**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 46 OF 2010**

***LESIIT, J***

**REPUBLIC……PROSECUTOR**

**VERSUS**

**SAMUEL KINYUA NJIRU……...……ACCUSED**

**JUDGEMENT**

1. The accused person **SAMUEL KINYUA NJIRU** is charged with Murder contrary to **section 203** as read with **section 204 of the Penal Code Cap 63**. The particulars of the offence are:

> **'That on the 29th March 2010 at Githurai 44 estate within Nairobi Area Province murdered Susan Gakii Gitonga.'**

2. The trial in this case was begun by Mwilu, J. as she then was who heard the evidence of PW1 to PW2. The case was taken over by Muchemi, J who heard PW3. I took over the case and heard PW4 to PW7 and the defence case.

3. The prosecution called a total of 7 witnesses.

4. The facts of the prosecution case were that the accused who was living alone having separated with his wife, attacked and burnt his wife after hitting her with a burning stove which exploded on her and burnt her causing her to suffer injuries that eventually led to her death. He was arrested while on the run after the police received a tip off from an informer, allowing them to track him to his house where he was arrested.

5. PW1 Corporal John Wainaina was in the crime branch. He was at Kasarani Police Station on 26th June, 2010 when an informer came to the station and reported that he had spotted the accused person who was suspected to have killed the deceased at Githurai 44. PW1 and his colleague PC Simon Koech together with the informer went to look for the suspect. They carried the suspect's photograph with them. When they reached there they did not find him. They then went to his workplace where he used to operate a *mkokoteni* (hand cart) to lay an ambush on him. Here they found and tracked him down to his house. They met him as he entered his compound and introduced themselves and told him that they had come to arrest him for being a suspect in the murder of the deceased.

6. The accused became hostile and tried to resist arrest but PW1 and his colleague managed to restrain

and arrest him. They took him to Kasarani Police Station.

7. PW2 Corporal Joseline Thigaa who was the crime officer dealing with investigations at the time testified that on 7th April 2010 the assault case was minuted to her by her OCS Chief Inspector Ndegwa. It was an assault against the complainant who is also the deceased Sarah Gakii. PW2 explained that the OB indicated that the assault took place the previous day at 14:30 hours. The report made by the deceased mother showed that the accused had assaulted the deceased by hitting her with a burning stove which exploded on her and burned her causing her to suffer injuries. The deceased was admitted at KNH.

8. PW2 called the deceased uncle whose number was given in the OB report and they agreed to meet the following day on 8th April 2010 at Kenyatta National Hospital, so that he could assist PW2 identify the deceased. They met and proceeded to where the deceased was admitted at Burns Unit Ward 4 where they found the deceased seated. PW2 observed that though the deceased was talking she had suffered burns on the chest, stomach and both hands.

9. PW2 recorded the deceased statement. In that statement the deceased said that the accused person was her husband though they had separated briefly. On the fateful day of 29th March 2010, the deceased was coming home from her place of work at Uncle Sam's bar where she worked as a bar maid. The deceased passed by her husband's house (the accused) to visit him as she usually did and found him asleep. She knocked the door and when he opened for her, she noticed that he appeared drunk. PW2 said that the deceased entered and lit the stove to prepare a cup of tea as it was cold.

10. After she prepared the cup of tea, the accused requested her to prepare hot water for him to take a bath. The deceased obliged and as the water was boiling, she asked the accused for money for the maintenance of their youngest child and this infuriated him leading to an argument between them. The deceased said that the accused took the water off the burning stove and threw it at the deceased causing an explosion that burnt the deceased.

11. The deceased stated that when no one answered her screams she ran to her friend's house, one Kangwiria who took her to Kenyatta National Hospital where she was admitted. PW2 said the deceased signed her statement. She produced it in evidence as P. exhibit no.2.

12. PW2 said she went to see the deceased at Kenyatta National Hospital on 17th April 2010 and found her in a critical condition. She could not talk and had difficulties in breathing and communicating. PW2 said she received information from the deceased uncle on 27th May 2010 that the deceased had passed away on 26th May 2011

13. PW2 said that the deceased friend, Kangwiria who the deceased ran to for help refused to meet her or to make a statement as a prosecution witness.

14. PW3 Eliud Githu Thangatha was an Uncle to the deceased. PW3 went to see the deceased on the 8th April 2010 and at the same time escorted PW2, the Investigating Officer of this case, in order to identify the deceased to him. PW3 spoke to the deceased after PW2 had finished with her. He said that when he went in to see her, he found the deceased was speaking but with a low tone and though stable she was in a critical condition at that time.

15. PW3 testified that the deceased told him how she got burnt. She told him that her husband had set her on fire in their home after finding her with another lady. He used a burning kerosene stove which he threw at her and burnt her from the face going down to her body. Her clothes also caught fire. The deceased told him that when she called for help, neighbours who included her friend Kagwiria came to her rescue and put off the fire and took her to hospital

16. PW4 PC Noah Kosgei was the investigating officer. He took over the file on 27th May 2010 from PW2 CPL Joslyne Nthiga who had been handling the matter. He told the court that the incident happened on 29th March 2010 and was reported to the Police on 12th April 2010. He said that the first report was

that of assault but it later changed to murder when the deceased died. PW4 went to the scene of crime at Githurai 44 where he carried out enquiries but he did not succeed to get any information. He said that he tried to interview the neighbours but they did not want their names recorded.

17. PW4 said that he found the accused person in their cells on 20th June 2010 the day when he was arrested by Police Officers on Patrol duties. He charged the accused person with murder on advice by the DPP. PW4 also took the accused person for examination by the doctor. He established that the accused and deceased had been married before separating.

18. PW4 produced the P3 form of the accused. He took the accused for Mental assessment on 14th July 2010 at the Police Surgery. The report dated 16th July by Dr. Kamau shows that the accused was 37 years old and mentally fit.

19. PW7 DR. Oduor Johansen conducted the post mortem on the deceased body on 6th July 2010 at Kenyatta National Hospital Mortuary. He found that the deceased had extensive mixed degree burns on the face, trunk, upper and lower limbs. He also established that internally there was inhalation burns meaning the deceased breathed something which burnt her. The Doctor formed the opinion that the cause of death was mixed degree burns estimated at 50% of the body. He produced the post mortem form as Pexh3.

20. The court having considered the evidence adduced by the Prosecution found that the Prosecution had established a prima facie case against the accused person and placed him on his defense.

21. The accused person opted to give a sworn defense. He also called 3 witnesses.

22. The accused said that he was the husband of the deceased. He said that on the fateful date of 29th March 2010 he had returned home from work at 10 pm bathed and went to sleep as he was very tired. He lived alone in Githurai in a simple double room consisting of a sitting room and a bedroom. The accused said that he locked the door with a padlock before he went to sleep at 11 pm.

23. He said that he was woken up at around 4.50 am by a fire which was spreading inside his house. The fire had burnt some jerry can tanks that he used to carry water with for clients. The accused said that he tried to put out the fire before he went outside where he met with his neighbours on the verandah who told him the smoke had entered their houses. They asked him why he wanted to commit suicide and kill them too.

24. The accused said the neighbours entered his house to find the cause. It was then that he heard the voice of his second wife coming from the gate. The accused said that the deceased claimed that if he had not put off the fire she could not have come back. The accused said that the neighbours asked the deceased why she wanted to kill him and she said she just wanted him dead. The accused said that the deceased who had since left him in 2009 did not look normal yet she was not drunk. He suspected that the deceased must have poured paraffin inside the house through the padlock opening then lit the fire. Accused said that one of the neighbours suggested that they lock the deceased inside the house until she becomes sober and also wait for the police to come and arrest her. The neighbours locked both of them inside the house and carried the key.

25. While they were inside the house, the accused said that he heard the deceased wake up and walk to the store. She then came to where he was and called him out; "*Baba Lians! Baba Mercy!*" and before he could say anything, she struck a match stick and lit herself. He said he covered her with a blanket as there was no water and the fire went off. He called his neighbour Wambui who was also a friend to the deceased and asked her to open the door as the deceased had lit herself up. When they opened the door he said they asked deceased who burnt her and she told them that she did it herself. They took deceased to Nazareth clinic for first aid before they took her to Kenyatta National Hospital. The accused said that he went to the Chief's camp to report the matter because of the damage to the house and later made a statement to the police which he produced as D. exhibit 1. He denied having poured paraffin on the

deceased or having burnt her.

26. DW2 Timothy Onyuma Onywero who is a Pathologist studied the Post Mortem Report by Dr. Oduor Johansen produced in evidence as P.exh 3. In brief he discredited the report, together with the brief circumstances of the case as stated by the police on page 1 of the report and the summary of the observations made by the doctor as well as the basis of the conclusions made by Dr. Odour.

27. DW3 Polatacius Murathi Njiru used to live in the same plot with the accused long time ago. He said that the accused and deceased had disagreements of domestic nature. On the material day he said he woke up and went to work and when he returned in the evening, he was told of what happened. He was not at the scene at the time of the incident and all he knew was what he was told by the accused.

28. The accused faces a charge of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

> **"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

29. The prosecution has the burden of proof in this case and should adduce evidence to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused by some act or omission caused or inflicted injury on the deceased out of these injuries the deceased died. The prosecution must adduce evidence to prove that at the time the accused did the act or omission which led to the injuries causing death to the deceased he had formed the necessary intention to either cause death or grievous harm to the deceased.

30. The intention to cause death or grievous harm is malice aforethought. Under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

> **"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**
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> **a. 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;**
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> **b. 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;**
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> **c. an intent to commit a felony;**
>
> **d. 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."**

31. I have carefully considered the evidence adduced by the prosecution and the defence. Mr. Oyieko Counsel for the accused and Ms. Onunga for the State filed written submissions which I have considered.

32. In his submissions, counsel for the accused urged that the crime scene was visited more than a month later by the investigator and was not cordoned off to preserve crucial evidence even after the assault was reported. Counsel submitted that the investigators merely relied on witness statements and an informer in their investigations. Counsel urged that the report from the Government pathologist was inconclusive and unreliable, further he urged that there were no eye witnesses. Counsel argued that the decision by PW4 to make a recommendation to DPP that a public inquest be instituted was ambiguous and lacked clarity. Counsel submitted that the Prosecution had failed to establish the elements of *actus reus* and *mens rea* and finally, that the prosecution had failed to prove the element of pre-meditation.

33. In her submissions, Ms. Onunga learned Prosecution Counsel urged that the prosecution had proved the case against the accused beyond any reasonable doubt. Counsel urged that malice aforethought was established under **section 206 (b)** of the **Penal Code** for reason that when the accused threw the burning stove at the deceased he knew that his action could cause death or grievous harm.

34. Ms. Onunga urged that DW2 was not present when the post mortem was being conducted by PW7 the Chief Government Pathologist and neither did he consult him or the Investigating Officers to understand the circumstances that led to the deceased death. Counsel urged that DW2 had not qualified as a Pathologist when the post mortem was conducted and therefore his evidence did not discredit that of PW7. Ms. Onunga submitted that according to PW2, the deceased had informed her that the accused had thrown a hot stove at her burning her. PW2 recorded the statement from the deceased to that effect and produced it as P. exhibit 2.

35. Having considered the submissions made in this case, the evidence adduced by both sides and the cases cited, the following are what I consider to be the issues for determination:

**a. Whether the statement made by the deceased to PW2 and 3 qualifies to be a dying declaration.**

**b. Whether the evidence of the pathologist was conclusive, and whether the prosecution has adduced evidence to establish the cause of death deceased.**

**c. Whether the prosecution has proved the element of pre-meditation.**

**d. Whether the motive for the offence has been proved.**

**e. Whether the accused has a good defence.**

36. There was no eye witness in this case. The evidence the prosecution is relying on is two dying declarations made by the deceased to PW2 and PW3. The prosecution also relies on circumstantial evidence. The first issue to determine therefore is whether the statement by the deceased to PW2 and PW3 was a dying declaration?

37. Mr. Oyieko in his submissions urged that the deceased's dying declaration was not admissible in court on the grounds that the deceased was in a proper state of mind, in a stable condition and could be able to talk without any difficulties. Counsel argued that for a statement to qualify as a dying declaration there must be proof that there was a likelihood of imminent death which he urged was not the case herein. He relied on the case of **Republic Vs Yiende High Court Criminal Case No. 16 of 1990,**where the court rendered itself on what constitutes a dying declarations as follows:

**1. Any statement made by a deceased is admissible as a dying declaration if it is established that it was made by him when he was in immediate expectation of death and had lost every hope of living.**

**2. It is not required in law, in order to support a conviction, that a dying declaration must be corroborated. There is need for exercising caution though before a conviction is based solely on it.**

**3. A dying declaration is the weakest of all evidence. It must be remembered that it is made in the absence of the accused and is not subjected to cross examination.**

**4. In the instant case, the evidence fails to establish that the deceased made a statement when he was under the solemn belief of impending death. Accused acquitted."**

38. Counsel also relied on **R. v. Eligo s/o Odel (1943) 10 EACA 90**. He also relied on the case of **Choge v. Republic 1985 KLR** where the court held that:

**"The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."**

39. Ms. Onunga urged that PW2 recorded the deceased statement which was produced as the deceased's dying declaration and further that all the prosecution witnesses confirmed the deceased's dying declaration.

40. The question is whether the declaration made by the deceased qualifies as a dying declaration, whether she made it in extremity when at a point of death so that it can be said her mind was induced to tell the truth.

41. The incident in question occurred on the 29th March, 2010 after which the deceased was admitted in hospital. On the 8th April 2010 PW2 visited her in hospital and recorded her statement, P. exh. 1. The deceased suffered severe burns on her chest, hands, upper and lower limbs, found to be 50% of her body as per the post mortem form. The burns were described as extensive and mixed degree burns. The deceased died two months after the incident, on the 26th May 2010.

42. PW2 described the deceased as stable on the 8th when she recorded the statement from her. PW3 on his part describes the deceased as able to speak but with a low tone, and that though stable she was in a critical condition at that time.

43. Given the severity of the burns the deceased had suffered, and the manner in which PW2 and 3 described her when they saw her on the 8th April, 2010 it is clear the deceased was in extremity when she made her statements to both witnesses, and was at a point of death. Indeed when PW2 visited the deceased again on the 17th April, she found her in a critical condition with difficulty in breathing and unable to speak. That was nine days after the initial visit.

44. Even though the death was slow, it is clear that the deceased was not making any healing progress during her hospitalization. I am satisfied that at the time the deceased made the two dying declarations, the statement P. exh. 1 taken down in writing by PW2; and the oral statement to PW3, the deceased was at the point of death and that her mind is induced by the most powerful consideration to tell the truth. I am satisfied that the deceased statements to PW2 and 3 qualify as dying declarations. I have cautioned myself that the dying declaration was made in the absence of the accused and further that it has not been tested through cross-examination.

45. Having cautioned myself of the above I am satisfied that the dying declaration is admissible in evidence, and that it forms strong evidence against the accused person in this case.

46. There is other evidence against the accused. The report of the incident was made to the police on the 7th April, 2012, about 10 days after the incident. It was made by relatives of the deceased. The accused made no report anywhere, not even to the AP Camp as he claimed in his defence. I do not believe that a formal report made to the Administration Police could have been ignored, especially that of serious burning where the victim was hospitalized.

47. On the other hand the accused was arrested near his house slightly over two months after the incident had occurred and slightly over one month after the deceased had died. By that time, the scene must have been interfered with and therefore no exhibits were recovered e.g. the stove which caused the burns on the deceased, and any other item proving presence of a fire inside the accused house could not in the circumstances be availed. Mr. Oyieko faulted the police for not securing the scene of the incident or visiting it before time lapsed.

48. The police were not at fault in my view. There is clear evidence the accused went into hiding after the incident and was not found until three months after the incident. The police could not have acted in a case they knew nothing about until much later. Likewise they could not have visited a scene in a house where the owner had gone underground. The accused was found one month after the death of the deceased. Contrary to what Mr. Oyieko submitted, the accused was nowhere for purposes of police action, for instance for facing a lesser offence before the deceased died.

49. The accused conduct after the incident, his failure to report the incident to the police, the failure to check on the deceased in hospital and going underground so that police took over two months to track him down all depict the conduct of a person with a guilty mind.

50. The deceased was his second wife, they even had a child with the deceased before they separated due to disagreement, as the accused stated in his statement to the police. Despite these facts, the accused did not bother to go and see her in hospital not even once. Having gotten burnt in his house, the accused should have been concerned, and if not, at least to know how the deceased was fairing. The evidence adduced by the prosecution is very clear that the accused was on the run and it took the intervention of an informer to have the police arrest him. The accused conduct of going underground was that of a person with a guilty mind.

51. The other issue is whether the evidence of the pathologist was conclusive, and whether the prosecution has adduced evidence to establish the cause of the death of the deceased.

52. As I stated earlier, DW2 discredited Dr. Oduor's Post Mortem Report. He read the first part of the report on the identification of the deceased and said that the circumstances were vague as they did not indicate the actual circumstances of the burns. He said that before examination of anybody, one needed to know the actual circumstances of death as that would determine the kind of examination they would carry out. He further observed that if it was suspected that violence was involved, on examination, he would have looked for injuries consistent with a violent struggle and defensive injury. He stated that guidelines for examination of this nature require that the person suspected to have inflicted the injuries should be examined for injuries consistent with the circumstances. On that basis he ruled out the possibility that this was an accident.

53. DW2 referred to Page 2 of the report and said that it gave an indication of the extensive mixed degree burns on the face, trunk, upper and lower limbs. He said that if he conducted that autopsy he would have wanted to know or to see the distribution or pattern of the burns. He said that there was no laterization meaning the actual location and degree of the burns was not given. There was also no mention of anterior and posterior. The pattern of injury, more so if it related to burns would give a clear indication or substance causing injuries. He noted that would also give an indication of the position of the victim at the time the injury was inflicted.

54. DW2 said the fact that the deceased spent a month in hospital before succumbing to the burns changes the dimensions of the report. For instance what was the intervention made in hospital? Also what complications occurred? He agreed that it would have been critical to have a scrutiny of the medical notes on the victim from admission to the date of death. His overall assessment of the report was that he could not definitively see a cause of death based on the findings that had been given.

55. Mr. Oyieko urged that the report by the pathologist was inconclusive and unreliable, and should be rejected. Counsel urged that the treatment record of the deceased was not availed in court and that in the circumstances, it could not be ruled out that the deceased may have died of other opportunistic illnesses.

56. Ms. Onunga, in response to the arguments of the defence counsel and the evidence of DW2 which discredited the evidence of PW7, urged that DW2 was not present when the post mortem was being conducted by PW7 the Chief Government Pathologist, and neither did he consult him or the Investigating Officers to understand the circumstances that led to the deceased death. Counsel urged that DW2 had not qualified as a Pathologist when the post mortem was conducted and therefore his evidence did not discredit that of PW7.

57. In **Republic Versus Eric Mutua Daniel High Court Criminal Case No. 30 of 2012** I dealt with the issue of doctors' opinion and the value of same to the court, and quoted extensively from a 2003 case in which I presided namely: **REPUBLIC Vs. KAMLESH MANSUKLAL DAMJI PATTNI alias PAUL PATTNI [2005]eKLR.**

> **"In the cited case, I quoted from a text, Sarkar's Law on Evidence 15th Edition Vol. 1, the opening remarks under the title *Medical opinion and its* value thus:**
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> **"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death.'**

In same text, **SARKAR ON LAW OF EVIDENCE** (Supra) I relied on a case quoted from **TANVIBEN PAKAJIKUMAR DIVETIA Vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551** where it was suggested:

> **"The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded.'**

In same case**, REPUBLIC VS PATTNI, (supra), I quoted REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683 where DIPLOCK, L. J.** gave the correct English position in regard to doctors evidence thus:

> **'… Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court.'**

And I continued to state as follows:

> **The above case did not elaborate on the statement to show when a doctor's evidence can cease to be treated as that of a professional man giving independent expert evidence. I did come across a more recent British authority which seems to lay down principles to be applied by the court to determine the value to be placed on such evidence. TURNER {1975} QB 834 at page 840;**
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> '**Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless.'**
>
> **It would seem then that the position in England seems to be that the facts upon which doctor's opinion is based must be disclosed and proved in evidence. Failure to prove them in evidence would render such an opinion of minimal or no value. In Kenya the position is quite clear and established, in DHALAY vs. REPUBLIC {1997} KLR 514 the Court of Appeal held:**
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> **'It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.'**
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> **The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case**

**NDOLO vs. NDOLO {1995} KLR 390. The Court of Appeal held;**

> **'The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision… of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected."'**

58. I need not say much as the cited authorities speak volumes. The point is that unlike PW7 who was a qualified pathologist with many years of experience, DW2 is a 'fresher', so to speak, who should learn at the feet of PW7. In addition, PW7 examined the body of the deceased and drew conclusions as a result of that examination and from the circumstances stated on the front page of the Post Mortem report. What DW2 did was a literature review of the report by PW7. That is no way of challenging expert evidence.

59. As clearly stated in the cited cases above where the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless. In this case the doctor, PW7 was not misinformed about the facts of the case. What he was informed that the deceased was burn is consistent with the summary on page 1 of the report and the rest of the prosecution evidence. There is no basis upon which to find that the doctor took into account irrelevant facts or that he ignored relevant facts.

60. It is trite law that the evidence of an expert who has been given the correct circumstances of the case, and has examined the body and given the basis of his report, his evidence should be respected. Of course the court must be satisfied that the expert is properly qualified in his field, and has given an opinion and given reasons upon which his opinion is based. In the event, there is no other evidence in conflict with such an opinion, there would be no basis upon which such opinion could ever be rejected by the court.

61. I find that PW7 gave his opinion based on correct facts, and that he examined the body taking into account all the relevant facts of the case and formed an opinion based on reasons he has also disclosed in his report. His report is comprehensive and conclusive. I find no basis to reject it. DW2's conclusions about the work done by PW7 is pedestrian and without any cogent or reasonable basis. I find his evidence of little assistance to the court.

The last two issues in the case are one, whether the prosecution has proved the element of pre-meditation; and whether the motive for the offence has been proved. I will consider these issues simultaneously.

63. The law in regard to motive is set out under **section 9 (3)** of the **Penal Code.** That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1** , where the Court of Appeal held as follows:-

> "**Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

64. The actual meaning of motive was defined by the court in the case of **Libambula v Republic [2003] KLR 683** which reasoned that point thus:

> **"Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the**

**Evidence Act Cap. 80 Laws of Kenya. <u>Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime</u>."** **(**Emphasis added)

65. Motive though admissible and important is not essential to prove a crime. In this case the prosecution relies heavily on the dying declaration of the deceased. I considered the evidence available and find that the deceased gave two possible reasons that could have driven the accused to burn her. These are provocation and intoxication. It was the deceased statement that the accused was drunk at the time he took the burning stove and threw it at the deceased. As for provocation, this can be inferred from what the deceased had informed the accused before he picked the stove.

66. The deceased said that she had just demanded for money for the maintenance of the child they had together. Of course it is unreasonable for a father to react so negatively and in such a strong and extreme manner. However taking into account that the accused was drunk, there is the influence of intoxication which can cause the strangest of behavior.

67. I am aware that the accused did not raise intoxication as his defence. That notwithstanding, having been adduced in the evidence of the prosecution, it cannot be ignored. This also answers the second issue of whether the prosecution has adduced evidence to establish premeditation to commit this offence. The answer for this is that there is no evidence of premeditation. The deceased went to the house of the accused that material day. It was not a planned meeting. Secondly the accused was under the influence of alcohol, and provocation. These factors negate the possibility that the accused had planned to commit this offence.

As to whether the accused has a good defence, the accused denied causing the burns which led to the deceased death. That is not true and neither is it reasonable or plausible. The prosecution has proved beyond any reasonable doubt that the accused is the one who threw a burning stove at the deceased causing her the severe burns which eventually caused her death. Accordingly I reject the accused defence in its entirety.

69. 68. Having considered the entire evidence, the submissions by counsels and all the cited authorities I find that the prosecution has proved that the accused caused the death of the deceased by the unlawful act of throwing a burning stove at her, as a result of which it exploded and caused severe burns to the deceased. However, I find that for the reasons I have given in this judgment the prosecution did not prove that the accused had premeditated the deceased death, neither had formed the intention to cause her grievous harm. I will therefore substitute the charge against the accused from murder contrary to **section 203** of the **Penal Code**, to **manslaughter** contrary to **section 202** of the **Penal Code**. I find the accused guilty of the substituted charge of **manslaughter** and convict him under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2016.**

**LESIIT, J.**

**JUDGE**