



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 48 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BEATRICE WAIRIMU MUIRU.....ACCUSED**

**J U D G M E N T**

The accused, **BEATRICE WAIRIMU MUIRU**, was charged with the offence of murder **contrary to section 203 as read with section 204 of the Penal Code**. She is said to have murdered **BENSON MUCHANGI NJAGI** on 18<sup>th</sup> May 2008, at Umoja Inner-core Estate, Nairobi.

**PW 1, CHARLES NDEGWA NYINGI**, was the caretaker of the Plot No. A118, Umoja Inner-core Estate, where the accused lived with the deceased.

On 17<sup>th</sup> May 2008, at about 12.08a.m, the watchman guarding the plot, informed **PW 1** that something was burning at the house where the accused lived.

When **PW 1** got into that house, he found that the deceased had suffered burns. The deceased was seated on a seat within the sitting-room. When **PW 1** asked him what had happened, the deceased did not answer.

**PW 1** then asked the accused, who was standing near the deceased to tell him what had happened. The accused did not respond.

**PW 1** checked the other rooms inside the house where the incident took place. He found that nobody else lived in that house, apart from the accused and the deceased.

In the sitting room, **PW 1** noted that the 3-seater sofa was burnt; and so was the carpet. However, none of the other items including the table, cupboard, radio and CD were burnt.

**PW 1** rushed to the home of the sister to the Deceased, to inform her about what had happened. The said sister is **NANCY WANJA NJAGI (PW 3)**

When **PW 1** got back to the scene, he was in the company of **PW 3** and her husband, **CALEB NDWIGA NYAGA (PW 4)**. They found the deceased in the bedroom. In other words, the deceased had been moved from the sitting-room where **PW 1** had left him.

Thereafter, the police were informed and the deceased was taken to hospital. However, the deceased later succumbed to his injuries.

**PW 2, JOSEPH LENTEYO**, worked as a guard or a watchman at the plot where the accused lived with the accused,

On the material day, **PW 2** saw the deceased being dropped-off at the gate, at about 12.00 mid-night. **PW 2** opened the gate for him, and the deceased went into his house.

However, after about 5 minutes, **PW 2** heard screams. He rushed to the accused's house, where he saw the deceased on a seat. **PW 2** noted that the deceased had suffered some burns.

When **PW 2** asked the accused, (who was standing near the deceased), about what had happened, the accused said that the stove had exploded into a fire after the deceased lit a cigarette.

At that stage, **PW 2** rushed to inform the caretaker (**PW 1**).

**PW 2** said that he did not see any cigarette inside the accused's house. He also did not see the stove which had allegedly exploded.

It was his further testimony that the accused lived only with the deceased. He said that there was nobody else living with them; not even a child.

However, he was not sure whether or not there had been anybody else inside that house on that material night. He explained that he saw nobody leave the said house, however, he admitted that it was possible for someone to have left the house when he (PW 2) went with PW 1 to inform the sister of the deceased.

**PW 3, NANCY WANJA NJAGI**, is a sister to the deceased. She is the person who helped her late brother secure the house he lived in with the accused.

It was her evidence that the deceased had been transferred from Embu to Nairobi, a few weeks before the tragedy.

On the material day, **PW 1** knocked on the door to **PW 3's** house, at about mid-night, and informed **PW 3** and **PW 4** that the deceased had suffered burns. **PW 3** rushed to the scene, where she found the deceased in the bedroom, whilst the accused was standing in the sitting-room.

When **PW 3** called out to the deceased, there was no response.

**PW 3** blamed the accused for what had happened to her brother.

According to **PW 3**, the deceased had introduced the accused to the whole family. The deceased had introduced her as the girlfriend whom he was due to marry.

At the time of the incident, **PW 3** knew that the accused was expectant. In fact, the deceased had consulted **PW 3** about the hospitals which the accused could visit for her pre-natal clinics.

**PW 3** explained that the deceased was taken to the Aga Khan Hospital because the nearby Jamaa Hospital did not handle burns, whilst the Kenyatta National Hospital was too far.

When **PW 3** was inside her husband's vehicle which ferried the deceased to hospital, the deceased asked her to remove his clothes. However, **PW 3** was not able to do so.

And when her brother asked her if he would survive, **PW 3** gave him encouragement.

**PW 3** said that she did not ask her brother about the burns because she did not wish to cause him further stress. She described him as being "very ill" and "in bad shape".

Although **PW 3** had cited the accused as a girlfriend to the deceased when she was giving evidence, she confirmed that in her statement to the police, she had indicated that the deceased was the wife to the deceased.

During cross-examination, **PW 3** said that it was her husband who told the deceased not to talk much. **PW 3** said that that was because the deceased was straining when talking.

**PW 3** also told the court that she received information that the police took away a stove from her late brother's house.

In answer to another question, during cross-examination, **PW 3** confirmed that her late brother used to smoke cigarettes. Indeed, when **PW 3** went to the scene, on the material day, she saw some cigarettes in the sitting-room.

**PW 3** also confirmed that her late brother used to drink beer.

**PW 4, CALEB NDWIGA NYAGA**, is the husband to **PW 3**. He largely corroborated the evidence of **PW 3**.

He said that the accused did not suffer any burns, but her clothes were wet. She was standing in the sitting-room, "simply gazing". She had no tears in her eyes.

**PW 4** did not see anything that may have caused the fire that burnt the deceased.

When the deceased had been placed in **PW 4's** saloon car, he requested **PW 4** to take him to hospital.

It was also the evidence of **PW 4** that the deceased asked that his clothing be removed. **PW 4** told the deceased to be patient, as they would soon reach the hospital.

According to **PW 4**, it is **PW 1** who told him that the deceased was burnt by the accused.

**PW 5, NICHOLAS NYAGA NJAGI**, is a brother to the deceased. On 17<sup>th</sup> may 2008, he hosted a birthday party for his son. The party was at his house in Tena Estate.

The deceased attended the party, which begun at 11.00a.m.

At about 2.00 **PW 5** went with the deceased to the “Tena View” Pub. But before they left the house, the accused talked to the deceased, through **PW 5’s** phone. Apparently, the deceased did not have a phone on him on that day.

The deceased informed **PW 5** that the accused had asked him for money. In response, KShs. 2,000/- was sent to the accused, by M-pesa. After the accused received the said sum, the deceased asked her to send him KShs. 500/-. The accused complied.

**PW 5**, the deceased and 3 of their friends drunk beer at “Tena View” Pub until 7.00p.m.

Just before **PW 5** and the deceased left the pub, the accused talked to the deceased, on **PW 5’s** phone, and told him that she was unwell.

Notwithstanding that information, **PW 5** and the deceased proceeded to “Visa Place”, where they had more drinks.

At 8.30p.m the accused sent a text on **PW 5’s** phone, saying that she had gone to Umoja Hospital, as she was not feeling well. The accused told **PW 5** to ask the deceased to find her at the hospital.

Although **PW 5** showed the message to the deceased, the deceased told him to ignore the accused. As far as the deceased was concerned, the accused was simply trying to get him to go home early.

**PW 5** left “Visa Place” just about mid-night. He then drove the deceased to his house in Umoja Estate.

According to **PW 5**, the deceased was not drunk. He had taken about 7-8 bottles of beer. **PW 5** described the late brother’s capacity to drink alcohol as “very big”.

Early the next morning, **PW 5** learnt that the deceased had suffered burns.

As far as **PW 5** was concerned, he did not sense any tension or problem between the accused on the deceased, on the material day. He said that the two of them spoke normally. Indeed, **PW 5** remarked that the accused even sent money to the deceased.

During cross-examination, **PW 5** said that it was his sister Jacinta (**PW 6**) who told him that it was the accused who burnt the deceased. However, **PW 5** was aware that **PW 6** was not at the scene when the incident took place. In fact, **PW 6** was resident in Embu.

**PW 5** said that the deceased was about 5 foot 7 inches tall, and about 71 kilogrammes in weight.

**PW 6, JACINTA MUTHONI NJAGI**, is a sister to the deceased. She lived and worked in Embu.

On 18<sup>th</sup> May 2008, at about 1.00a.m. **PW 3** phoned **PW 6** and told her that the accused had burnt the deceased.

**PW 6** notified other members of their family about what had transpired.

As **PW 6** is a medical doctor, she was allowed to see the deceased at the ICU, at the Aga Khan Hospital. In her assessment, the deceased had suffered 80% burns. He was therefore in critical condition.

**PW 6** did not talk to the deceased, as he was unable to talk.

Meanwhile, **PW 6** did not know of any differences between the accused and the deceased.

**PW 6** said that if somebody’s clothing caught fire, and if they were not removed quickly, the clothing would enhance the burns.

In this instance, **PW 6** learnt that her brother had got home after mid-night. As she knew that he used to smoke, she said that she would not be surprised if she were told that the brother smoked a cigarette after he reached home.

**PW 7, CPL. JULIUS MAINA**, was attached to the Buru Buru Police Station at the material time.

On the night of 18<sup>th</sup> May 2008 he was on mobile patrol duties, when they received a call over the police radio, about a case of creating a disturbance.

When the police officers got to the scene, they found the deceased lying on a bed. He had burns all over the body.

The police arrested the accused, who was the only other occupant of that house. The police needed her to explain to them what had happened.

**PW 7** said that inside the house, there was smell of kerosene.

However, **PW 7** and the other police officers in his team did not remove anything from the house. After they went away with the accused, the house was locked-up, and the keys were left with the care-taker (**PW 1**).

**PW 7** never went back to the house thereafter.

**PW 8, PC KIPRONO BII**, was also attached to the Buru Buru Police Station at the material time. He was with **PW 7**, on the mobile patrol duties, on 18<sup>th</sup> May 2008.

**PW 8** corroborated the evidence of **PW 7**, concerning the smell of paraffin inside the house where the incident took place.

Inside the kitchen, **PW 8** saw a stove and a jerry-can which had a little paraffin in it.

But, just like **PW 7**, this witness played no other role in the case, save to arrest the accused.

**PW 8** testified that the stove which he had seen at the scene was at the police station. The stove was taken to the station by the Duty-Officer.

**PW 9, PC EDWARD MUHIA**, works with the Scenes-of-Crime Section, with the Police Force. He had done that job for over 22 years.

On 21<sup>st</sup> May 2008 he took photographs of the body of the deceased, at the Aga Khan Hospital Mortuary. The said pictures were exhibited before this court.

On 24<sup>th</sup> May 2008 **PW 9** took photographs at the house where the accused and the deceased used to live. The said photos, showing the burnt sofa, were produced in evidence before this court.

The photos do not show any stove or any match-box.

**PW 10, WILLIAM KAILO MUNYOKI**, is a Government Analyst, working at the Government Chemist, Nairobi.

At the request of the police, he analysed some pieces of clothing, which had some black substances on them.

In his report, he said that he detected petrol on the clothing. He also concluded that the black substances were the residue of the burning of the pieces of cloth.

**PW 10** did not know the source of the pieces of clothing. He did not know whether they were from the burnt sofa or from the clothing worn by the deceased.

During cross-examination, **PW 10** explained that paraffin is a residue of a petroleum product. His report talked about a petroleum product, but did not specify paraffin.

Examples which **PW 10** gave of petroleum products are petrol, kerosene, diesel and jet fuel.

And in the clothing he analysed, the Analyst detected petrol, not paraffin. He emphasized that his report did not mention paraffin because he did not detect paraffin.

**PW 10** described his report as conclusive, because it stated that he detected petrol.

**PW 11, DR. MOSES NJUE GACOKI**, is the Chief Government Pathologist.

He performed the autopsy on the body of the deceased, at the Aga Khan Hospital.

**PW 11** estimated the burns to cover 80% of the body.

Inside the chest cavity, **PW 11** found about 600 milliliters of fluids. Both the lungs were heavy, weighing 900 grams and 950 grams, respectively; whilst the weight of normal lungs was about 600 grams.

The weight was attributed to the fluids which collected in the lungs. And the said weight is said to have compromised the ability of oxygen to move within the chest.

The pathologist explained that when a person breathes in hot fumes, the lungs respond by filling-up with fluids.

The degree to which the size of the lungs increased in this case was a sign that the damage to the lungs was massive.

Other organs were normal.

Consequently, **PW 11** concluded that the cause of death was severe burns and associated complications.

According to **PW 11**, the burns were caused by paraffin and flames.

It was the evidence of **PW 11** that clothing limited the spread of burns. Therefore, when one was burnt on both his front and his back, as in the case herein, something like

paraffin, which spreads, was used.

In this case, the burns were largely superficial i.e. they were largely on the skin.

**PW 12, PC AGGREY WERE**, was the Investigating Officer. He first saw the deceased when the said person was still admitted in hospital. By the time **PW 12** saw the deceased, he was not talking.

**PW 12** then went to the scene, where he picked up underwear for a male person.

**PW 12** recorded statements from **PW 1, PW 2, PW 3** and a brother of the deceased. He also recorded the statement of a person called Omondi. The said Omondi told **PW 12** that the accused had bought paraffin from his shop on 17<sup>th</sup> May 2008.

**PW 12** also said that the clothing that was sent to the Government Chemist for analysis was recovered from the house. However, the statement he recorded did not mention the piece of clothing which he allegedly recovered from the scene.

The said statement mentioned the recovery of a stove on 21<sup>st</sup> May 2008.

The statement also stated that there was no *mens rea* on the part of the accused. Therefore, **PW 12** recommended that the accused be charged with manslaughter.

When the accused was put to her defence, she told the court that she met the deceased when she was a student in Form 1. They became friends, and she abandoned school in 2007, to join him.

On the material day, she needed to visit the hospital because of gynecological problems. As the deceased did not have money, he went to his brother (**PW 5**), to borrow some money, which the accused would use when she went to hospital.

According to the accused, she called the deceased at 1.00p.m., and he promised to be home within 30 minutes.

Although the deceased did not return home as promised, he organized for the accused to receive KShs.2,000/- through M-pesa. After that, the accused sent to accused KShs.1,000/-.

Thereafter, the accused called the deceased 3 times, through **PW 5's** phone. The deceased had no phone, as he had lost it. On all 3 occasions, the deceased promised to go home to help the accused, but he did not keep his word.

The accused walked to Umoja Hospital at about 8.30p.m. she was attended to, and then she went back home at 10.00p.m.

At about 12.00 midnight, the deceased reached home, and asked the accused for food. When the accused told him that she had not cooked because she was unwell, the deceased became violent.

Whilst she was in the kitchen, the deceased picked up the stove intending to hit the accused with it. The accused ran out to the bedroom and locked herself in.

The accused heard some noise, as if from a falling stove.

A little while later, the deceased put on the radio in the sitting room. Thereafter, the accused heard a scream. She rushed out from the bedroom, and found that the clothes that the deceased was wearing were on fire. The deceased was trying to remove his T-shirt over his head.

The accused screamed.

She then rushed to the bathroom, got some water in a basin, which she used to put-off the fire.

It is then that **PW 2** knocked on the door.

Thereafter, when **PW 1** and **PW 2** went over to **PW 3's** house, the deceased staggered from the sitting-room, into the bedroom.

The accused phoned **PW 3**, but the latter did not answer her phone. However, **PW 3 and PW 4** soon arrived at the scene, in company of **PW 1 and PW 2**.

The accused denied buying any petrol or putting the deceased on fire. She said that she and the deceased did not have any grudges. Although they had some financial problems, she and the deceased loved each other. She therefore had no reason to harm him. If anything, the accused said that she was relying upon the deceased for everything.

The foregoing sums up all the evidence tendered at the trial. From the said evidence it is clear that there were no eye-witnesses to the incident which caused the death of the deceased. All the evidence was circumstantial.

It is now well settled, in law, that before a court can draw an inference of guilt, on the accused person, from circumstantial evidence, the court has to be sure that there were

no other co-existing circumstances which weaken or destroy the inference.

I must therefore ask myself whether or not the evidence adduced by the prosecution was such as can only be explained upon the hypothesis of the guilt of the accused herein. For the court to find the accused guilty, the evidence should be incompatible with any innocent explanation.

In my understanding, the prosecution sought to show that the accused was annoyed with the deceased because he did not return home earlier, as he had promised. Consequently, the accused had to go to hospital on foot, at 8.30p.m.

As she was pregnant, weak and unwell, the appellant did not cook for the deceased. Therefore, when the deceased turned up after mid-night, demanding food, the accused is alleged to have doused him with paraffin, and then lit a fire that consumed him.

Of course, that is possible. However, I also find that there is absolutely no proof of any *mens rea* on the part of the accused. As she said, she relied upon the deceased for everything.

And even though it was suggested that she was annoyed with the deceased, it is equally true that she did send him some money which had been sent to her, for her use in seeking medical attention.

I find that it is equally plausible that the deceased may have accidentally spilt paraffin from the stove, onto his clothes, and that his clothing thereafter caught fire when he lit up a cigarette.

I am aware that the deceased died a very painful death. He certainly did not deserve to die in that manner.

His brothers and sisters are justifiably annoyed and pained by the untimely death. And as the deceased was only with the accused inside their house at the time the incident occurred, the siblings of the deceased blamed the incident on the accused.

The Investigating Officer found no reason that would be sufficient to cause the accused to want to end the life of her partner. But he says that a certain Mr. Omondi sold paraffin to the accused on the day before the incident. I believe that the Investigating Officer wanted to suggest that the accused had planned to kill the deceased, using the paraffin.

The accused admitted having purchased paraffin on the day before the incident. But she explained that the said paraffin was for use in the stove, which was for cooking.

In any event, there is no suggestion whatsoever that on the day when the paraffin was purchased, there was any grudge between the deceased and the accused. Therefore, I find the explanation given by the accused to be plausible.

It is unfortunate that the deceased died in the manner he did. However, I find and hold that the prosecution has failed to prove that the accused is the person who caused the said death. The accused is Not Guilty.

I therefore order that she be set at liberty forthwith unless she is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi this 10<sup>th</sup> day of November, 2011.**

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**FRED A. OCHIENG**  
**JUDGE**