



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)

Criminal Case 163 of 2003

REPUBLICPROSECUTOR

VERSUS

JOSIAH MWAI MUYA ACCUSED

JUDGMENT

The accused **Josiah Mwai Muya** is charged with the offence of murder contrary to section 203 as read together with Section 204 of the Penal Code.

The particulars of the offence are that on 23rd and 24th October, 2002 at Githunguri village in Kiambu District within Central Province murdered Rose Wanjiru Mwai.

He denied the charge. The prosecution called 14 witnesses in support of its case.

P.W.1 Josiah Muya Mwai, Muya, one of the sons of the accused reached home at about 10.15 p.m. on 23rd October, 2002 and saw somebody he identified as accused standing near his parked vehicle, a Peugeot 404 pick up registration No. KUF 108. He then retired to bed at a garage which he shared with his brother Samuel Mbugua Mwai (P.W.2) and Paul Njoroge Mwai (P.W.5)

About 4.30 a.m. on 24th October, 2002 he heard screams. He recognized the voice as that of his step sister Regina Nyambura Mwai (P.W.4). She was shouting that the kitchen was on fire. The other sisters and brothers were awakened by the screams as well.

As a family they tried to put off the fire in vain. However, with assistance of neighbours they eventually succeeded. Samuel Mbugua (P.W.2) pushed the kitchen door hard and it opened. Sarah Wairimu (P.W.7) the sister, at that juncture exclaimed that she saw a body in the kitchen. He too confirmed this but did not verify the identity of the person.

In company of Paul Njoroge Mwai (P.W.5), Sarah Wairimu (P.W.7), Regina Nyambura (P.W.4) and Samuel Mbugua Mwai (P.W.2) they decided to report the incident at Githunguri Police Station. On the way they passed by their ***Where there is no Statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender age*** father's(accused) shop at Githunguri Trading Center and informed him of the tragedy.

Accused person accompanied them and made a report. The police visited the scene. Later on, photographs of the scene and exhibits were collected by the police. The body was taken to the City Mortuary to await post-mortem.

About 3.00 p.m. on 24th October, 2002, while at home he witnessed Samuel Mbugua Mwai (P.W.2) opening the accused vehicle registration No. KUF 108 Peugeot 404 Pick-up using a wire. Mbugua(P.W.2) and Mwai(P.W.1) searched the cabin and found, inter- alia, a Motorola mobile phone, a landline telephone head, three shirts – white, blue and purple; a flask and a kitchen knife belonging to the deceased. Also recovered was original Result Slip belonging to Samuel Mbugua Mwai (P.W.2) for the year 1999 for Giiko Primary School. They equally found certificate of ownership of Nyakinya Investors Ltd in the name of Rose Wanjiru (deceased) with a receipt dated 11th November, 1998, another receipt of Gatundu Nyakinyua Company dated 8th August, 2002 in the name of Rose Wanjiru Mwai(deceased).

Arising from these developments they went back to Githunguri Police Station in company of their aunt Edith Njihia to make further report. Most significantly he testified that there was bad blood between his mother (deceased) and father (accused).

PW.2 Samuel Mbugua Mwai, Mbugua, arrived at home about 10.00 p.m. As he headed for the garage which they used as a bedroom, he heard the gate being closed behind him. Mbugua flashed the torch but could not identify the person closing the gate. Fifteen minutes later he heard somebody knocking the gate. He recognized his father's voice asking:

“Who are you”

He recognized Josiah Muya Mwai (P.W.1) by voice identifying himself. Muya proceeded to the garage which they used as a bedroom. They retired to bed.

About 4.30 a.m. on 24th October, 2002 he heard screams of his step-sister Regina Nyambura(P.W.4). It was a distress call that the kitchen was on fire. Eventually with assistance of neighbours the fire was put off. When he pushed the door of the kitchen hard it opened and Sarah Wairimu (P.W.6) exclaimed that there was a body inside. On advice of a neighbour, Mama Chris, they went to report the incident at Githunguri Police Station. On the way they briefed and/or informed their father at Githunguri shopping centre who accompanied them to the police station. It was now about 6.00 a.m. Some policemen accompanied them home. It was confirmed that the body was that of their mother Rose Wanjiku Mwai. The policemen advised that the scene should be photographed which was done about noon. The police then took exhibits among which were jerrycan, *sufuria* and other items found around the body. The body was then taken to the City Mortuary for post-mortem.

In the course of the day Samuel Mbugua (P.W.2) became suspicious when he saw a kitchen knife on the dashboard of their father's Peugeot pick up. By reason of bad blood between his parents, he suspected that it could be the probable murder weapon. He used a wire to open the vehicle door and inside several items belonging to the deceased were found. Among others were a Motorola mobile phone for personal use and clothes which the deceased used to sell.

P.W.3, Joseph Nganga Mbugua, Mbugua **was** informed by David Mwangi(P.W.6) at 6.30 a.m. of the death of his sister Rose Wanjiru Mwai. He went to the scene and was directed by the accused to go to the kitchen and “see for himself”. Having confirmed the death of the deceased he demanded a briefing from the accused. Accused told him that he came home the previous night but did not find his wife. He relaxed on a chair in his sitting room and in that position he only heard a bang of the kitchen door. He thought it was his wife closing the door. He felt sleepy and retired to bed. In the morning, as usual, he went to open his shop at Githunguri Trading Centre. About 6.00 a.m. his

children came and informed him of the tragedy. He accompanied them to Githunguri Police Station and made a report. The accused opined that the deceased could have got burnt in the process of lighting fire. He asked accused for the mobile phone to trace whom the deceased had talked to before her death, in vain. The accused suggested that the deceased could have taken the mobile phone for charging the battery. In the evening he received a message that the mobile phone and other items belonging to the deceased had been recovered in the cabin of the Peugeot 404 pick up belonging to the accused parked in the homestead.

P.W.4, Regina Nyambura, Nyambura, arrived home at 9.00 p.m. in the evening of 23rd October, 2002. She saw the deceased in the kitchen. She found the main door of the house shared by the accused and the deceased locked. She used a side door to gain access to the room where she usually slept. She found her step sister Sarah Wairimu (P.W.7) already asleep. She too retired to bed.

About 4.30 a.m. she was awakened by an explosion from the kitchen. She realized the kitchen was on fire and instantly raised alarm. She woke Sarah Wairimu (P.W.7) and the two of them alerted their brothers who were sleeping in the garage. The first person to wake up was Josiah Mwai Muya (P.W.1). Next was Samuel Mbugua Mwai(P.W.2) who pushed the kitchen door hard after the fire was extinguished and on opening exclaimed that there was a body in the kitchen. Neighbours came but strangely. She did not see his father (accused) nor his mother (deceased) during this period.

On the way to Githunguri police station, they called at their father's shop and informed him of the tragedy. Their father joined them and wrote a statement. The police accompanied them to the scene. On the way home they met Joseph Nganga Mbugua (P.W.3) who accompanied them. When the police examined the kitchen she saw the corpse of her step mother lying on her back on the floor. According to her, the body was burnt beyond recognition save for the feet. She did not know the circumstances of the deceased's death. However, she confirmed having seen her last on 23rd October, 2002 alive at 9.00 a.m. in the same kitchen where her body was found. She confirmed that the accused usually left home about 4.00 a.m. for his shop at Githunguri Trading Centre, but on that day she neither saw him nor knew when and how he left.

P.W.5, Paul Njoroge Mwai, Njoroge, went to sleep about 10.00 p.m. on 23rd October, 2002 at the garage which they shared with Josiah Muya Mwai (P.W.1) and Samuel Mbugua Mwai (P.W.2). At about 5.00 a.m. on 24th October, 2002 he heard his sister Regina Nyambura (P.W.4) call out Josiah Muya Mwai (P.W.1), Samuel Mbugua (P.W.2) and Paul Njoroge Mwai (P.W.3). She was screaming that there was fire in the kitchen. He woke up and assisted in putting off the fire. A corpse partly burnt was discovered in the kitchen. He accompanied his brothers and sisters to report the incident at Githunguri Police Station. On the way they passed by their father's shop, whom they briefed. The father instructed him (Paul Njoroge Mwai) to remain at the shop as he accompanied two of his daughters and two of his sons to report the incident at the said Police Station. He remained selling at the shop until 2.00 p.m. On reaching home he learnt of her mother's death in the kitchen. The police came on 24th October, 2002 at about 3.00 p.m. and took away the exhibits-3 shirts, blouse, the thermos flask, landline telephone head, the cell phone, kitchen knife, jerrycan among others. The items were removed from their father's Peugeot 404 pick-up cabin.

P.W.6, David Mwangi, Mwangi, was enroute to Nairobi. He was in company of his son George Mbugua Mwangi. His son received a call on mobile phone regarding the tragedy at the accused's home. He discontinued his

journey but left his son to proceed. On the way he met his brother-in-law, the accused and his children in a pick-up belonging to the O.C.S Githunguri Police station. On arrival at the accused homestead, he was directed by the accused to the kitchen where he identified the body of his sister. He inquired from the accused the circumstances, of her sister's death in vain. The accused was evasive.

P.W.7 Sarah Wairimu, Wairimu, was at home about 6.45 p.m on 23rd October, 2003. She was sent by her father to go to their shop at Githunguri town to collect for him a torch and thermos flask. She complied. She returned and eventually went to bed at 9.30 p.m in one room out of three that accused shared with the deceased in the main house. Her step sister Regina Nyambura (P.W.4) found her asleep. Around 4.00 a.m. she heard Regina Nyambura (P.W.4) screaming that there was fire in the kitchen.

In a joint effort they woke up their three brothers sleeping in the garage ten (10) meters away. When the fire was finally put off, the door of the kitchen was pushed hard by Mbugua (P.W.2) and she saw the leg of a person. She looked for her father and mother in the homestead in vain. Together with the step sister and two brothers, in the company of their father they reported the matter to Githunguri Police Station. Her father booked the report. He had no idea when accused left home to open the shop at Githunguri Trading Centre that fateful morning. He had only stayed with the deceased and the accused for two years and had no idea whether there was a problem between them.

P.W.8 Dr. Njue Moses, Njue had worked with Dr. Maundu who is since retired. He was acquainted with the handwriting and signature of the said doctor. On application he produced the postmortem report relating to the deceased under Section 33 as read together with Section 77 of the Evidence Act.(Cap.80) Laws of Kenya.

According to the post-mortem report, the cause of death was due to head injury, fracture of the skull and brain hemorrhage extradural. The degree of injury was 95% burns. The burns had occurred after death. The post-mortem report was received in evidence as exhibit 11.

P.W.9 Lucy Waruhuru Kamau, Lucy, recalled that on 23rd October, 2002 at 3.00 p.m. she was at her Green Grocery Shop about 4.00 p.m. at Githunguri village when deceased alighted from a matatu and asked for "sikuma wiki". She had no money but promised to pay later. About 7.00 p.m. the deceased brought her shs.20/= being consideration and took the route to her home. That was the last time she saw the deceased alive.

P.W.10 Naomi Muthoni Mwai, Naomi stays in London. She received the news of the death of her mother on 24th October, 2002. She spoke to the accused on phone and demanded an explanation. Accused told her that the deceased died in the kitchen while lighting fire using petrol instead of paraffin. She equally talked to her brother Samuel Mbugua Mwai (P.W.2) who informed her that on the fateful night he came home about 10.00 p.m. and accused asked him to identify himself. Mbugua did not see the deceased that night 23rd October, 2003. She also talked to Regina Nyambura (P.W.4) who told her that she heard a bang and an explosion from the direction of the kitchen that fateful night just before she saw fire at the kitchen and raised an alarm. According to her, the relationship between her parents was strained before she left for London by reason of the fact that the accused was keeping a mistress at Githunguri Trading Centre.

P.W.11 No. 64539 P.C. Peter Kinyua, Kinyua, recalled that on 24th October, 2002 at 5.30 a.m. he was at Githunguri Police Station on crime stand-by duties. He received a report from the accused that somebody had got

burnt inside his kitchen. The accused was in company of his children, namely, Regina Nyambura. (P.W.4) Sarah Wairimu (P.W.7) Samuel Mbugua (P.W.2) and Josiah Mwai Muya (P.W.1). The report was booked in the O.B. by Chief Inspector David Gathu. In company of Chief Inspector Gathu, Kinyua visited the scene. There was a corpse burnt beyond recognition save for the legs which were placed on a kitchen chair, the head was in the *sufuria* inside which was some liquid. There was a plastic container containing some liquid which he thought was a petroleum product. He summoned scenes of Crime Personnel from CID Headquarters Nairobi who photographed the scene. Together with P.C. Lazarus Kirofi they collected samples from the 3 "*sufuria*" inside the kitchen. In addition they took the plastic bag that contained a clear liquid. He escorted the exhibits to the Government Chemist for analysis. He then escorted the corpse to City Mortuary pending post mortem report. After escorting the body P.C. Kirofi handed over a knife, a landline telephone – head, Motorola mobile phone V2288, 3 shirts, and thermos flask to the investigation officer. The said items, were recovered inside accused Peugeot 404 motor vehicle registration No.KUF 108. The items were recovered in a polythene bag underneath the front cabin seat of the said vehicle by Samuel Mbugua Mwai (P.W.2) in the presence of Josiah Muya Mwai (P.W.1).

He was told by Samuel Mbugua Mwai (PW2) that he had seen a knife on the dashboard of the accused's said vehicle where the aforesaid items were also recovered.

On 25th October, 2002, the accused person was arrested by Chief Inspector Gathu and P.C. Kirofi and formally charged with murder. He produced the aforesaid items as exhibits 1-11 in these proceedings.

PW.12 Naomi Muthoni Mbugua, Muthoni, is the mother of the deceased. She confirmed that there was bad blood between the accused and deceased throughout their marriage. The deceased had confided in her this fact during her lifetime. When her daughter died she suspected foul-play.

P.W.13 Police Inspector Samuel Gathu(Rtd); Gathu recalled that on 24th October, 2002 he was in the police station about 5.30 a.m. when accused, in company of his children, reported outbreak of fire in his kitchen. He visited the scene in the company of P.C. Kinyua, PC Kirofi, accused and the children of accused.

He confirmed having seen an extensively burnt corpse of a lady lying on her back with the head in the *sufuria* and legs on the stool. The kitchen was smelling petrol or petroleum – products mixed with water. The two or three *sufurias* in the kitchen contained substances smelling strongly of petrol. Of utmost importance, though the kitchen walls were made of timber it strangely it had not burnt save for items that were close to the body. He questioned the accused who confirmed having slept at his permanent house the fateful night which he shared with the deceased. He visited the bed-room but did not see any sign of a struggle. He then got information that there were goods seen inside the Peugeot 404 pick-up belonging to the accused parked in the compound. One of the officer's opened the door of the vehicle. Inside was a polythene bag containing assortment of goods. On enquiry he established that those items belonged to the deceased. On interrogation the sons and daughters of the accused, divulged that there was bad blood between accused and the deceased. Taking everything into account he read foul play. He summoned scenes of crimes personnel who photographed the scene. He handed over the items recovered in the kitchen and the vehicle to the scenes of crime personnel. He escorted the corpse to the City Mortuary for post-mortem. He then caused the accused to be arrested and formally charged with murder.

P.W.14, John Kibuthi, Kibuthu, is a gazetted Government Analyst of 17 years standing. He carried analysis on the

exhibits relating to this case. His conclusion was that the liquid marked "D" was found to contain kerosene. Liquid marked "B" and "D" were found to contain sooty material i.e. a black deposit from incomplete combination of organic matter. He marked the exhibits as GCE. 33/02 JAK for purposes of identification. He signed the report and produced the same in evidence as exhibit 11 (a) and exhibit memo as exhibit 11 (b).

At the close of the prosecution case Mr. Adala for the defence submitted that there was no case to answer. The prosecution contended on the other hand contended that a *prima facie* case had been established warranting the accused being put on his defence.

After examining the evidence adduced that far I put the accused on his defence after explaining the provision of Section 306 (2) of the Criminal Procedure Code.

The accused chose to make unsworn statement and not to call any witness. In his unsworn statement the accused testified that on the night of 23rd October, 2002 his son Josiah Mwai Muya (P.W.1) arrived at home and found him in his garage at about 10.00 p.m. He asked Muya to identify himself which he (Muya) did. Muya left him at the garage. He slept at 11.00 p.m. and woke up at 4.00 a.m. in time to walk to Githunguri Shopping Centre to open his shop. About 5.30 a.m. or thereabouts his children Josiah Mwai Muya (P.W.1), Samuel Mbugua Mwai (P.W.2), Regina Nyambura (P.W.4) Paul Njoroge (P.W.5) and Sarah Wairimu (P.W.7) came to his shop and informed him that the kitchen in his homestead got burnt and inside was a corpse. He accompanied his children to Githunguri Police Station and booked the report.

Arising from the report the police accompanied them back to his home. He went to their bed-room but did not find his wife. He went to the kitchen and found his wife's burnt body. He was shocked.

Police commenced investigations. Scenes of crime personnel took photographs. Exhibits were collected and the body was taken to the City mortuary for post-mortem. He was later arrested and charged with murder on 25th October, 2002.

At the close of the defence case I summed up the case for the assessors who returned a verdict of "Not Guilty". I reserved my judgment.

It is common ground that the accused was the husband to the deceased. The couple, inter alia, owned a three bed-roomed permanent house at Githunguri village. The accused also owned a shop at Githunguri Trading Centre. His family used to help him in running the shop. It is equally common ground that accused daughter, Regina Nyambura (PW.4) and Sarah Wairimu (P.W.7) slept in one of the three bedrooms in the said house shared by accused and the deceased.

Both girls were home on the fateful night but came at different times. Sarah Wairimu (P.W.7) was at home at about 6.45 p.m. but was sent by accused to their shop at Githunguri Township to collect a torch and a thermos flask. She returned and went to bed about 9.30 p.m. before Regina Nyambura (P.W.4) whom they shared one bed-room out of the three in the main house where accused and deceased also were also occupying one as the couple's bed-room. Regina Nyambura (P.W.4) arrived home about 10.30 p.m. and found the main door of the house locked. She accessed their bedroom by aside door. She slept in the same room with Sarah Wairimu.

On the same night Josiah Mwai Muya (P.W.1) and Samuel Mbugua Mwai (P.W.2) and Paul Njoroge Mwai (P.W.5) all sons to the accused arrived home about 10.00 a.m. The first to arrive was Samuel Mbugua Mwai(P.W.2). Fifteen or so minutes

later Josiah Mwai Muya (P.W.1) arrived. Samuel Mbugua recognized the accused's voice asking "who are you". Samuel equally recognized Josiah Mwai Muya's (P.W.1) voice identifying himself to the accused. Paul Njoroge Mwai arrived in company of Regina Nyambura at about 10.00 p.m. the two had been at their shop at Githunguri Trading Centre. They all retired to bed.

Regina Nyambura (P.W.4) last saw the deceased at the same kitchen where the body was found at 9.00 a.m. on 23rd October, 2002. She went to sell at their shop at Githunguri Trading Centre. According to Nyambura, no one used to sleep in the kitchen.

According to the testimony of the accused his son Josiah Mwai Muya (P.W.1) found him in a vehicle garage at 10.00 p.m. on 23rd October, 2003. He retired to bed about 11.00 p.m. He woke up at about 4.00 a.m. and went to his shop at Githunguri Trading Centre. About 5.30 a.m. he received a report from the children that the kitchen at his homestead got burnt. He accompanied his children to Githunguri Police Station and booked the occurrence in the occurrence book. In company of the police officers he went to his home, entered the bedroom but did not find his wife. He went to the kitchen and found his wife lying dead. He was later charged with murder.

There was no examination of the accused to determine if he was mentally sound to stand his trial. Be that as it may, there was no suggestion from the defence that the accused was of unsound mind at the time of the commission of the alleged offence. Accordingly I proceed on the premise that the accused at material times was of sound mind and hence capable of having the necessary mensrea, a cordinal requirement in a charge of murder.

Post-mortem report was produced by Dr. Moses Njue (P.W.8) on behalf of Dr. Maundu, since retired. The conclusion was that the deceased died of head injury, fracture of the skull, brain hemorrhage, extradural. Burns were assessed at 95%. Most significantly burns occurred after death. In essence the deceased was dead before being set on fire.

The issues for determination is this: who killed the deceased?. Put in another way: how did the deceased meet her death and in whose hands?.

The prosecutions case as I understand it is that the accused with malice afterthought unlawfully caused the death of deceased. Towards establishing its case the prosecution pieced together certain events which amounts to circumstantial evidence connecting the accused with the offence, to wit:

- (i) the bad blood between accused and the deceased arising from the keeping of mistress by the accused – See evidence of Josiah Muya Mwai (P.W.1), Naomi Muthoni Mwai (P.W.10) As regards evidence that their marriage was rocky See the Evidence of Naomi Muthoni Mbugua (P.W.12).
- (ii) accused was at home between 6.45 p.m. in the evening of 23rd October, 2002 – 4.00 a.m in the morning of 24th October 2002 - See defence of accused, evidence of Josiah Muya Mwai (P.W.1) Samuel Mbugua Mwai (P.W.2) and Sarah Wairimu (P.W.7)
- (iii) accused evasiveness about the circumstances preceding the death of the deceased – See evidence of Joseph Nganga Mbugua (P.W.3), David Mwangi (P.W.6) and Naomi Muthoni Mwai (P.W.10)
- (iv) discovery of items belonging to the deceased in the pick-up of accused (doctrine of recent possession) at 3.00 p.m on 24th October, 2002 so soon after the death of the deceased. See evidence of Josiah Muya Mwai (P.W.1), Samuel Mbugua Mwai (P.W.2), P.C.Peter Kinyua (P.W.11) and retired police Inspector Gathu

(P.W.13)

- (v) the fact that the kitchen wall was made of timber but strangely the same did not burn. Only the things around the body were burnt thereby lending credence to the assertion by the prosecution that the whole thing was stage-managed. *It thus excludes suicide by the deceased.* See evidence of P.C. Kinyua (P.W.11) and Retired Inspector Samuel Gathu (P.W.13)
- (vi) Government analyst(P.W.14) evidence that the liquid found in the *sufuria* on which the head rested contained kerosene an inflammable/petroleum product – see also evidence of John Kibuthu (P.W.13) and Naomi Muthoni Mwai (P.W.10) as relates to accused explanation on phone that the deceased light fire using petrol instead of kerosene.
- (vii) the body was resting in a position suggesting that it was placed there to facilitate the total burning which was achieved in the scale of 95% burns – See evidence of Dr. Moses Njue (P.W.8), P.C. Kinyua (P.W.11) and Retired Police Inspector Samuel Gathu(P.W.13).
- (viii) Post-mortem report – exhibit 11 – that the burns were occasioned after death thereby suggesting an attempt to conceal the injuries – See evidence of Dr. Moses Njue (P.W.8).
- (ix) The deceased paid Lucy Waruhuru Kamau (P.W.9) sh 20/= in respect of *sikuma* wiki which deceased purchased at about 4.00 p.m. in the same evening. Lucy saw deceased take the route to her house and deceased was on indeed found dead in her kitchen in the morning of 24th October, 2002.

I am alive to the law that in order to justify circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than his guilt. That there must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution that it is a burden which never shifts to the party accused. See **SAWE –V- REPUBLIC (2003) K.L.R. page 364 at page 372**

I am equally aware that circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. See **REPUBLIC –V- TAYLOR, WEAVER & DONOVAN (1928), 21 Cr. App.R.20.**

On the totality of the circumstantial evidence adduced by the prosecution through its witnesses, it is clear to me that the accused was at his homestead on the night of 23rd October, 2002 and the morning of 24th October, 2002. The only other persons at home during this period were his the children. While there is evidence that the accused and the deceased had had blood between them there is no similar evidence regarding the relationship between the deceased and any of the children at home on the night of 23rd October, 2002 or in the morning of 24th October,2002. This evidence exculpates the said children but inculpates the accused.

It is equally clear to me that the accused and deceased shared a bedroom in the main house. This is not denied by the defence. Accused left the homestead about 4.00 a.m. in the morning of 24th October, 2004 and apparently left his wife in the bedroom. This is borne out by the accused's defence that when he came back with the police he went to the bedroom first but did not find his wife thereby implying that she left her in the bedroom. By coincidence the fire broke out almost the same time the accused left his homestead. On the evidence the deceased and the accused were not seen by the children and the

neighbours assisting in putting off the fire. When the fire was eventually put off the deceased was discovered burnt beyond recognition in the kitchen. There is no evidence that some third party came to the homestead that night, killed the deceased and set her on fire inside the kitchen. There is also no evidence that the deceased had known enemies. There is evidence that deceased used to sleep in the main house hence the issue of the deceased having slept in the kitchen is equally out of question. The kitchen wall was made of timber yet strangely it did not burn. Only the items close to the body got burnt. The body was also lying in a way that suggests it was placed in that position by a third party thereby excluding the theory of suicide. Going by the medical evidence, the accused could not have killed herself and subsequently lay down and set herself on fire. The post-mortem report conclusion was that death occurred before the burns. Hence burning was meant to conceal the injuries some property of the deceased including Motorola mobile phone for personal use were also found in the Peugeot 404 pick-up belonging to the accused hardly 12 hours after the death thereby attracting the doctrine of recent possession. In the face of the evidence that there was bad blood between them, compounded by the evasiveness of the accused when asked about the mobile phone of the deceased by Joseph Nganga Mbugua (P.W.3) persuades me to conclude that on circumstantial evidence the accused had the motive, the means and the opportunity to murder the deceased during the night of 23rd October, 2002 and/or the morning of 24th October, 2002. I believe the evidence of the prosecution witnesses. They appeared to me to be witnesses of truth. I reject the accused defence in its entirety. The accused person appeared to me to be evasive and unreliable. His evidence is a hollow sham. Although all the three assessors had returned a verdict of not guilty I have the misfortune of disagreeing with them. They misconstrued the concept of circumstantial evidence which in law is often the best evidence. I find as a matter of fact that there are no co-existing circumstances weakening the chain, of circumstances relied on by the prosecution. I find that the prosecution has proved its case beyond reasonable doubt. In the result, I convict the accused of the offence of murder as charged. I sentence him to suffer death as provided by law. Right of appeal 14 days.

DATED AND DELIVERED AT NAIROBI THIS

31st DAY OF AUGUST 2006

**N.R.O. OMBIJA
JUDGE**