



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KIAMBU**

**CRIMINAL CASE NO. 1 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VESRSUS**

**MERCY WANJIRU MURIMI.....ACCUSED**

**JUDGMENT**

1. **MERCY WANJIRU MURIMI** is charged with the offence of murder of *Josphat Murimi Kimenju deceased*. They were husband and wife. They had a turbulent marriage which fact is admitted by the accused. It is during their quarrel on 10<sup>th</sup> June, 2015 that the deceased suffered horrendous burns and finally succumbed to his injuries while receiving treatment. The deceased died on 13<sup>th</sup> June, 2015 at **Kenyatta National Hospital, (KNH)**.

2. The ingredients of the offence of murder were re-stated in the case **REPUBLIC V. MOHAMMED DADI KOKANE & 7 OTHERS (2014) eKLR** as:-

**“The offence of murder is defined as follows by section 203 of the penal code:**

**“any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

3. The prosecution is obligated to prove beyond reasonable doubt the following ingredients:-

- a. The fact of death of the deceased.
- b. The cause of such death.
- c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused.
- d. Proof that the said unlawful act or omission was committed with malice aforethought.

4. Prosecution called nine witnesses. It is the prosecution's case that the deceased was injured in the family home. The witnesses that were present were the couples' two daughters. Both of them testified for the prosecution.

5. The first witness to testify was the couple's first born A.N. She was 16 years old when she testified which means she was 12 years old when she witnessed the events that led to the death of her father. The second witness was the second born daughter of the couple. She B.M. was 11 years when she testified which means she was 7 years old when the accident occurred.

6. Both of them said that they resided as a family unit at Makongeni, in Thika. They lived in one bedroom apartment. Their parents slept in the bedroom while they slept in the sitting. They both recall on 10<sup>th</sup> June, 2015 that they were woken up by loud voice. A.N. said:-

**“... loud voice of mother woke me up.”**

7. A.N. said that when the deceased arrived at home, in the evening of 10<sup>th</sup> June, 2015 she had not slept. The accused was in the kitchen near the balcony cooking. Both A.N. and B.M. on being woken by their parents' quarrel tried to intervene. B.M. said:-

**“They were throwing things – mother was throwing things at father. We tried to intervene together with my sister.”**

8. Both A.N. and B.M. proceeded to state that they saw their mother go to the kitchen and return back with a container which had paraffin. Both the witnesses said that there was electric light in the sitting room. The deceased was seated on the chair. They saw the accused douse the deceased with paraffin and also saw her strike the match.

9. A.N. stated:-

**“Father resisted mother as she was pouring paraffin...”**

10. Both witnesses saw the accused strike the matchstick twice and they saw the deceased put off the light of the match twice and on the accused striking the matchstick the third time, the deceased's clothes caught fire and when the deceased got burnt they saw the accused put a blanket on the deceased. A.N. saw deceased's skin was peeling due to the burns. B.M. was burnt on her right hand when she got too close to the deceased as he was burning.

11. The daughters saw the deceased, while a light and trying to escape through the front door but it was padlocked. The witnesses unlocked the door and screamed which attracted neighbours who assisted by calling fire brigade, police and Red Cross.

12. A.N. telephoned the deceased's mother **PWK (P)** her grandmother, to inform her of the occurrence and to inform her that the deceased had been rushed to hospital. Philomena visited the deceased at KNH, where he had been referred to because his burns were serious. She testified that the deceased, while he was in hospital, more than once told her that the accused wanted to kill him and the children. She noted that the deceased was burnt on his face and torso. The following day after she saw the deceased at KNH she learnt that he had succumbed to his injuries.

13. The deceased, while in hospital, also informed his sister, **Lucia Muthoni Kimenju** that the accused had attempted to kill him and the children.

**14. John Komu Mathu** was the caretaker at the apartment where the couple resided. He rented the apartment to the deceased in June, 2015. The deceased lived with his daughters and the accused joined them there soon thereafter. He was informed of an incident at the plot and he went to see what was happening. This is what he said:-

**“Deceased lay on the bed with burns. I could not observe him for long as the injuries were horrifying - all his torso, with clothes were bunt.”**

15. Deceased's brother **Michael Kimenju** visited him at KNH. He too noted:-

**“He (deceased) badly scalded with burns all over the body. He said that it is his wife who set him ablaze, that she wanted to kill him and children.”**

16. The first person at the scene was a next door neighbour, **Teresia Wanjiku**. When she and her husband responded to the couples' daughter's screams they went to that apartment and on it being opened by the daughters this neighbour said:-

**“Inside the house was full of smoke ... My husband went in... My husband is the one who went in and reported seeing that the deceased had burns and wife (sic) trying to put out fire.”**

**17. Dr. Orata's** post-mortem report revealed that the deceased had suffered 70% total body surface area 3<sup>rd</sup> degree deep burns on the trunk, back, thighs and upper limbs.

18. The accused presented her defence under oath.

19. The accused stated that the deceased was her husband. She narrated the occurrence of 10<sup>th</sup> June, 2015. On that evening, the deceased arrived home at 10.30 p.m. He was drunk. Her daughter A.N. told her while she was in the kitchen that the deceased had arrived and had gone to sleep. When she went to the sitting room accused said she found the deceased seated on the sofa set. Accused said that she returned to the kitchen to warm water for deceased's bath. She also went to the bedroom to prepare the clothes the deceased would wear. This is what accused narrated:-

**“He (deceased) followed me to the bedroom and began to quarrel me. He said I was showing him matharau (disrespect) and that I was seeing other men. He said I should go away so that he can marry another woman who could give him a male child.”**

20. Accused stated that the lack of a male child in their marriage was problematic and was the cause of them separating from time to time. She said:-

**“We were having an unstable marriage because of that issue.”**

21. Accused said she ignored the deceased because he was drunk. She went to the kitchen and the deceased followed her and began a quarrel. As she went about warning food, she said:-

**“... he hit me with his hand. He hit me on my eyes.”**

22. Accused said that although she asked deceased to stop hitting her he continued and it was then that A.N. and B.M. tried to help her “by crying.”

23. Accused said:-

**“I pushed my husband (deceased) and I got an opportunity, I and the children to run to the sitting room. After a while, my husband came out of the kitchen crying – “help me” ... I did not know that when I pushed my husband away that the stove ... he got on fire.”**

24. Accused said that she wanted to put out the fire using water, but the water was coming out from the tap very slowly. She eventually put out the fire with the blanket. The deceased became unconscious.

25. In concluding her defence, the accused said that she did not know that in pushing the deceased in self-defence he fell on the stove.

### **ANALYSIS AND DETERMINATION**

26. Recalling the ingredients set out above for murder as provided in **Section 203** of the Penal code, I will proceed to consider those ingredients applying the evidence adduced in this matter.

27. I will consider together the two first ingredients that is the fact of death of deceased and the cause of death.

28. Death of the deceased was first confirmed by the deceased’s mother and then by deceased’s siblings. The post-mortem report of Doctor Orata also stated the fact of death and the cause of death. In that post-mortem report, the doctor graphically showed by drawing out on a sketch of a body where the burns of the deceased were. That sketch shows that deceased was extensively burnt. He had burns on the front, the face, both arms, chest (front torso) and thighs down to one knee. The back sketch shows the burns were on both arms, the back torso, buttocks and back of the thighs. The doctor’s report shows that the cause of deceased’s death was 70% 3<sup>rd</sup> degree deep burns.

29. The other ingredient to consider is whether the deceased met his death as a result of an unlawful act or omission of the accused.

30. It will be useful to begin by considering the accused’s response to cross-examination by learned prosecution counsel for the Director of Public Prosecutions, Mr Kasyoka. The accused was asked by the said counsel whether the accused’s children A.N. and B.M. were truthful and could be relied upon. This is how accused responded:-

**“They are my children. I have brought them up myself. Yes, I also used to take them to church. They are truthful.”**

31. That response helps this Court to determine who between those children and the accused was telling the truth. Those children and the accused were the only eye witnesses of the incident that led to the severe burning of the deceased.

32. Despite their young age, those children’s evidence was consistent with each other. A.N. was awake when deceased arrived on the fateful day. She however fell asleep. B.M. was asleep and did not see deceased arrival home. Both of them however were very clear that they were awoken by arguments between their parents. Indeed, it was more than argument because B.M. said that she saw the accused and deceased throwing things at each other. When the argument progressed the children saw the accused, their mother, go to the kitchen and returned with a container. By then, they said the deceased was seated on sofa set with his eyes half closed. B.M. said that the deceased was drunk that night. Both children said they saw their mother pour paraffin on the deceased. A.N. said that the deceased “tried to resist” but the paraffin covered his torso and head. A.N. saw the accused go back to the kitchen and return to the sitting room, where the deceased was and both she and B.M. said their mother, the accused, struck a matchbox twice which the deceased successfully extinguished but the third strike of the matchbox set the deceased on fire.

33. Although the accused, in her defence and for the first time said that the deceased was unconscious and continued to be unconscious until he passed away, that was not supported by the prosecution’s witnesses who included the deceased’s mother and his siblings nor was it supported by the couples’ children. It is noteworthy that those witnesses were not cross-examined by defence on that issue. It follows that the statement by accused that the deceased was unconscious is an afterthought and is hereby rejected. Further, the deceased’s mother in her evidence narrated a telephone call made by A.N. on the fateful night when she said:-

**“Shosho, dad has been set ablaze by mother and has injury on chest and abdomen.”**

34. Further, deceased mother on visiting deceased at KNH said that the deceased informed her that it was accused who burnt him with paraffin. The deceased also narrated that statement to his sister Lucia Muthoni Kimenju and to his brother Michael Kimenju.

35. This evidence was deceased’s dying declaration which can be relied upon by this Court. See the Court of Appeal case, **MOSES WANJALA NGAIRA VS. REPUBLIC (2019) eKLR** thus:-

**“[26] In PHILIP NZAKA WATU VS REPUBLIC [2016] eKLR, this Court stated the following on admission and reliance on a dying declaration:**

**“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”**

That dying declaration is well corroborated by evidence of A.N. and B.M.

36. Accused raised self-defence in her defence. The Court of Appeal in the case of LUCY MUENI MUTAVA VS. REPUBLIC (2019) eKLR discussed such a defence and had this to say:-

**“9. Provocation is a defence available to a person who by his/her actions causes the death of another and is faced with a charge of murder. Provocation was succinctly defined in the case of Duffy [1949] I ALL ER 932 as:-**

**“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”**

**See also Section 208 of the Penal Code. The person relying on the defence simply states that at the time he committed the offence he was under a diminished capacity and acted in the heat of anger or passion. See ELPHAS FWAMBA TOILI VS. R [2009] eKLR.**

**10. It therefore follows that for such a defence to suffice two conditions must be satisfied as deduced by this Court in PETER KING'ORI MWANGI & 2 OTHERS VS. R [2014] eKLR namely:-**

**“The “subjective” condition that the accused was actually provoked so as to lose his self-control; and**

**The “objective” condition that a reasonable man would have been so provoked.”**

37. Accused did not, in promoting that defence say that she was under diminished capacity. She stated that the deceased hit her twice, then she pushed him and he fell on stove. Accused did not only state that being hit led her to lose self-control nor did she say the acts of the deceased would have provoked a reasonable man.

38. Not only did accused fail to bring herself within the ambits of self-defence, but also, her version of what happened the night in question and how the deceased was burnt is countered by overwhelming prosecution's evidences, which shows that she doused the deceased in paraffin and made two attempts to set the deceased alight, and eventually succeeded on the third trial.

39. This Court does hereby finds that not only did the accused's unlawful act lead to the death of the deceased, but was also committed with malice aforethought.

40. Accused's act of pouring/dousing the deceased with paraffin, retreating to the kitchen to fetch a match box, lighting matches twice and on the third attempt setting the deceased alight had the singular intention of causing maximum injury to the deceased. So severe was the burning of deceased that the first people on the scene, the neighbours' first reaction was to call for a fire brigade. It was when one of them entered the home and saw the severe burnt deceased that they requested for fire brigade, the police and the Red Cross to attend the scene.

41. Although the accused alleged the deceased was drunk and hence began to assault her, to the contrary, I find that it was because the deceased was drunk that the accused took advantage of attacking him so viciously. The children of the couple A.N. and B.M. stated that the quarrel between accused and deceased was because accused was angry that the deceased was talking on telephone to a lady called Mercy. The accused had malice aforethought, she had an intent which preceded the act to do serious bodily injury to the deceased. Undoubtedly, the accused had knowledge that dousing deceased in paraffin setting him alight would produce such consequence as occurred, that is, death. The prosecution has proved the mental element, malice aforethought of accused which demonstrates that the accused is guilty as charged.

42. In conclusion, it is therefore my finding that it has been proved beyond reasonable doubt that **Mercy Wanjiru Murimi** is guilty of murder of **Josphat Murimi Kimenju, deceased**. The accused is convicted as charged.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KIAMBU THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021**

**MARY KASANGO**

**JUDGE**

**Coram:**

Court Assistant: Ndege

Accused: present at Langata Prison

For the Accused: Mr. Njehu

For the Republic: Mr. Kasyoka

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**