



REPUBLIC OF KENYA

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

**Criminal Case 21 of 1997**

**MARY WANJIKU GICHIRA..... ACCUSED**

**-versus-**

**REPUBLIC..... PROSECUTOR**

**Coram: Oguk, J .**

**Mrs. Ondieki for the state Sichale for the Accused**

**JUDGMENT**

The Accused, MARY WANJIKU GICHIORA was charged before this Court with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. She is alleged in the particulars of the charge to have murdered her husband, JOHN MBUGUA KAMAU (the deceased) on the night of 24th/25th of September, 1996 at Soweto Village, Nairobi within Nairobi Area. She denied the charge.

The prosecution case was that the Accused and the deceased were husband and wife. Their marriage was blessed with one child, a baby girl, then aged 1 year and 8 months. They lived at Soweto slum Village in Nairobi. According to the evidence of Mary Wairimu Kamau (PW4), the deceased and his wife did not stay harmoniously.

They used to quarrel and fight and would later go to her for reconciliation. This was confirmed by their immediate neighbour, Kigochi Mwaura Gathini (PW1) who used to live in house No. 2 while they were in house No.1 in the same block made of off-cut timber walls and iron-sheeting roofing. He told the Court that the deceased and his wife used to quarrel a lot whenever they took alcohol. Even though he never used to see them taking drinks, he used to hear them talking at high voices in their house as if they were drunkards. There was only a wooden wall partition separating his house from that of the deceased and his family which made it easy for him to hear their voices as they quarrelled.

On the night of 24th September, 1996 at about 9.30 p.m Julia Ngengo Muchiri (PW2), who is a sister in law to the deceased, testified that she was in a certain house within Soweto Village for a funeral ceremony where neighbours were consoling the bereaved family. The deceased was also there. The Accused then came to the place carrying her child and called her husband (the deceased) aside and they started talking. They soon started fighting with each other and she saw the child whom the Accused was carrying fall down. She rushed to the scene and picked the said child from the ground. She separated them and while carrying the said child, they left the funeral ceremony for their house. On their way home, she heard the Accused telling her husband that he will never beat any woman again and that, that will be his last time ever to beat any woman but the deceased never responded.

On reaching outside their house, the Accused refused to enter the house. Their neighbour, Kichochi Mwaura (PW1) heard the voice of the deceased telling his wife to enter the house but she replied that he would not do so as he was beating her. The deceased then started pulling her by force to enter the house and as they entered the house he heard them quarrelling. He could not sleep in his house because of their quarrels which later sub-sided between 10 to 10.30 pm. He then got an opportunity to sleep.

The evidence of George Kiarie Moko (PW5) who was also a neighbour to the deceased and his wife was also similar to that of Kichogi Mwaura (PW1), but in his case, he actually saw the deceased and his wife quarrelling outside their house as he was answering a call of nature outside his house. He saw the deceased trying to beat his wife as the lady was pleading with him not to beat her outside the house but rather inside the house. After they entered their house, he heard them still quareliing as if they were fighting. This continued for about half an hour and the noise subsided. He then retired to his bed to sleep.

Felista Nyokabi (PW7) who is also a neighobour of the deceased at Soweto Village, similarly testified that on the material night, while inside her house she heard some screams and went out to find out what was happening. She then realised that it was the Accused who was screaming inside her house. She heard her husband asking her why she was screaming and realised that it was just a domestic affiar. She then went back to her house and retired to sleep.

In the meantime, Julia Ngeondo {PW2) who had carried the child of the Accused as they left the funeral ceremony following the fight between her and her husband, testified that she went with them upto their house. She calmed them down on reaching the house till they started talking about the fight. It was then around 10 pm. The Accused was complaining that her husband was never giving her money for food and the deceased replied that if that was the case, then he would give her shs. 100/-, He then gave her shs. 100/- to enable her buy some food to cook. The Accused took the money from her husband who stated that he was retiring to his bed to sleep. Julia then left the house leaving the Accused who had been given shs. 100/- still seated while carrying her child. the husband, the deceased had gone to sleep.

Not long after things had quit ended in the house of the deceased and his neighbours started to sleep, Kigochi Mwaura (PW1), his immediate neighbour, testified that he was awakened from sleep by the screams of those who were passing by who were shouting that that there was fire. He got out to find out what was happening. It was then between 11 and 11.30 pm. He noticed that there was fire in the house of the deceased. He could see a person inside the house through the burning flames between the off-cut timber wall, trying to find his way out. He then tried to break the door of the house of the deceased to pen it for him, only find that it had been locked from outside. He confirmed that he actually saw the padlock on the door which made it difficult for him to break the said door open. He could not do much as the fire was spreading to his house and he rushed back to try and salvage some of his properties from the house.

The neighbours of the deceased, George Kiarie (PW5), Felista Nyokabi (PW7) and John Ndegwa (PW8) heard the screams about fire and they came out of their houses to find that the house of the deceased was on fire which was speading to other houses.. Kiarie stated that this fire started just within about 45 minutes after the fight between the deceased and his wife, the Accused, inside their house had subsided. He had then not even fallen asleep and was still resting on his bed. Several villagers in Soweto came out of their houses on hearing about the fire alarm. This included the deceased own brother, James Muchiri Kamau (PW3) and his wife, Julia Ngendo Muchiri (PW2) who had shortly before then succeeded in calming down the deceased and his wife. They furiously fought the fire from spreading to other houses while others were using water in fruitless effort to put off the fire. Some of the villegers went and telephoned the Kasarani Police Station and the Fire Brigade of the Nairobi City Council. APC James Njoroge (PW6) and other officers from the nearby Kahawa Chief's Camp who heard of the fire alarm rushed to the scene. It was not until the fire brigade personnel arrived that they succeeded in putting off the said fire after it had completely burnt down a total of 11 houses within the said village. They then found the charred remains of John Mbugua (deceased) having been burnt almost beyond recognition in his house. His wife (the Accused) together with his child were nowhere to be seen throughout the incident and yet shortly before then they were in the same house with the deceased. She could not be located at all by the relatives and neighbours of the deceased anywhere that night after the fire outbreak. The remains of the deceased were removed from the scene by P.C Daniel Mbuitu(PW9) from Kasarani Police Station

to the City Mortuary after the scene was photographed by the scenes of crime personnel P.C John Munyi (PW10). He further took further photographs of the deceased at the City Mortuary.

On the 1st of October, 1996, Dr. Samuel Odera Ywaya (PW11) who is a Police Pathologist carried out Post Mortem Examination on the body of the deceased after the same had been identified to him by his brother James Muchiriri (PW3) and John Ndegwa (PW8). He found that the body of the deceased who was aged about 28 years had 100% burn all over the body. He formed the opinion that the cause of death of the deceased was due to the burns by fire. He prepared a post mortem report which he duly signed and produced in evidence (ex.3). The body of the deceased was thereafter released to his relatives for burial.

On the following day after the incident, the 25th of September, 1996, the wife of the deceased, the Accused herein, who was nowhere to be found during the fire incident the previous night when the residents of Soweto were trying to put out the fire, was found by members of the public within the same village. They got hold of her and started beating her as they led her to the scene of the incident. On arrival, they knocked her down called for old tyres which were heaped on her and poured paraffin on her in readiness for lynching. Just before they struck fire to burn her, she was rescued by an A.P James Njoroge (PW6) from the nearby Kahawa Chief's Camp. On arrival at the scene, he restrained nearly 100 angry Soweto villagers who had gathered to set her a blaze. He took her to the Chief's Camp and thereafter to Kasarani Police Station.

On the 27th of September, 1996, the Accused was taken before I.P David Makali (PW12) who recorded from the statement under inquiry. The same was admitted in evidence as learned counsel for the Accused raised no objection (ex.4).

In this statement, (ex.4) the Accused stated that she and the Accused got married on the 27th of June, 1995 but separated in Jan. 1996 till the 27th of August, 1996 when they re-united. Later on the 21st of September, 1996 when he wanted to beat her, she again ran away to stay with her sister Dorcas Wambui at Congo Village within Kahawa West. On the evening of the 24th of September 1996, her husband, sent her sister to inform her to come home but she never went back. Later that night and about 9 pm, he came for her at the house of her sister, Wambui while drunk. He started beating her as they left the house. She was carrying her child.

On reaching Soweto Village, some of the residents advised her husband not to beat her on the way suggesting to him that it was better to beat her in the house than in public, but he continued to beat her till the child she was carrying fell down and was picked up by the sister in law of the husband. He went on beating her till they reached the house. Her husband then ordered the same lady to put down the child and go away. When she later realised that her husband wanted to sleep, she took her child and went out of the house. She bought some paraffin of shs. 3/- and went back to the house and put the paraffin in their lamp and thereafter went to look for accommodation in a certain house belonging to a certain lady who was a stranger to her in Congo Village. She slept there till morning and on the following day, as she was going back to Soweto Village, members of the public arrested her and started beating her. They were about to lynch her when an Administration police officer came and rescued her.

The Accused denied in her statement to have burnt her husband or set fire to their house. After the police investigations were completed, she was charged with the murder of her husband, now deceased.

In her defence before the court, the Accused largely repeated what she had recorded in her statement under inquiry (ex.4) which I have set out above. She stated that the deceased, forcefully took her from the house of her sister, Dorcas Wambui on the evening of 24th of September, 1996 while holding her by the collar and yet she was then carrying her child. She refused to go with him but he forced her out of the house and started beating her. He continued beating her on their way home while she was still carrying the child. At some stage when they reached a place where there was a funeral ceremony, her child fell down and was picked by her husband's sister in law.

The deceased continued to beat her while dragging her till they reached their house.

He then told his sister in law to leave as he would not beat her again, but as soon as she had left, he started to beat her again. During the scuffle, she got a chance to escape from the house with her child and went and sought refuge in the house of a certain lady who was a stranger to her. On the following morning, as she left that house for the house of her sister, she was caught by a group of people who started beating her insisting that she must go and see the place which was burnt the previous night at Soweto. They took her to the scene and knocked her down, placed old motor vehicle tyres on her and some plastics. They poured paraffin on her, but before they could set her on fire, an Administration Police Officer came and rescued her and supported her with a walking stick till they reached the Chief's Camp. She was later taken to Kasarani Police Station. After two days, she recorded her statement (ex.4) and was later charged with an offence she knew nothing about.

It is not disputed that the Accused and her husband had strained relationship, and that for a time they were living separately. This is clear from her own evidence and was supported by that of Mary Wairimu Kamau (PW4) who was a sister to the deceased. I accept their evidence that between January, 1996 till the 27th of August, 1996 the deceased and the Accused were not living together. Even after they reunited, they knew no peace in their house. This was confirmed by their immediate neighbour, Kigochi Mwaura (PW4).

I accept the evidence of the Accused that on the material day, her husband went to fetch her from the house of her sister, Wambui at Congo Village and forced her against her wishes through beatings to accompany him back to their house. He continued to beat her all the way even as they passed through the place where there was a funeral ceremony at Soweto Village. Although the sister-in-law of the deceased, Julia Ngendo Muchiri (PW2) stated in her evidence that it was the Accused who had gone for her husband at the place where there was a funeral, I do not think that this was so. I believe that they just passed through the place on their way home and that is when she spotted the deceased beating his wife to the extent that even her child slipped from her hands and fell down. In my view, such beatings must have been severe, otherwise, I do not see how the child could have slipped from the safety of the hands of her mother to fall down. The beatings were such that, Julia (PW2) found it necessary to hold the child for the mother. I think such beatings must have prompted the Accused to issue threats to her husband that he would never beat any woman again in his life as stated by Julia. Even as they reached the house, the Accused refused to enter the house and had to be forced by her husband to enter the house where he continued to beat her according to the evidence of her neighbours. Julia Ngendo (PW4) later managed to bring peace between them before leaving for her house. According to the testimony of the Accused, her husband, who had expressed a decision to go and sleep before Julia left the house, continued to beat her immediately she had left them in the house. This could be true. Their immediate neighbour, Kigochi Mwaura (PW1) who could not sleep because of the disturbances in the house of the deceased between him and his wife testified that he heard her husband telling her go and sleep and the noise later subsided. This must have been after the deceased had gone to bed leaving his wife still seated down with the child. It must have been at this stage when the Accused left the house and bought some paraffin of shs. 3/- to put into the lamp. Earlier on, the Accused had complained in the presence of Julia that she had not eaten any food and her husband gave her shs. 100/-. There was no evidence that this lady ever prepared any food that night in her house, instead, she bought paraffin, brought it to the house, poured it in the tin lamp inside the house and left with her child having locked the door from outside.

Even though the Accused says that she never locked the door from outside, this I do not believe to be true. She must have done so. Kigochi Mwaura (PW1) who went to rescue the deceased when the fire broke out found the door locked with a padlock and this made it difficult for him to break open the door and he therefore left to go and salvage his properties from his house leaving the deceased struggling inside the house to find his way out. He could not find his way out and collapsed due to the heat of fire and died of burns beyond recognition. The Doctor who performed Post Mortem Examination stated that he had 100% burns.

The crucial issue that is before the court for determination is who could have started the fire inside the house of the deceased on the material night.

The available evidence clearly shows that the Accused, who is the wife of the deceased, was the last

person to be with him in that house before the fire outbreak. According to the evidence on record, the fire broke out in the said house approximately within 45 minutes to 1 hour after the noise emanating from that house had subsided. The only source of light or fire in the said house before Julia left the deceased and his wife was that which was coming from a tin lamp. The Accused in her own statement to the police {ex.4} admitted that after her husband had retired to bed, she picked her child and went out to buy some paraffin for shs. 3/-. She brought the same in the house and says that she poured it into the lamp before leaving the house again with her child never to come back that night.

At this state, one would pause and ask why the Accused found it necessary to go and buy paraffin for shs. 3/- only if she was not going to prepare any food in that house. Her husband who had already retired to bed, did not need any light to be left on in that house which could necessitated her going out to buy paraffin to put in the lamp.

In my respectful view, I am satisfied that the Accused found it necessary to buy some paraffin in question in furtherance of the threats she had issued earlier on to her husband in the presence of Julia Ngendo Muchiri (PW2) that he would never live to beat any woman again. Of course, as any human being, she must have been bitter that she had been badly beaten by her husband that night, but was it necessary to kill him when she had all the opportunity to escape from the house to go and sleep elsewhere after her husband had gone to bed. Her conduct of going out to buy paraffin with her child safe in her hands and then leaving out again having locked her husband in the house with the tin lamp, on where she had herself placed it, leaves no doubt in my mind, that the Accused had already formed the necessary intent, malice afore thought to cause the death for her husband by fire. This she did quite cleverly. Instead of spraying the house with paraffin and setting it a blaze immediately which could have enabled some of her neighbours to come out and find her nearby, she must have placed the tin lamp in such away that it could slowly set the house ablaze after she had gone and was safe elsewhere.

The circumstantial evidence relied upon in this case irresistably points only to the Accused and to no other person, as the one who could have started the fire inside the house of her deceased husband. see: KIPKERING ARAP KOSKE & ANOTHER vs- R. (1949) EACA 135. That she had the intention of causing death of her husband is manifest by her conduct of locking the house from outside thereby making it difficult for him to escape once fire had started inside the house. In so doing, the Accused thereby succeeded in making her sweet revenge to the beatings received from her husband on the material night thereby fulfilling her threats issued that night that he would not live to beat any woman again.

I am not persuaded by her defence that she knew nothing about the death of her husband.

I am in full agreement with the unanimous opinion of the three assessors that the Accused is guilty of the offence charged. I am satisfied that the prosecution has proved their case against the Accused beyond all reasonable doubts.

For reasons stated, I find the Accused guilty and convict her of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

Dated and delivered at Nairobi this 6th day of May, 1998.

S,O, OGUKE JUDGE

6/5/98:

Coram: Oguk, j

Mrs. Ondieki for the state

Mrs. Sichale for the Accused

Accused in person

Court/clerk - Kaingu Assessors:-

1. JENNIFER Okello
2. Mr. James Muoso
- 15 3 . Samuel Omuti

Court: Judgment delivered - 6/5/98

Mrs. Ondieki: Accused may be treated as a first offender as I have no records.

Mrs. Sichale:- In mitigation, I urge the court to take into consideration that the Accused is a young lady of about 23 years old. She is also a mother of a child now aged 3 years. She was at the time un employed and has been left as the sole guardian of this child.

I also urge the court to take into consideration that the Accused and the deceased never knew of any peace for the short period of their marriage.

The Accused has been in custody from September, 1996.

I further urge the court to take into consideration the trauma which the Accused went through when tyres were placed on her with a view of setting her ablaze. Finally, the Accused here in is a first offender. I urge the court to treat her with extreme leniency.

S,O, OGUUK

JUDGE

Sentence:

I feel quite moved by the mitigating circumstances which has been ably presented before this court by learned counsel for the Accused. However, this is one of those cases where it is difficult for this court to exercise any leniency, particularly in a case like this, where the Accused had absolutely no regard for the life and safety of her husband and their neighbours who are slum dwellers living in off-cut timber walled houses. She did not bother about the injuries her husband was likely to suffer as a result of her actions.

I will leave the Accused to the mercy of H.E. The President, but on my part, I sentence her to suffer death as prescribed by law.

Order:- Accused to suffer death as prescribed by law.

R O A explained Dated and delivered at Nairobi this 6th day of May, 1998

S.O. OGUUK

JUDGE

Order: I order that the Deputy Registrar do pay the three Assessors all their travelling and subsistence expenses in this case.