



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE(MURDER) NO. 29 OF 2009

REPUBLIC.....APPLICANT

VERSUS

J M O.....RESPONDENT

JUDGEMENT

Introduction

1. The accused person herein J M O was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. Particulars of the offence are that “On the 22nd day of April, 2009 at [Particulars Withheld] in Gucha south District within Nyanza province murdered J N M. He pleaded not guilty.

The facts

2. The facts of the case are that the accused is the husband of the deceased. On 15th March 2009, the accused and the deceased were at home, with the deceased in the kitchen preparing supper while the accused was in the main house. The couple operated a diesel driven posho mill. On this particular day, the posho mill engine could not start; the diesel was kept in the main house. The diesel was also used for lighting.
3. At about 8.00 p.m., the deceased went to the main house to add diesel to the tin lamp which she was using in the kitchen. Also in the home that evening were the couples 2 children aged 11 and 8 years respectively. The children were outside the house at the material time.
4. Suddenly the 2 children heard the deceased screaming, as she also asked the accused to stop pouring diesel on her. The children also heard the accused and the deceased quarrelling over some salt which had been left behind by people who had been splitting timber in the compound. Immediately there was an explosion in the house.
5. Both the accused and the deceased came out of the house. The deceased was on fire. The accused tried to put out the fire and in the process he received burns on his hands and mouth. The accused then disappeared from the scene. Neighbours who had heard the screams rushed to the scene and assisted the deceased to Kisii Level 5 Hospital where the deceased was admitted for 2 days before she died.
6. During investigations, a jerrycan was sent to the Government Chemist for analysis and was found to contain diesel. The prosecution maintained that by pouring diesel on the deceased, the accused intended her death.

The Prosecution's case

7. The prosecution called seven (7) witnesses in support of their case whereas the accused person gave his own version of the occurrences of the 22nd day of April, 2009 but called no witnesses.
8. **PW1 DR. WILLING OMWOYO** a pathologist qualified from Russian Federation Chuvash State University with a Masters' degree equivalent of MBCHB and who has worked as a medical officer at Kenyatta National Hospital, Machakos Hospital and Ndhiwa conducted a post mortem on **J N M** on the 29th April, 2009 at **TABAKA MISSION HOSPITAL**. The body was identified to him by **T C O (PW7)** and **A O M (PW6)**.
9. His findings were that the deceased suffered 3rd degree burns involving the left and right articular region at 7%, 3rd degree burns on the chest abdomen and back at 36%, 3rd degree burns involving both humerus at 18%, 1st degree burns to the left femur 7%. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to post burns sepsis anaemia. He filled and signed the post mortem report which he produced and is marked as **Exhibit.1**.
10. He told the court that he was also requested to examine the accused as to his mental status on 28th April, 2009 which he did and found the accused as mentally stable and fit to stand trial. He filled a p3 form and signed it and produced. The same was marked as exhibit.2.
11. **R K M PW2** the daughter to the deceased told the court that on the 15th March, 2009 at about 8.p.m. she was at home but in a different house. She discovered that her mother was injured when she went to their house. She said that she did not talk to her mother but that she (her mother) was alive though she was burnt.
12. PW2 stated further that her father the accused was present at home but she did not talk to him but only heard him talk about how the deceased was burnt accidentally. Her father had bought diesel for posho mill and when he started the engine it failed to start. The posho mill was located in their land near their house about 30 metres.
13. On cross examination PW2 testified that she did not see the person who injured the deceased. That there was no kerosene in their house but instead there was diesel which was in the posho mill. She also said that occasionally, they used diesel to light the tin lamps. She also told the court that she only found her mother injured outside the house, that she did not see any fire. She also testified that she was with her brother but the father was a sleep since he was drunk.
14. **P.C. SAMUEL KANJA NO. 42463 PW3** told the court that he was instructed by the then acting OCS Sgt Dennis Mwangoma to accompany him to Nyaramba village after he had received a report from OCPD Gucha. They proceeded to the accused's home where they found the scene disturbed. He observed that the 3 room mud walled house had no evidence of fire but that the accused was suspected to have poured diesel on his wife on 15th March, 2009 and she died on 21st April, 2009 while undergoing treatment at Kisii level 5 hospital.
15. He drew the sketch plan of the house, proceeded to Nyamarambe Administration police camp where the accused was being held re-arrested him and took possession of a 5 litre plastic container containing liquid suspected to be diesel. They then escorted the accused and the exhibits to Etago Police Station and commenced investigations. On the 29th April, 2009 he witnessed the post mortem on the body of the deceased conducted by Dr. Omwoyo at Tabaka Mission Hospital mortuary. After the investigations the accused was charged with the offence herein. He says that he escorted the exhibit to government chemist Nairobi. Later on he received the exhibit plus the report but he only produced the sketch plan of the scene which was marked as **Exhibit.1**. He told the court that the distance between the posho mill and the 3 roomed mud house of the accused was 12 metres and that the posho mill belonged to the accused person and it was operational. He produced the container with the liquid that was handed to him and it was marked as exhibit.2.
16. On cross examination PW3 confirmed that there was no evidence of fire at the scene, as they went to the scene of crime one month after the incident. He further stated that he was one of the investigators and that the information they received was that the accused had poured diesel on his wife and set her ablaze. That the information was confirmed from the accused's children although he did not say so in his statement. He confirmed that he re-arrested the accused who also had injuries all over his body, injuries allegedly suffered by the accused as he tried to extinguish the fire on his wife.

17. **PW4 SGT. DENNIS MWANGONA NO.59556** attached to Nyamaiya police station but who was previously attached to Etago police station told the court that he jointly with PW3 carried out investigations in this case.
18. He said that on 22nd April, 2009 at about 2.00p.m. he received a telephone call from his OCPD to go to Nyamarambe DC's office and collect one J M who had been arrested by AP's at the D.C's office. They proceeded there and established that J M had been burnt by his wife J N on 15th March, 2009. They also proceeded to the homestead of the accused and established that the accused had picked a quarrel with his wife on 15th March, 2009 and during the fracas the accused poured inflammable liquid later discovered to be diesel and the wife was seriously burnt and during the incident the accused also sustained some burns. The deceased passed away on 21st April 2009. According to PW4, they recovered a jerry can with half full liquid (diesel). They then re-arrested the accused took him to Etago police station and charged him with the offence. That the incident was not reported to the police until after the death of the accused's wife. He also stated that the scene was disturbed due to the long period it took for police to visit it. He identified the accused person in the dock.
19. On cross examination, PW4 told the court that they went to the scene a month after the incident. That the incident was never reported to the local administration. The container which had diesel (Exhibit.2) was given to them by family members who witnessed the incident and that they acted on information received from various sources.
20. **PW5 D N M** from Nyamarambe and a student at [Particulars Withheld] Secondary School is a son to the deceased and the accused person herein. He told the court that on 15th March, 2009 at around 8p.m. while he was in his sleeping house reading he heard noise from his parent's main house. He came out and saw both his parents engulfed in fire and ran to call his aunt so that they could take them to hospital. On coming back with his aunt they found a crowd had gathered in the compound. They took the deceased to Nduru District Hospital using a wheelbarrow and on the way he says he was being forced by the villagers to say that it was his father who had burnt his mother.
21. From hospital they went to Nyamarambe D.O's office and again he told the court that he was forced to say that it was the accused who had burnt his mother. He recorded a statement at Etago police Station in which he stated he heard his mother and the accused quarrel over salt. PW5 was declared a hostile witness after the state counsel Mr. G. Gitonga made an application to that effect because he (PW5) was saying what was contrary to what he stated in his statement. The state counsel was allowed to cross-examine PW5 on the statement.
22. On cross examination by the state counsel PW5 told the court that he was not lying to protect his father. He said that he believed in God and reiterated that he recorded his statement at Etago police station and not Nyamarambe. That his mother had flames all over her body while the father was holding her hand. He told the court that it was not possible that his father could have been holding his mother's hand when one was engulfed in flames. He added that the fire was not started by his father and lastly that he did not visit his father in remand.
23. On cross- examination by Mr. Bigogo for the accused PW5 told the court that he escorted his mother on a wheel barrow, but the father did not accompany them and he was not even in the compound. His mother was talking and she told him that as she was putting diesel into the tin lamp, in the bedroom the fire burnt her together with the accused who was sleeping and they therefore ran out together engulfed in fire.
24. PW5 also testified that his uncle T C O had also recorded a statement saying that as the deceased was adding diesel into her tin lamp, it burst into flames and her clothes caught fire and she was helped by the accused to get out of the house where the fire was extinguished. He told the court that he never visited his mother in hospital but his brother did and that he did not witness his father burn his mother and lastly that the statement was recorded by the police officers as he talked.
25. **PW6 A O M** from Nyamarambe told the court that the accused and the deceased were his parents and that on the 20th April, 2009 at around 2p.m. at TABAKA MISSION HOSPITAL MORTUARY, he identified the body of his mother to the doctor who conducted the post mortem examination.
26. On cross examination by Mr. Bigogo for the accused, PW6 told the court that the accused was a responsible, loving, caring and innocent father and that on 15th March, 2009 he was not at home

but was in Nairobi Aviation college taking hotel management course.

27. **PW7 T C O** from South Mugirango told the court that the deceased was his sister in-law as she was married to his brother. He testified that on 15th March, 2009 he was on leave and was at home. He was called by his brother P O who told him that something had happened at home.

P O was calling him from Nyamarambe. He said that he then turned down the radio and immediately heard noise from his brother's house (accused's house). He testified that he went to the accused's home and found the deceased burnt. He assisted her to Nyamarambe District Hospital, but at the gate of the hospital he was stopped by the Police and together they returned home as the sister in-law was being attended to. At home the police wanted to know what had happened. They found a container in the sugar plantation which contained nothing and it was taken away by the police. He says that the deceased was referred to Kisii though he took her to ICU Kisumu the following day. The deceased all along could not talk.

28. After 2 to 3 weeks the deceased started talking then sometime in April, 2009 when he (PW7) went to visit her at New Nyanza General Hospital she (deceased) requested for bananas and eggs and she told him that the accident happened as they (accused and deceased) were pouring diesel in the tin lamp when it exploded and that according to her it was an accident.

29. PW7 also testified that he went back to Nairobi but came back after 3 days and organized a mini harambee to help defray the hospital bill. But in the evening he was called back to the hospital and was informed that the deceased condition had deteriorated. He went and picked her and took her to Kisii level 5 hospital where she was admitted. The following day he was informed by the deceased's daughter who was looking after her in the hospital that she had passed on. He emphasized that in April, 2009 the deceased told him that on the day of the incident they had quarreled over salt though by the time they were pouring diesel in the tin lamp the quarrel was over. He told court that he was not present when the incident occurred. On cross-examination he repeated what he had stated during the examination in chief.

30. After several adjournments the 3 remaining witnesses were not availed, thus the prosecution was forced to close its case after the 7 witnesses had testified.

Case to Answer

31. Mr. Bigogo who initially indicated on 24th January, 2012 that he wanted to make oral submissions on no case to answer left the matter to court for the ruling on whether the accused person had a case to answer. The court after carefully evaluating the evidence of the 7 prosecution witnesses was satisfied that the prosecution had established a prima facie case requiring the accused person to be put on his defence and accordingly the accused was put in his defence. The provisions of section 306(2) of the Criminal Procedure Code were explained to the accused by the court and it was left upon the accused to indicate through his counsel how he intended to defend himself. On the 19th December, 2013 accused through his counsel informed the court that he would give an unsworn statement and he was not going to call any witnesses.

Defence Case

32. The accused gave an unsworn statement in Ekegusii with Mr. Bibu interpreting in English. He told the court that he hailed from Nyamarambe in South Mugirango. On the 15th March, 2009 a Sunday as he re-calls at around 8.00p.m. he was the 1st person to get to his home and he went to sleep. At 8.00p.m. his wife J came to put paraffin in the lamp. He testified that on that day they did not have paraffin but had diesel for the posho mill. That occasionally when there was no paraffin in the house she could use diesel as alternative paraffin. That on that day while the lamp was alight she took the diesel and put in the lamp and the lamp exploded and a fire caught her.

33. He testified that he woke up and found that she was on fire. He then took the 5 litre jerrican with the diesel and threw it outside. In the process as he tried to assist the deceased, he says he was burnt on his hands and mouth (he showed the court scars on both hands that were more pronounced on the right hand at the wrist and also on the month). That in an attempt to put off the

- fire he took some water in a 20 litre jerrycan and poured on her. That the children heard the commotion and joined them outside the house. Both of them had been burnt.
34. He further told the court that neighbours also came and took them to hospital for treatment. That his wife was taken to Kisii Level 5 hospital while he was treated at Nyamarambe but afterwards was taken to Tabaka Mission Hospital. While at Tabaka he was informed that his wife had been removed from Kisii level 5 to Russia hospital in Kisumu and that she had passed on while at Kisii. After getting the news the police went to Tabaka hospital and arrested him. And that was his testimony.

Final Submissions and Analysis of Evidence

35. At the close of the defence case Mr. Bigogo submitted that the evidence of pW2-PW3, PW5 and PW7 supported the accused's case and that he had no further submissions to make.
36. From the evidence of PW2 it appears that the deceased had the habit of using diesel when there was no kerosene in their house to light the tin lamps. It is also evident from her testimony that there was diesel in that house since the father (accused) had a posho mill which used diesel. She did not see any fire that night, she found her mother (the deceased) outside their house. She did not see the person who injured her mother.
37. PW5 was also at the scene a few minutes after the incident. He saw both his parents engulfed in fire and he ran to call his aunt so that they could take them to hospital. On coming back they found a crowd had gathered. The deceased was taken to Nduru District Hospital using a wheel barrow. He told the court that he heard his mother and the accused quarrel over salt. He also told the court that it was not possible that his father could have been holding his mother's hand when she was engulfed in flames and that the fire was not started by his father the accused herein. On cross examination PW5 told the court that his mother was talking at the time when he found her and the accused outside the house and that she told him that as she was putting diesel into the tin lamps in the bedroom there was an explosion which burnt her together with the accused who was sleeping and they both ran out engulfed in fire.
38. PW7 told the court that he was on leave on that fateful night and was at home when he was called by his brother P O who told him that something had happened. He turned down his radio and immediately heard noise from his brother's house (accused's house). He went to the scene immediately the incident occurred and found the deceased burnt. He was among the people who took the deceased to hospital. He confirmed to court that there was a container with diesel which the police took away. He told the court that when the deceased started talking sometime in April, 2009 when he (PW7) went to visit her she told him that the accident happened as they (accused and deceased) were pouring diesel in the tin lamp which exploded. He also mentioned the issue of the quarrel over salt and stated that according to the deceased, that by the time they were pouring diesel in the tin lamp the quarrel over salt had ended.
39. The police have confirmed to the court that they did not do much in terms of investigating the incident herein. **P.C. SAMUEL KANJA NO. 42463 (PW3)** told the court that they proceeded to the accused's home long after the incident. He observed that the 3 roomed mud walled house had no evidence of fire but that the accused was suspected to have poured diesel on his wife. He drew the sketch plan which he produced as an exhibit and told the court that they recovered a 5 litre plastic container containing a liquid suspected to be diesel which they took to the government chemists Nairobi but he did not produce the report from the government chemist.
40. On cross examination PW3 told the court that they went to the scene of crime one month after the incident. This was also confirmed by PW4 **SGT DENNIS MWANGONA NO. 59556** who also investigated the incident herein. He told the court that the incident herein was not immediately reported to the police but the same was reported after the death of the deceased. He stated further that that the scene was disturbed due to the long lapse of time between the occurrence of the incident and the police visit.
41. The accused person who gave unsworn testimony told court that he was the first one to get home on that fateful night of 15th March, 2009. That when his wife (deceased) came home she went to put paraffin in the tin lamps but there was no paraffin. It happened that on that day they had diesel for the posho mill and according to him occasionally when there was no paraffin in the house the wife could use diesel as alternative paraffin.

42.He told the court that on that day while the lamp was a light, his wife took the diesel and put it in the lamp and the lamp exploded and fire caught her. He woke up found she was on fire, took the 5 litre jerrican which had diesel and threw it out of the house. In the process of trying to assist her, his hands and mouth were burnt. He showed the scars he had to the court.

Findings

- 43.The prosecution case herein rested on circumstantial evidence as none of the witnesses saw the accused pouring diesel on the deceased. In a case depending entirely on circumstantial evidence the court must before deciding upon a conviction, make a finding that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt on circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inferences. See **MWANGI –VS- REPUBLIC [1983] KLR 522.**
- 44.I am alive to the fact that the deceased died a month after the incident. I am also alive to the fact that the police commenced investigations into this matter a month after the incident. According to the police, they arrested and charged the accused person on suspicion that he had poured diesel onto the deceased. Suspicion, no matter how strong can never be a basis for a conviction. I also find that the chain of circumstances in this case do not point at the accused person as the culprit in this case. It is likely as the accused person says that the tin lamp exploded as the deceased tried to fill it with diesel while it was still alight. In that case, the accused cannot be held accountable for the explosion from which the deceased eventually died.
- 45.PW2,PW5 and pW7 told the court that before the deceased passed on she had told them that her burns were caused by an accident. I want to believe that the whole incident was an accident and that the accused herein tried his best to save his wife but unfortunately she succumbed to the burns. It cannot be said that the inculpatory facts in this case are incompatible with the innocence of the accused. Those circumstances make the inference of guilt on the part of the accused very weak.
- 46.In the premises, yes the prosecution has proved the death of the deceased. However they have not proved that the deceased was murdered and that she was murdered by the accused. I resolve the doubt as regards the circumstances of the deceased's death in favour of the accused with the consequence that I find the accused not guilty on the information preferred with the result that the accused is acquitted and set free under the provisions of **Section 322 (1)** of the **Criminal Procedure Code.**
- 47.Unless he is otherwise lawfully held, the accused person shall be released from prison custody forthwith.
- 48.Orders accordingly.

DATED and delivered at KISII this 8th day of May, 2014

R.N. SITATI,

JUDGE.

In the presence of:-

Mr. Ochieng (present) for the State

Mr. S. Ondari for Bigogo (present) for the Accused

Mr. Bibu - Court Assistant