused while PW8, Police Constable Stephen Karanja (PC Karanja) and PW9,

Inspector Moses Mwaniki Nderi (Inspector Mwaniki) both police officers from Dagoretti Police Post came into the picture after the matter was reported to them.

Johnson told the court that he was in Kamwembe bar about ten (10) metres from where the accused and the deceased were when he witnessed the two of them quarrel. He said he could not tell the cause of the quarrel. He also said the two fought. He said that the deceased stood to go away from the bar when the accused followed him and poured some liquid on him and set him on fire using a match stick. He said the accused ran away on seeing the deceased burning but he was arrested by members of public.

Philip was also in the same bar drinking on 4<sup>th</sup> September 2012 at about 5.00pm. He testified that he heard the accused insulting the deceased calling him a dog to which the deceased also called the accused a dog. After the insults the accused picked a white container from a green paper bag he had placed under the table and followed the deceased who had started walking away from the bar. The accused poured the liquid in the container on the deceased and lit him up using a match stick. He testified that the first match stick failed to ignite and the accused lit a second one which ignited and he set the deceased on fire. Philip further testified that the accused left the container which the witness checked and confirmed it had contained petrol.

Margaret was not a patron in the said bar. She was there on business selling meat to the patrons. Her evidence is that she was selling meat inside the bar at a table near the bar counter. She said the accused and the deceased were inside that bar seated on different tables but not far from each other. She testified that the accused left his table and approached the deceased at his table and pointed at him using his finger to which the deceased also pointed at him leading to a quarrel. After the quarrel the accused returned to his table and the deceased started to stand up intending to leave the bar at which the accused returned to the table where deceased was and told him "*you will not insult me again*". The accused had a polythene bag containing some liquid which Margaret said was thinner which is used to dissolve paint. He poured the liquid on the deceased and using a match stick set the deceased on fire.

Margaret further testified that the deceased ran out of the bar burning and the accused was prevented from escaping by the members of public. Some other members of public assisted the deceased by putting out the fire.

Dr. Oduor confirmed the death of the deceased. He testified that he performed the post mortem on the body of the deceased on 12<sup>th</sup> September 2012. He confirmed the cause of death as extensive burns covering 55% of the deceased's body.

### **The defence**

The defence offered one witness, the accused. He testified on oath and told the court that on 4<sup>th</sup> September 2012 around 4.00pm he was at Munga Bar in Dagoretti. He said he ordered three cups of *muratina* and one keg beer which he took. He denied having been at Kamwembe Bar the scene of the crime. He denied having met the deceased on 4<sup>th</sup> September 2012 or pouring some liquid on him and setting him on fire. He said he was assaulted by young men who are relatives of the deceased at a place between Kamwembe Bar and Munga Bar. He said the reason of the assault was a case against the deceased he had reported at the King'ong'o police post after the deceased had assaulted him and broke his eye glasses. He said that the last time he had met the deceased was in August 2012. He said he knew that the deceased had died but denied knowledge as to what had caused his death.

On cross examination the accused admitted that he used to see the deceased because they were neighbours and corrected his evidence that it was not true that he had seen the deceased last in August 2012. He said he thought the question was whether he had met the deceased face to face. He also admitted on cross examination that he knew the deceased had died because of burns but denied causing those burns.

### **Analysis and determination**

Murder is defined under Section 203 of the Penal Code as the killing of any person by an unlawful act or omission with malice aforethought. Murder carries a mandatory death sentence as set out under Section 204 of the Penal Code.

In a murder trial the prosecution bears the onus of proving the case and the standard of proof is that of proof beyond reasonable doubt. The prosecution must prove three main ingredients as follows:

- (i) That death has occurred and the cause of that death.
- (ii) The identity of the person who caused that death.
- (iii) Malice aforethought.

The death of the deceased has been confirmed by the evidence of Dr. Oduor who told the court that he conducted post mortem of the body of the deceased at the City Mortuary on 12<sup>th</sup> September 2012. The body was identified to him by relatives of the deceased including David who is a nephew. Dr. Oduor told the court that after examining the body he formed the opinion that deceased died as a result of extensive burns covering 55% of his body.

On the identity of the person who caused the death of the deceased, I have considered all the evidence by the prosecution. Of particular relevance to this issue is the evidence of Johnson, Margaret and Philip the three witnesses who were inside the bar where the deceased was set ablaze leading to his death. The three witnesses testified to seeing the deceased and the accused arguing before the accused poured some inflammable liquid on the deceased and set him ablaze.

I was able to pick some discrepancies in the testimonies of these three witnesses on what happened. Johnson testified to witnessing an exchange of words between the accused and the deceased in a quarrel. He also refers to a fight between them. He said that after the fight the deceased started walking out of the bar and accused followed him and poured some liquid which Johnson called paraffin on the deceased and set him ablaze using a match stick.

Margaret saw the accused pointing at the deceased with a finger and the deceased doing the same and both quarrelling. After this the deceased stood up to go away when the accused confronted him again telling him "*you will not insult me again*" and poured some liquid Margaret thought was thinner used to dissolve paint and setting him on fire using a match stick.

On his part, Philip testified that he heard the accused insulting the deceased by calling him dog and the deceased also calling the accused dog and telling the accused that his (accused's) wife was a prostitute. Philip said that after this exchange, the accused took a paper bag from under the table where he had placed it, removed a white container from the bag and poured some liquid on the deceased and set him ablaze using a match stick. Philip said that he confirmed that the liquid was petrol. These discrepancies however do not affect evidence that the accused confronted the deceased, followed him as he tried to leave, poured some inflammable liquid on his and set him ablaze. The discrepancies can be explained away since each person perceives events differently.

Despite these discrepancies, the evidence of the three witnesses who were present agree on material facts; that both the accused and the deceased were at Kambwembe bar on the material day; that an altercation ensued between them after the accused confronted the deceased; that deceased started walking away from the bar; that the accused picked some liquid from a paper bag he had and poured it on the deceased and set him ablaze using a match stick. Evidence of the three eyewitnesses as well as that of Kiarie also shows that the accused did not have a chance to escape from the scene.

I have considered this evidence and taken into account the fact that the time was around 5.00pm and therefore there cannot be any mistake that the accused is the person who confronted the deceased, started a quarrel with the deceased, followed the deceased as he attempted to leave the bar and set him on fire. He did not have a chance to escape. In my considered view the accused was properly identified and it

cannot be true as he stated that he was not at Kamwembe bar the scene of this crime.

There is the issue concerning the liquid poured on the deceased. Was the liquid paraffin, petrol or thinner as testified by the witnesses? To confirm what type of liquid was used it was vital to subject the same to forensic examination. This was not done as evidence shows. The police did not collect the samples of the liquid to determine what it was. However, from the witnesses' accounts, this court has no doubt in concluding that the liquid was inflammable and ignited on being lit causing 55% burns on the deceased's body as a result of which he died. The witnesses in my view are not experts in determining what type of the liquid it was. They probably based their conclusion either on sniffing the liquid or on the fact that it was flammable. Despite lack of analysis to determine the type of the liquid, this court has no doubt that it was a type of liquid that could ignite upon being set on fire. This court will therefore take judicial notice that a liquid that ignites upon being set on fire is inflammable liquid. I do not think this conclusion causes any prejudice to the accused person given that the Dr. Oduor confirmed the cause of death of the deceased was as a result of 55% burns on his body.

The last issue I want to address is the mental status of the accused at the time of committing this offence. Mens rea, the intention of an accused person in a murder trial, is everything. For without intention to cause death or cause grievous bodily harm, a charge of murder cannot stand. This is the malice aforethought defined under Section 206 of the Penal Code. This section provides that malice aforethought is deemed to be established when there is prove of any one or more of the following circumstances:

- (i) **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;**
- (ii) **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;**
- (iii) **An intent to commit a felony;**
- (iv) **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.**

As analyzed in this judgement, it is the accused who confronted the deceased resulting in an altercation with him after which the accused took a polythene bag he had come into the bar with. The bag had a container with some liquid in it. He followed the deceased as he was leaving the bar and poured the liquid on him. He then struck a match stick and lit the deceased. All the three accounts of Margaret, Philip and Johnson point to the fact that the accused had entered the bar carrying a polythene paper bag with a container which had some liquid; that he is the one who confronted the deceased and started insulting him; that an exchange of harsh words ensued; that the deceased stood up to walk out of the bar; that the accused picked the liquid and followed the deceased; that the accused poured the liquid on the deceased, lit a match stick and set the deceased ablaze. The deceased caught fire and started burning. Members of public managed to put out the fire but not before the deceased had sustained 55% of burns on his body. These extensive burns caused his death the following day while undergoing treatment at Kenyatta National Hospital.

When this eye witness evidence is compared to the defence of the accused, I find no other explanation than that the accused lied to the court that he was not at Kamwembe bar or that he did not see deceased on 4<sup>th</sup> September 2012. I observed the accused testify and his demeanor was defiant and in my view was lying to the court.

When I take the accounts of the three eye witnesses, Johnson, Philip and Margaret, it is clear to me that the accused attacked the deceased. Even when the deceased decided to leave the bar perhaps to avoid further confrontation with the accused, the latter followed him, poured liquid on him and set him on fire.

In my considered view, the accused's intention in pouring the inflammable liquid on the deceased, striking a match stick and setting the deceased on fire was clear: he intended to burn the deceased. It is my view that one does not pour inflammable liquid on another and strike a match stick and set the other on fire without the intention to either causing the death of or grievous harm to that person. This intention of the accused becomes apparent when his actions prior to his setting the deceased on fire are taken into account. My conclusion on this issue is that the prosecution has established that the accused person possessed the intention to cause the death of or grievous harm to the deceased.

Before concluding this judgement, I wish to address an issue that was raised by Mr. Onyango Agutu, counsel for the accused in his final submissions. He submitted that it cannot be determined what caused the death of the deceased, whether it was 55% burns on his body or negligence by the doctors who handled the deceased. Counsel submitted that the deceased was taken to another hospital first before his transfer to Kenyatta National Hospital and it is not clear what type of treatment was administered on him. Counsel cited **John Muia Muli v. Republic Criminal Appeal No. 96 of 1999** in support of his argument. In that case the Court of Appeal quashed a conviction after it ruled that it could not determine whether the deceased died as a result of the wound inflicted on him after the accused shot him on the chest with an arrow or was due to negligence by doctors.

I wish to distinguish that case with the case before me. In the **John Muia Muli case** above, the deceased had been hospitalized for eleven (11) days before he died. The cause of death in that case was cardio-pulmonary arrest secondary to penetrating injury on his left side of the chest resulting in pneumothorax (collapsed lungs). The deceased had contracted an infection while in hospital that exacerbated his condition. In the case before me the deceased died the second day as a result of extensive burns. Dr. Oduor told the court that the deceased's skin had been destroyed. The circumstances of these two cases are not similar and therefore the cited case does not assist the accused. In any case the accused told the court that he was not even at the scene of crime.

My careful analysis of all the evidence leads me to the conclusion that the prosecution has proved all the ingredients of murder beyond reasonable doubt. The deceased died as a result of burns resulting from the actions of the accused who lit him up after dousing him with some inflammable liquid. The accused was positively identified by three eye witnesses and my opinion after considering all the circumstances is that he possessed malice aforethought. I therefore reject his defence that he was not at the scene and did not meet the deceased that day as pure lies. I find him guilty of the murder of Peter Gitau Kiarie as charged and convict him accordingly. I make orders accordingly.

**Dated, signed and delivered this 7<sup>th</sup> day May 2015.**

**S.N. Mutuku**

**Judge**

**In the presence of:**

Ms Florence Magoma, prosecution counsel

Mr. Onyango Agutu, defence counsel

Mr. Paul Kimani Njenga, the accused

Mr. Daniel Ngumbi, Court Clerk