

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 50 of 1997

REPUBLIC.....PROSECUTOR

—versus—

DAWSON NDALAYA.....ACCUSED

JUDGMENT

The Accused, DAWSON NDALAYA, was charged before this Court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 5th day of February, 1997 at Mukuru Kaiyaba Village, Industrial Area within the Nairobi Area murdered ESTHER NJERI. The Accused denied the offence. Briefly, the prosecution case was that the Accused, DAWSON NDALAYA, commonly known as DADI; and the deceased, ESTHER NJERI; a young lady aged about 25 years, were lovers even though the Accused was a married man who was then living with his 2nd wife FRESIAH WANJIKU (DW1) in a separate house within Mukuru Kaiyaba Village, Industrial Area, Nairobi. The deceased also stayed in a rented house within the same village but her house was slightly far from that of the Accused and his 2nd wife. However, the Accused used to frequent her house and even to sleep there. She also used to go for drinks at the bar of the Accused and his wife Wanjiku which they were running just next to their residence at the same village. On the morning of 4th February, 1997 at about 9 a.m., one Mary Wanjiru Kanyanja (PW1), a lady aged about 60 years and a close friend of Esther Njeri (the deceased), as they both came from Gatundu Division to reside at Mukuru Kaiyaba Village, Nairobi, went to her house. She found her and her lover Dadi (Accused). Her house was not far from that of Njeri and she asked them why they were fighting and they told her that it was just a domestic matter which they had resolved. She then went away. Later that evening, at about 4 p.m., a neighbour to Njeri (deceased), known as Grace Wanja (PW2) testified that she saw the Accused walking passed her house while very annoyed and threatening that he would burn everything in her house which she assumed was the house where Njeri was staying. When she later saw her, she cautioned Njeri to be careful as her husband, (the Accused) had threatened to burn everything in her house. Despite the threatening utterances which Wanja heard from the Accused, both the Accused and his lover, Njeri were able to go out together at about 4.30 p.m. to visit one of the villagers, George Mbugua Njuguna (PW3) who had a sick child. According to his evidence, both Accused and Njeri stayed in his house till about 6 p.m. when they left together. Later that evening when Mary Wanjiku (PW1) went back to her house, she found Njeri (deceased) sleeping on the bed of her daughter. She enquired from her what was the matter and she replied that she had been beaten by Dadi (Accused) who was demanding that he goes back to her house to prepare for him some food but she had refused to do so. She was then complaining of injuries in her liver where she had been hit by Dadi. She remained in the house of her friend Wanjiku till later in the night around 4 a.m. She then left to go to her house but shortly thereafter, just around 5 a.m. on the 5th of February, 1997, she was escorted by a group of people back to the house of Wanjiru (PW1). They urged her to open her door for Njeri who had been burnt. She directed her daughter to open the door and when Njeri entered the house, she was surprised to see her severely burnt all over the body from waist upto the head. Even her mouth was burnt and she could not speak properly. Njeri told Wanjiku that it was her lover, Dadi who had burnt her. None of the people who had escorted her entered the house but Wanjiru (PW1) went and called another neighbour Wanja (PW2) to come and see what has happened to Njeri. She came and also observed that Njeri had very serious burns on the upper part of her body. Njeri again repeated to her that it was the Accused who had burnt her. She asked to be taken to the hospital as she had some shs. 480/— in her house. Cash contributions were then solicited by the women from the villagers and they raised shs. 700/- which was enough for them to hire a vehicle to take Njeri to the hospital. After

a vehicle had been hired, but before they left with Njeri to the hospital, Wanjiru (PW1) and other ladies called for one Anthony Karobia (PW8) who was a KANU Youth Winger residing in the same Village. She came and saw how badly Njeri had been burnt. He made his own contribution of shs. 20/- and was sent by the women to go and call the Accused to accompany them to take his lover to the hospital. He went to the house of the Accused and found him with his wife Fresiah Wanjiku (DW1) who was then preparing to go for her duties. After she had gone, Antony told the Accused that they would like him to accompany them to escort his lover Njeri to the hospital. Accused did not hesitate and just left with him to where the vehicle was. Njeri had already been put in that vehicle by the village women. On their way to Kenyatta National Hospital, they passed through Industrial Area Police Station where Njeri reported the incident to the OCS C.I Wahome (PW12) and P.C (W) Monicah Kalundo (PW13). She told the police officers that her husband, (Accused) had poured paraffin on her and set her on fire. The police officers then detained the Accused and booked him for a charge of assault while they allowed the other ladies to escort Njeri to the hospital. She was admitted at the hospital. Thereafter, her friend, Wanjiru (PW1) went to her parents home at Gatundu and reported the incident to her father, Kuria Gaturu (PW 10). When the old man (PW 10) came to see her daughter at the hospital on the 7th of February, 1997, he found her in great pains and advised her to inform the doctors where she was feeling a lot of pains. When he came back on the following day, he found her in a stable condition and she told him that it was Dadi (Accused) who had hit her with a shoe on her chest, hit her with a piece of timber on her shoulder and then set her on fire. She died on the night of 9th of February, 1997 at about 11 p.m.

Post Mortem Examination on the body of Njeri was later performed by Dr. Mutuma (PW 11) who found her with 40% burns on the body. He formed the opinion that the case of death was due to burns. He produced the Post Mortem Report in evidence. The father of the deceased then took her body to his farm at Gatundu for burial. He also collected all her household goods from her house at Mukuru Kaiyaba and took them away to his Gatundu home. While the deceased was still admitted at the hospital, P. C Kinyua (PW14) recorded a statement from her which she duly signed (ex.1). That statement was produced in evidence as counsel for the Accused raised no objection. It was one of the statements that was contained in the committal bundle. In that statement, the deceased stated that when she went back to her house at about 4 a.m. from the house of Wanjiru (PW1), she found the door locked from inside. When she knocked the door, the Accused came and opened for her. He asked her where she had been and she explained to him. He then set upon her with beatings and after she had fallen down, he poured paraffin on her and set her a blaze. As neighbours came to her rescue, the Accused went away as they wanted to arrest him. In the charge and caution statement taken from the Accused by I.P Nzala (PW19), the Accused denied having committed the said offence. (see ex.2). When put on his defence, the Accused raised an alibi defence to the effect that on the night of 4th and 5th of february, 1997, he was in his house with his 2nd wife, Fresiah Wanjiku (DW1) for the whole night till the following morning when a Youth Winger, Karobia came at 8 a.m. to call him to go and escort Esther Njeri (deceased) who had been burnt to the hospital. He denied that he had any hand in the said incident in which she was burnt. His testimony was corroborated by that of his wife, Wanjiku (DW1) who stated that they were together in their house on the night of 4th of February, 1997 and later went to bed at 11 p.m. They slept in their house till the following morning when he left for the toilets as she was preparing for him some warm water for a bath. Karobia then came to see him and she left them in the bar adjacent to their house as she left for her duties. In this case, according to the testimony of Mary Wanjiru (PW1), the deceased spent the night of 4th/5th February, 1997 in her house. She found her in her house on the evening of 4th February, 1997 sleeping on her daughter's bed and she informed Wanjiru that the Accused had beaten her because she had refused to prepare for him some food. This must have been after they had come from the house of George Mbugua Njuguna (PW3) where both of them had gone to see his sick child. She left the house of Wanjiru, quite surprisingly in the early morning of 5th of february, 1997 at about 4 a.m to go back to her house. It was an odd time, so one can say. She did not stay long as at about 5 am., she was escorted back to the house of Wanjiru with very serious burns for which she later died. She told both Wanjiru and her neighbour, Wanja (PW2) that it was the Accused whom she had found in her house who had burnt her. She repeated the same to the CI Wahome (PW12), the OCS of Industrial Area Police Station and P.C (W) Monicah Kalundo (PW12) who had seen her with such burns while she was being taken to Kenyatta National Hospital. By then the accused had been called by the Youth Winger to assist in escorting her to the hospital and he was present at the police station when the deceased reported that he was the one who had set her on fire. She later repeated the same story to her father, Kuria Gaturu (PW 10) when she went to

see her at the hospital. In what can be taken as her dying declaration, she repeated the same story in her statement to the police which she duly signed in her hospital bed (ex.1). Despite the fact that the deceased consistently maintained that it was her husband who had set her on fire in her house, regrettably, the police officers, did very little or no investigations at all in the matter. They never visited her house in time to check on any evidence of burns which would indicate that it was the scene of the incident. A police officer, I.P Joseph Mutende (PW12) from Industrial Area where the incident had occurred, only went to the house of the deceased after her death and found that her father had collected all her belongings and carried them away to his home in Gatundu. He did not even interview her neighbours and to record any statements from them whether they heard any disturbance in the said house at the time of the alleged incident or to establish from them whether they saw any fire in that house. He completely failed to record any statement from those who had escorted the deceased after she had received the burns upto the house of Wanjiru (PW1).

The result of the shoddy investigations carried out by the police officers, left the Court with no direct evidence to be relied upon to corroborate the reports of the deceased that it was the Accused who had set her on fire. There were clear leads in the statement of the deceased, (ex.1) that after Dadi (Accused) had set her on fire in her house, neighbours who came to her rescue wanted to arrest him and he escaped and went away, yet the police officer found it unnecessary to investigate this matter and find out who those people were. This point was well taken by the gentlemen and lady assessors when they returned a verdict that the Accused was not guilty. I respectfully agree with them. The standard of police investigations in such a serious case as murder, left a lot to be desired. The Accused had raised an alibi defence which was corroborated by his wife, Fresiah Wanjiru (DW1) to the effect that he was in his house throughout the night of 4th and 5th of February, 1997 and was no where at the scene of the alleged incident. It was not for him to prove that his defence was true. It was only sufficient if such defence as it stands, raised some doubt in the mind of the court that it could be true, in which case, he was entitled to be given the benefit of doubt. I am satisfied that the said defence was not rebutted by the prosecution. In the result, the case against the Appellant was not proved beyond all reasonable doubts as required by law. I am in agreement with the assessors that the guilt of the Accused was not proved. In the circumstances, I acquit the Accused of the offence charged.

I order that he shall be set at liberty and be released forthwith unless otherwise lawfully held. Dated and delivered at Nairobi this 19th day of May, 1998.

S.O. OGUK

JUDGE