



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE NO. 10 OF 2016**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JOHN MATHENGE ..... ACCUSED**

**JUDGMENT**

**1. JOHN MATHENGE (Mathenge) is charged with the offence of murder of Mary Wanjiku Kanyi (the deceased). The particulars of that offence are that John Mathenge:-**

**“On the 11<sup>th</sup> day of December 2015 at Likii village, in Laikipia County within the Republic of Kenya murdered Mary Wanjiku Kanyi.”**

2. The prosecution’s case is that Mathenge, who was the husband of the deceased, arrived at home on 11<sup>th</sup> December 2015 at 1 a.m. while very drunk. Mathenge knocked the front door which was opened by the deceased. Mathenge as he entered the house insulted the deceased. She did not respond to his insults. The deceased refused to respond to those insults because it would have resulted in him physically assaulting her, as he normally did.

3. Mathenge demanded food from the deceased. The deceased served him with food but Mathenge declined to eat it saying to the deceased that she disrespected him.

4. Mathenge went to bed and slept for two hours when he woke up, according to deceased, violently demanded food. Deceased informed him that she had served him and the food was still on the table.

5. Mathenge woke up and went to light up the paraffin cooking stove. The deceased inquired from Mathenge why it was that he derived pleasure in making her suffer.

6. According to the deceased Mathenge insulted her and kicked her using his foot. He threatened to kill her.

7. According to the deceased’s written statement, recorded by the investigating officer (IO) exhibited before court, she stated therein:-

**“He further slapped me telling me that he can even kill me for being disrespectful ..... As I was retiring back to bed, my husband (Mathenge) called me out while insisting that I join him at the table. It was at this juncture when he (Mathenge) threw the burning stove at me.”**

8. The deceased was set on fire on her clothes and body by that stove thrown at her by Mathenge. This is

what the deceased stated in her written statement:-

**“..... he (Mathenge) threw the burning stove at me. I started screaming as my clothes and body were on fire. Flames eventually engulfed me as I wailed for neighbours to come and help me out.”**

9. Mathenge poured water on the deceased as the flames were burning out. Their son, 3 years old, MW, (PW 1), began to cry. Neighbours who came to the house in response to deceased's screams were turned away by Mathenge. Mathenge told those neighbours that the deceased wanted to burn the house. Mathenge also told those neighbours that everything was under control.

10. The deceased took advantage of the appearance of those neighbours to run out of the house.

11. The deceased ran to her brother's (Joseph Kagwiri's PW 2) house which was about 500 metres away.

12. This is what PW 2 said of that night:-

**“On that day I had slept and at 1 a.m. or 2 a.m. I heard screams(s) outside my house. There was a knock at my door. It was my sister (the deceased). ..... she was calling me ..... I opened the door. But on opening I was shocked by what I saw. Because my sister (the deceased) was not dressed, she had 'leso' and pant. I was shocked because from the head to thighs her flesh look like it was failing. She has been burnt. She said John (Mathenge) burnt her .... She told me John threw to her (a) stove while it was on fire.”**

13. It is important to note what the now 4 year old son of Mathenge and the deceased testified of the happening of that night. This is what he said in evidence:-

**“My mother (the deceased) went up 'juu juu' is where God is. She went juu because baba (Mathenge) threw to her stove ..... The stove baba threw to mum was used to cook ..... Before baba threw the stove thy had quarreled with mum. When baba threw the stove to mum I saw fire.”**

14. PW 1 indicated before court where the fire burnt the deceased by touching his chest and thighs.

15. PW 1 displayed exceptional intelligence in relaying the incidents of that night. He said that the deceased after she was set on fire by Mathenge was tied by another lady with a 'leso' as she ran out of the house. He remembered that he was asleep but was awoken by the noise or screams of his parents. He also spoke of his recollection of Mathenge throwing the stove to the deceased and then she died – which in his innocence referred to it as going 'juu' (going up to heaven).

16. The deceased on being taken to Nanyuki teaching and referral hospital was transferred to Kenyatta National Hospital (KNH) for specialized treatment. She died at that hospital on 28<sup>th</sup> January 2016.

17. Inspector of Police Simon Murimi was the investigating officer (IO) of this case. He stated that after the report of the incident of burning of the deceased was made at Nanyuki Police Station, the deceased was taken to Nanyuki teaching and referral hospital. On the following morning the IO in the company of one other officer went to the hospital. They spoke to the deceased who informed them that Mathenge had thrown to her a burning stove for no apparent reason. The IO recorded the deceased's statement which was exhibited in this case.

18. The deceased informed the IO that Mathenge had previously threatened to kill her but she did not take it seriously because he had often come home drunk, beaten her, then in the morning all would be normal. The IO was of the view that the deceased was a victim of abused by Mathenge.

19. The IO on that morning arrested Mathenge when he attended the hospital to see the deceased. The IO said of Mathenge that he looked remorseful.

20. The IO said he was unable to persuade the neighbours to testify in this case because they told him they feared that Mathenge would harm them if he was acquitted in the case.

21. The fact that the neighbours of Mathenge feared to be involved in the matter was explained in the evidence of PW 2, brother of the deceased. He stated that when the deceased ran out of the house screaming neighbours who came out on seeing her went back into their respective houses. The neighbours who heard the commotion of that night did not wish to testify, according to PW 2, because they were scared.

## **DEFENCE**

22. Mathenge in his defence, for the first in this matter, allude to the fact that prior to the incident he was a 'boda boda' (motor cycle) operator.

23. He stated he was married to the deceased and they were blessed with one child namely MW.

24. He stated that on 10<sup>th</sup> December 2015 the day began very normally with him having tea with the deceased. The deceased inquired from him what plans he had for them for the 'Jamuhuri' day celebration. He promised to call her later and inform her what plans he had. He said that he thereafter left for work of 'boda boda' and that they did not quarrel.

25. Mathenge said on that day at 4 p.m. he alerted her he was going to pick her up. Mathenge reached home at 4.30p.m. and carried the deceased on his motorcycle together with their son PW 1.

26. They went and shopped and the deceased had her hair done at salon.

27. On their return home the deceased prepared dinner. At 8.30 p.m. Mathenge was called by his customer by the name of Mama Diana. This customer requested Mathenge to pick her with his motorcycle.

28. Mathenge said the deceased refused to allow him to go to carry out that business but Mathenge explained to the deceased he needed to go to pick up Mama Diana because she was his customer. That although the deceased continued to make noise, refusing him to go out, he still went out.

29. Mathenge said that he picked Mama Diana and took her to her destination. He also said that there were other customers who needed his services and he obliged. That he however called the deceased at 9.30 p.m. asking her to wait of him since he was still busy but the deceased complained accusing him of having a love affair.

30. At 11.30 p.m. when Mathenge finish his business of carrying his customers he telephoned the deceased but the deceased told him to stay where he was and not to go home.

31. Mathenge said that he went home any way and the deceased continued to accuse him of having an affair. She then called him to eat dinner and when he got up from the bed he found she had dismantled the stove, holding the wick of the stove with one hand and the other part of the stove with the other hand. She poured the paraffin on herself and set herself on fire. Mathenge asked her whether she wanted to burn down the house and according to him she responded:-

**“No you will eat me today ...”**

32. Mathenge said he poured water on the deceased in attempt to put off the fire.

33. Mathenge further said the deceased ran out of the house as he tried to extinguish the fire on their curtain. That when he went out he did not see the deceased.

34. Mathenge denied burning the deceased.

## **ANALYSIS AND DETERMINATION**

35. The prosecution is required to prove, beyond reasonable doubt, the three ingredients of murder. They are:-

**(a) Proof of death of the deceased;**

**(b) that the accused committed the unlawful act which, caused the deceased's death; an**

**(c) that accused had malice aforethought.**

## **FIRST INGREDIENT**

36. Dr. Bernard Owino Midia gave evidence on his finding following the post mortem carried out over the deceased's body.

37. The deceased was burnt on the early hours of 11<sup>th</sup> December 2015. She died on 28<sup>th</sup> January 2016.

38. The doctor carried out the post mortem on 10<sup>th</sup> February 2016. He described the deceased as appearing wasted, that is lean in physique. In layman's language that was thin/slim seeming poorly nourished.

39. The doctor's finding were that the deceased body had 3<sup>rd</sup> to 4<sup>th</sup> degree septic burns, that is burns that were deep and appeared infected. There was burns on the anterior involving 24% of the total body surface area.

40. There were burns in the upper limb and lower limb which involved burns accounting for 7% of the body surface for each limb-therefore 14% for the two limbs.

41. The doctor found both of the deceased's thigh were also burnt each thigh account for 10% of the total body area of each thigh making a total area for both thigh to be 20%.

42. The deceased's face was burnt accounting for 5% of the body area. The doctor concluded that the deceased suffered burns 63% of the whole body surface area.

43. Deceased's body was also found to be anemic and the lungs were firm – which is called consolidation.

44. The deceased mouth – the upper airways and bronchus was found to have partially digested material.

45. The doctor stated that his conclusion was that the deceased died as result of:-

***(a) Aspiration – meaning that the deceased inhaled substance into her airways. The substance was partially digested food material.***

**(b) Complication of 63% burns on total body surface area.**

46. From the above evidence the prosecution proved beyond reasonable doubt the deceased's death. Death was also confirmed by PW 2, brother of the deceased and by Grace Nyachihi, aunt of deceased, who both identified the deceased's body for the doctor who performed post mortem.

## **SECOND INGREDIENT**

47. The prosecution's evidence overwhelmingly proved that the cause of death was the unlawful act of Mathenge – of throwing a burning paraffin stove to the deceased and thereby causing burns on the

deceased on 63% of her body surface.

48. The doctor on being cross examined by the Learned Counsel Mr. Thuku for Mathenge stated that the deceased had major burns and that the aspiration, which was one of causes of death of the deceased could have been as a result of the burns of the deceased suffered. This is what the doctor said:-

**“It (aspiration) can occur as one is succumbing to death called agonal. Agonal is agony - it is the process as one is dying the body contracts muscles of internal organs and one can even expel the content of the stomach when one is dying – one is gasping for air which can lead to aspiration.”**

49. The understanding of that evidence was that the process of dying can cause food particles to be expelled from the stomach to the airways thereby causing aspiration.

50. The evidence of the prosecution witnesses, PW 1, PW 2 and PW 5 very clearly corroborate each other. In particular this court was very impressed by the evidence of PW 1, who was only 4 years old, but who gave very candid evidence.

51. That evidence proved beyond reasonable doubt that the accused, who arrived home drunk, after two hours of sleep woke up the deceased demanding food. He in that process, insulted and physically abused the deceased. Finally he threw a lit paraffin stove to the deceased thereby setting her alight. The deceased received burns on 63% surface of her body.

52. The evidence however offered by Mathenge in his defence was made up and unbelievable. I reject it.

53. Mathenge throughout the prosecution’s case did not at all allude to operating a bodaboda. PW 2 was said to reside about 500 metres from Mathenge’s house. Since that is so, and since it was not challenged in cross examination, PW 2 could have been questioned on whether Mathenge operated a boda boda. Similarly PW 1, Mathenge’s son, could have also been asked. Instead Mathenge waited until when he offered his defence and alluded to having conducted some business with his bodaboda which angered the deceased and led her to burn herself.

54. I did not believe the evidence of Mathenge, in his defence. It was in my view fabricated. It was an afterthought. His defence was that the deceased held two parts of the stove with her two hands, the question that arises is how did the deceased set herself on fire when both her hands were holding part of the stove. The more likely scenario was that it was Mathenge who threw the stove at the deceased.

55. The prosecution proved the second ingredient.

### **THIRD INGREDIENT**

56. The prosecution under this third ingredient was required to prove that Mathenge had intention to cause death or to do grievous harm to the deceased.

57. As stated before although the deceased by her dying declaration said that Mathenge, on the night in question arrived drunk – she stated that Mathenge slept for two hours then woke up with fury and demanded from the deceased food. What followed was his insult and physical abuse of the deceased and finally the throwing of a burning paraffin stove to her. That led to extensive burns on her body leading to her very painful death.

58. Undoubtedly the prosecution proved beyond reasonable doubt intent to cause death or grievous harm. Mathenge had in any case earlier on threatened to kill the deceased which threat he fulfilled that night.

### **OTHER ISSUES**

59. Mathenge learned counsel submitted that the prosecution’s case fails because the prosecution did not

call the neighbours of Mathenge to testify of what occurred.

60. Section 143 of the Evidence Act is clear that no specific number of witnesses is necessary to prove a fact. That provision of the law was reiterated in the case **COLLINS AKOYO OKWEMBA & 2 OTHERS –V- REPUBLIC (2014) eKLR** where it was held:-

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**“The prosecution is under no obligation to call any number of witnesses so long as they bring before the court evidence sufficient to prove their case to the required standard.”**

61. In my view the prosecution called the material witnesses, one being PW 1 who was present where the incident occurred; secondly PW 2 who saw how the deceased was burnt and who received her death declaration; and lastly PW 5 the IO who spoke with the deceased and recorded her statement before her death. Further there was no evidence that those neighbours, who were not called, could have tendered evidence that would have been adverse to the prosecution.

62. The prosecution cannot be faulted for not calling neighbours who did not witness the incident and who in view of their fear of Mathenge played no other part other than to go at Mathenge’s doorstep.

63. That submission on the number of witnesses is rejected.

**CONCLUSION**

64. In the end this court finds that the prosecution proved beyond reasonable doubt that John Mathenge murdered Mary Wanjiku Kanyi (deceased). Accordingly John Mathenge is hereby convicted of murder contrary to section 203 of the Penal Code.

**DATED AND DELIVERED AT NANYUKI THIS 31<sup>st</sup> DAY OF JANUARY 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: John Mathenge .....

For Accused .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**