



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**CRIMINAL DIVISION -NAIROBI**

**REPUBLIC -VS- NICHOLAS MWENDWA MUTUKU**

**HIGH COURT CRIMINAL CASE E030 OF 2020**

**RULING ON CASE TO ANSWER:**

1. The accused was charged with murder contrary to section 203 as read with :-

***On the night of 26<sup>th</sup> September 2020 at Mihango estate Kayole subcounty within Nairobi the accused murdered Kelvin Maundu .***

2. The accused pleaded not guilty.

**THE PROSECUTION'S EVIDENCE**

3. Prosecution called 8 witnesses who testified as follows .

4. Pw1 Martin Mwendwa Mutua a resident of Mlolongo stated that he does casual jobs and stated that he

stayed in the same plot with the accused which was a storey building and his house was at the 3<sup>rd</sup> floor while the accused lived on the 2<sup>nd</sup> floor.

5. That the accused lived Kelvin Maundu, the deceased and another mzee he knew as *fathee*.
6. That on 27/9/2020 he was at his house and it was about 7:00pm, that the house was a single room . The accused was with the deceased and Fathee, the deceased had been burnt on the face and he was sleeping on the mattress , the accused and fathee was on the seat . That kelvin was burnt on the face and chest.
7. That when the deceased saw him he said “*bro nipeleke hospitali walikuwa wanataka kunimaliza .*”
8. Pw1 went back to his room. The deceased was taken to Mama Lucy Kibaki hospital, the sister came and brothers came. That the sister is called Ngina and she came with the brother called Denis .That they stayed for a short while and left with Ngina, Denis and another sister. That *fathe* and Nicholas left earlier.
9. That his cousin called him at 2:00pm and told him that Kelvin passed away , pw1 went to the hospital ,

and they also went to Kayole police station where they reported the death.

10. That Kelvin had stayed with the accused for 1 month.
11. He stated during cross examination that he had known the accused and the deceased for a long time, and that he had stayed at the plot 4 years. That the accused and the deceased were his cousin.
12. That the door was not locked that day when he went to the accused house.
13. He stated that the deceased never talked he was taken to hospital and that the deceased sister's number was given to them when they reached the hospital. That they took a matatu and they dropped at Bee centre and walked to mama lucy hospital which was about 500 m away. That the house was about 5 km from Bee centre .
14. That he was surprised when he saw he that the deceased was burnt .That the accused and *fathee* had been sleeping .He stated that the deceased told him that they wanted to kill him.
15. PW2 No 235260 Inspector Daniel Musembi crime scene accompanied Police Constable Wachira to the

scene at Kayole at Mihango state and thereafter Mama Lucy . That the incident was at room No .16 and that there were two room there, one room was unoccupied, other had signs of occupation and had been partly burnt.

16. He took general and close views of the deceased body, the deceased was wearing clothes, the closer views show the burns and he also took photographs of the room. He produce the report dated 28/9/2020 and 7 photographs.

17. He was cross examination and he stated that there was no sign of commotion in the house.

18. That he visited the scene 28<sup>th</sup> while the incident was on 27<sup>th</sup>, there was possibility of tampering with the scene .That there was smell of paraffin although they did not recover any of it. There were charred pieces of clothes and there no other sign of burning. The carpet was on the other room with a cupboard and bed .That there was no sign of struggle in the vacant room save for the smell of paraffin. The partially burnt clothes were in the other room. He did not take photos of the whole room.

19. He stated during reexamination that commotion could be seen where items are misplaced.
20. Pw3, Denis Muinde is the brother of deceased and also cousin to Pw1, he identified the deceased body at the hospital and stated that he saw body injuries on the deceased chest and face.
21. He said that Pw1 did not tell him anything and that he did not hear the deceased talk. That the deceased was with Martin for a longer period.
22. Pw4, Stephen Tukei from the government chemist referred to the government analyst report dated 23/7/2021. He stated that on 2/10/2020 he received exhibits from No. 98830 Police Constable Patrick Wachira .The exhibits included a blue white striped shirt, grey t-shirt, purple jacket with red and white spots and he was to ascertain traces of fire accelerants in the items.
23. He found diesel which is a highly inflammable petroleum products in the items .He produced the report as exhibit 3 and the exhibit memo form as exhibit 4.

24. He was cross examined and he stated that exhibit A3 in the khaki bag ,the purple jacket with white and red spots had been removed from the deceased at the morgue while A4 were remains collected from room. That the jacket had no burnt parts.
25. That diesel is a highly flammable petroleum product but kerosene is more flammable.
26. Pw5, Dr. Onwendo Muthui also from government chemist referred to exhibit memo and blood samples, stomach contents, kidneys and liver with the deceased name. He was to examine the presence of toxicity of any chemically toxic substance. He did full screening which showed negative results on all exhibits. He produced the report dated 3/8/2021.
27. He was cross examined and he stated that blood test is done where carbon monoxide is inhaled, the test was negative in this case.
28. Pw6, Jeremiah Okwaro Abwire a lorry driver from Kayole and also the caretaker of the plot which was at Mihango. He stated that the accused was a tenant of Door no. 16 on the 2<sup>nd</sup> floor. That he was at the plot on 26/9/2020 at 10:00 pm when he met Maundu

who was going outside the plot .Pw6 was outside helping wife at her vegetable kiosk which was on ground floor. He greeted him and that it was during Covid 19 when there was curfew .That Maundu said that Nicholas Mwendwa asked him to buy beer, Maundu went outside the plot while he went to his room.

29. He testified that later that night he heard them open the gate as they were speaking in Kamba and that they climbed the stairs.

30. The following day in the early morning hours he went to buy goods in the market, that the accused had arrears of Ksh 2000/= and he went to room at around 11:00am, that the door was open and there was a strong smell of kerosene. That no one responded and he went to Martin's house which was upstairs. Martin was their other friend and he inquired where Mwendwa was.

31. That Martin told him that Mwendwa had burnt Maundu was burnt and Maundu was taken to Mama Lucy Kibaki hospital .In the evening he was told that Maundu had passed away.

32. That shortly thereafter, officers from Directorate of Criminal Investigations came to inspect the house and also took photographs. He saw a broken stove and burnt mattress and that Maundu's clothes were burnt .That they managed to trace Mwendwa who had a bag and muguka .He was at corner mbaya in Kayole which was 10 minutes from the plot.
33. That they took him to Matopeni police station .That Mwendwa had rented the house and he paid ksh 2500/= .He identified the rental agreement signed on 29/9/2020 and testified that the accused paid ksh 5000/= as deposit and rent which was paid at equity bank landlord into the account .The accused would pay rent and give him the receipts. He identified the agreement and receipts as Pmfi **8 (a) and (b).**
34. Further that they had commotions during their stay and neighbours would calm them down .That one mzee also stayed with them and that the three of them had been together that day .PW6 identified the accused at the dock.
35. He stated during cross examination that the accused had been with deceased for 1 month and

had been with mzee for 2 weeks, he saw Mwenda use the keys .Pw6 would be back at 4:00pm after his driving job. That the plot had single rooms and each floor had 8 rooms. He stated that he did not hear any commotion and that he only came to know when he asked for rent , Martin did not say that he heard commotion that night .He was referred to his statement and noted that *he peeped the room and immediately saw kerosene on the floor* . That he did not indicate in the statement that Martin told him that they burnt Maundu. He admitted that he did not witness the incident.

36. That the accused was found seated with a bag with cloths and that he was chewing muguka , the accused relatives were also reluctant to arrest him. That the incident occurred at the plot where he was a caretaker and therefore he took him to police .That the accused was taken to the station with his paper bag with clothes and that he was to report the case instead but he was escaping.

37. That the photographs were taken before the arrest. That he never swept Kerosene on the floor

and he did not know if the officers took photos of the kerosene.

38. He was reexamined and he said that Martin had told him that the deceased had been taken to hospital and also about the death. That he took the DCI officers to the house .Lastly that he never saw mzee again and that Martin and his aunt were reluctant to arrest him.

39. On 4/3/2025 directions were taken under Section 200 of the Criminal Procedure Code where the accused chose the matter to proceed from it reached.

40. Pw7 No. 98830 Corporal Patrick Wachira Muriuko who was duty on 27<sup>th</sup> stated they received the report and that they went to scene. That they found that Kelvin Maundu had burnt wounds on the leg, on his face and chest. That Maundu called Martin Mwendwa to take him to hospital .That Martin Mwendwa recorded his statement and the accused was arrested by the public that night who brought him to the station. He was interrogated and the caretaker gave out the tenant agreement where the accused rented room No.16 on 2<sup>nd</sup> floor.

41. That they found the deceased clothes , his short had been completely burnt .He produced the short as exhibit 4 , the t-shirt which smelt petrol as exhibit 5 , the jacket was produced as exhibit 6, the tenancy agreement produced as exhibit 7 , the government analyst report as exhibit 8 and the accused mental assessment report dated 5/10/2020 was produced as exhibit 9
42. He stated that they found the jacket at Mama Lucy Kibaki hospital mortuary and that it smelt petrol.
43. He was cross examined and he stated that he did not know that the deceased and the accused were related .That the accused married *fathe's* daughter. He admitted that did not visit Masii and that he did not interrogate the neighbor. Further that he did not know whether Martin was among those who brought the accused to the station. That the accused did not say that he was fixed by Martin and *fathe* . That he visited the place , the house had 2 rooms .One had a sofa and mattress and there was water on the floor.

44. That *fathe* came seeking for a place to sleep. That there was no report or claim of injuries when the accused was brought to the station.
45. When the deceased was found he was burnt and the accused was the one who rented the house and he was in the house. The house had things scattered all over the house. That Martin said that he took the deceased to hospital. That the caretaker did not state that there was fire at the place.
46. Further that clothes were taken to the government chemist and they were found to have diesel. The accused, the deceased and *fathe* worked and lived together. and he did not know if they had problems and whether they were drunk. That the fire was at the deceased corner. Lastly that he tried to look for *fathe* but the name and identity or phone numbers were not found, he also did not his daughter.
47. Pw 8 Dr Charles .K. Muturi the pathologist from Mama Lucy Kibaki hospital referred to the postmortem dated 28/9/2020 with findings that the deceased died while being treated, he also had clothes on. That the deceased suffered 2<sup>nd</sup> degree

burns on the left side of the face, on the skull and chest regions, the abdomen, right arm and there was swelling on the arteries.

48. The deceased lungs and brain was congested. The cause of death was skin burns open fire burns, toxicology was also pending.

49. He was cross examined and he said that he did not find any drug or medicine or alcohol on him. That he did not examine the nails to check defensive marks.

50. Parties filed written submission on case to answer.

### **THE ACCUSED SUBMISSIONS.**

51. The accused submits that Pw1 and Pw6 evidence was contradictory. That there was no commotion on the night except for the evidence of diesel found on the deceased clothes. That the house did not have diesel or petrol and no container was recovered. That there was nothing to connect the accused to the death. Further, that there was no allegation of disagreement or confrontation that night.

52. That Pw1 and pw6 claimed that deceased said the accused burnt him. Pw6 did not confront the accused .The deceased words to Pw1 were not repeated to relative who came to the hospital or as the deceased was taken to hospital. That there would be confrontation and reports to the police.

53. There was no evidence that the deceased was repulsive or fearful of the accused.

54. The accused further submits that the evidence was inconsistent and that the investigating officer said that the deceased died on the scene while others testified that he died while undergoing treatment. That Pw8, the doctor did not indicate that tranquilizers or sedators were administered to the deceased .Therefore the deceased was in control or all his faculties and there were no defense injuries on the deceased body.

### **THE PROSECUTION'S SUBMISSIONS.**

55. The prosecution refer to the evidence on record submit that the deceased legs and upper body was swollen. The evidence was corroborated and the clothes given to the government chemist smelt petroleum product and heavy smell of kerosene.

56. That toxicology tests ruled out poisoning but the cause of death was proved to be burns.
57. The prosecution submits that malice aforethought was proved by setting the person on fire and the inherently violent manner of death demonstrated the intention to kill or cause grievous harm.
58. The accused was identified by the caretaker who testified that the deceased said the accused sent him to buy beer. The accused was with the deceased before the death and the chain of events places him in the *locus in quo* .
59. Further that Pw1 found the accused, the deceased and father in the same room in the morning when the injuries were discovered.

### **ANALYSIS & DETERMINATION.**

60. **Section 306 of the Criminal Procedure Code** provides that:-  
***“When the evidence of the witnesses for the Prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of the several or anyone of the several accused committed the offence***

***shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defense may desire to submit, record a finding of not guilty."***

61. At this stage the court is called upon to determine whether the accused should be placed on his defense. The burden of proof is on the prosecution to prove *prima facie* case against the accused.

62. Such a case comprises evidence that requires a rebuttal from the accused. In **Republic -Vs- Abdi Ibrahim Owl [2013] KEHC 2122 (KLR)** the court defined the a *prima facie* case as :

***"'Prima facie' is a latin word defined by Black's Law Dictionary 8th Edition as, "sufficient to establish a fact or raise presumption unless disapproved or rebutted". 'Prima facie' is defined by the same dictionary as "the establishment of a legally required rebuttable presumption."***

63. This was well explained in the case of **Ramanlal Trambaklal Bhatt-Vs-R (1957) E.A 332 at 335,**

where the court of appeal held that:-  
***“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution’s case, the case is merely one in which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defense is made, but rather, hopes the defense will fill the gaps in the Prosecution case.....there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defense”. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense”.***

64. The prosecution’s evidence must meet the threshold and should be able to convict the accused person where a defense is not made. Credibility of

the evidence or weight is not in issue, the court looks at some reasonable amount of evidence which requires the defense to give an explanation.

65. I have considered the oral testimony of witnesses and documentary evidence adduced in this case. The prosecution witnesses also presented photographs of the scene and the government chemist reports.

**66. Section 203 of the Penal Code** provides for the offence of murder. The elements of the offence as discussed in case law are listed as: death as a result of unlawful cause, the identification of the perpetrator and the perpetrator had malice aforethought. Refer to the case of **Antony Ndegwa Ngari v Republic [2014] eKLR**).

67. The prosecution's evidence was that the accused and the deceased were related and that they had shared a room together with an old man called fathe.

68. Pw1 was a neighbour, relative and also friend and he lived at the 3<sup>rd</sup> floor while the accused and the deceased lived at the 2<sup>nd</sup> floor of the building . Pw6 was the caretaker , he corroborated pw1's

evidence on the accused and deceased residence at the time of the offence. He stated that the accused rented the room No. 16 and paid Ksh 2500 as rent. The rent agreement and receipts were produced to this end.

69. Pw1 testified that he had visited the accused house when he found the deceased sleeping on a mattress and noted he had burns.

70. The accused and *fathe* were at the house, the deceased told him the words  
“ **bro , nipeleke hospitali walikuwa wanataka kunimaliza**” At page 23 of the proceedings .

71. The Accused person contends in submissions that these words were not repeated at the hospital or on the way to hospital. The Accused was not confronted or investigated.

72. The Court of Appeal in ***Festo Wandera Mukando v. R.*** [1976-80] 1 KLR 1626, 1631 where Trevelyan and Chesoni Judges of Court of Appeal held inter alia that :-

73. “**[W]e were once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can**

***prove embarrassing to the Court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the Court should no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then it is an end to the case or the count or counts concerned.”***

74. A dying declaration is provided for Section 33 of the Evidence Act where statements by deceased persons are admissible evidence:-  
Section 33 of the Act enacts that:-

***33. Statement by deceased person, etc.,  
When Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court***

***unreasonable, are themselves admissible in the following cases—***

***(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.***

75. The last words of the deceased on the occurrence of an offence or an event are admissible evidence where the legal evidential threshold is met.

76. In the case of ***Aluta -Vs- Republic [1985] KLR 543 citing Okale -Vs- Republic [1965] EA 556*** the Court held that at page 547 paragraphs 5-10 thus:

***“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels’ speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.***

**77.** Further, the court must be certain that the deceased was accurate in his statement and that he was not mistaken on the identity of his assailant. In the case of **Jasunga s/o Okumu versus Republic (1954) 21 E.A.C.A page 331** cited by the High Court in **Republic -Vs- James Githinji Wamani [2020] eKLR .**

**That:**

**“It is not a rule of law that, in order to support a conviction, there must be corroboration of a**

dying declaration (R. v. Eligu s/o Odel & Another 1943) 10 E.A.C.A 90; re Guruswami (1940) Mad. 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused... But it is, generally speaking, very unsafe to base a conviction solely on a dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. R v Said Abdulla, (1945) 12 E.A.C.A 67; R v Mgundwa s/o jalo and others, (1946) 13 E.A.C.A 169, 171). In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased

**could not have been mistaken in his identification of the accused. “**

78. Further that:-

**“The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was unacknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (Waugh v The King, (1950) A.C 203) ... It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased**

**wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to**

**a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).”**

79. Whereas the deceased statements to Pw1 was not corroborated, I still find that this court will take time to test the accuracy of the evidence and make appropriate conclusions of law and fact.

80. Having overhaul the evidence of the prosecution , I find that the ingredients of the offence were proved as follows:-

81. Firstly, that the deceased suffered burn injuries in the two rooms identified by witnesses in this case and one of the room was linked to the accused. Pw 2 said that they visited the scene and took photos, that they found one room which was vacant but it smelt petrol, the other had charred clothes. The petrol or kerosene was not found but the deceased clothes smelt petrol. The government chemist report was produced and it was also oral evidence of witnesses who dealt with the exhibits that the deceased clothes / short had been completely burnt.

82. This corroborated the cause of death as skin burns which is unlawful cause of death. There is no doubt that the assailant intended to cause grievous harm, maim or cause serious permanent disfigurement of the victim.

83. Sadly, the deceased succumbed to the injuries two days after the assault.

84. The accused was also placed at the scene during the eve of the offence. The accused actions after the injuries were sustained and during investigations all prove a rebuttable case.

85. The accused sent the deceased to buy beer during curfew hours of the 26<sup>th</sup>. The deceased was seen walking to the shop at 10:00pm by pw6. Pw 6 and pw 1 visited the accused house the next day. The deceased was found to have sustained burn injuries on his face and chest and was calling out for help. Pw6 stated that the room No.16 which was rented by the accused also smelt petrol which smell persisted and was noted on subsequent days when the police visited the scene and the deceased burnt clothes

were recovered from the scene. The smell of smoke and inflammable petrol products noted in the accused house meant that the burns / offence occurred at the accused house.

86. Lastly, pw1 visited the accused house on 27<sup>th</sup> at 7:00pm when he found the door open the deceased lying with burnt injuries .The deceased was in the company of the accused and **fathe** and the two were found seated despite the serious nature of injuries suffered by their counterpart. The deceased was in pain and he also called cried out for help when pw1 came to the place. The deceased wore burnt clothes as he was rushed to hospital and some had been completely burn during recovery of exhibits from the mortuary.

87. In the upshot, I find that the prosecution has proved a prima facie case and the accused shall be heard on his defense.

**DELIVERED SIGNED & DATED IN OPEN COURT AT  
CRIMINAL DIVISION NAIROBI THIS 24/11/2025  
VIRTUALLY /PHYSICALLY.**

**M.W. MUIGAI**  
**JUDGE**

Mr. Odawa for the Accused – present online

Accused Person – present online

**Mr. Odawa**

1. The Accused person to provide Defence through sworn statement.
  2. 2 witnesses to be called.
  3. State/ODPP/Charge sheet and proceedings & Judgment of Wamunyu Magistrate Case 28 of 2019. Republic Vs. Kelvin Maundu who is the deceased in this matter sentenced for 3 years. The deceased escaped on the way to Prison and there were/are active warrants for the arrest. The character of deceased and he had enemies within and without.
- COURT – Defence hearing on 3/12/2025.