



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 33 OF 1996

REPUBLIC versus 1. P S D

2. J S D

30.1.1997

Coram : Aluoch, J

Mr. Georgiadis and Mrs. Markham, prosecuting

The 2 accused persons are present, represented by Mr.

Rao, Rebello and Billing

The 3 Assessors present

COURT

I have a judgement which I will now read out to the parties.

J. ALUOCH

JUDGE

JUDGEMENT

The two accused persons were charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal Code, Chapter 63, Laws of Kenya.

The particulars of the charge, as shown in the charged sheet were that on the nights of the 5th and 6th December, 1995, the two jointly murdered K K D, wife of 1st accused and mother to the 2nd accused.

The prosecution called several witnesses as will appear in this judgement. I have decided that in order to achieve some sort of sequence of events, I will begin with the evidence of John Wafula Kisa, a security guard employed by the Factory Guards Ltd, but assigned to guard the 1st accused's house from 14.1.1994 to date. He made 2 statements to the police in connection with this matter. He was on guard duties at the accused's residence in Spring Valley, along Lower Kabete Road, on the evening of the alleged offence.

His evidence was that on the evening in question, he reported on guard duties at the accused's

residence at about 5.45 p.m. and was to work throughout the night, and report off duty at 5.45 a.m. the following morning.

Kisa's evidence is at page 26 of volume 2 of the typed copy of the proceedings. When he reported on duty that evening, he first went round to see how things were. He found the 1st accused and the 2nd accused, an old mother, and the deceased. His evidence in chief reads further, "At first, I found people in the sitting room.

After about 30 minutes I saw Jagdeep coming running asking me to help. I found a lady seated in the kitchen burning. I never heard anything whilst outside and I was at the sentry box".

At this juncture the prosecution applied to declare this witness hostile, as he appeared to be changing his evidence from what was in this statement, recorded with the police on 9th September, 1996 at 8.26 a.m. at Nairobi area C.I.D. In that statement he had said in part,

"At about 9.00 p.m. while at the sentry box, I heard a commotion between Mzee and his wife. Even before there were quarrels between the husband and wife that she was unfaithful.

On this day of the 5 th December, 1995, I suspected it was the same thing about the unfaithfulness of the woman"

"When I head the noises, J came to his bedroom crying and saying I am tired of this noise..... J came out of the room and went to where the mother was. She was at the kitchen I left the sentry box and went to the kitchen. J then called me to help him put off fire which was burning his mother.

She was seated at the verandah burning"

The above evidence which I have quoted from Wafula's statement to the police only came out as he was being cross examined by the prosecuting counsel, Mr. Georgiadis, after he had been declared hostile. It appears on page 28 of the typed copy of the proceedings, aforesaid.

The further evidence of the witness shows that he helped to put off fire by pouring water on the deceased, and eventually, he helped to carry the deceased to the car and as he did so, the deceased said, "**Kilele kila siku kelele kelele.**". Wafula confirmed in court that what he told the police in this second statement was true. He also clarified in this statement that though he said in his 1st statement that it was gas which burnt her, he was not sure, but it was Mzee, the 1st accused who told him she (the deceased) had been burnt by gas".

Because the prosecution had declared this witness hostile. I directed the assessors to treat his evidence with a lot of caution, because the tendency to change his evidence made him almost worthless as a witness. However, I directed the assessors further, that if they had warned themselves sufficiently of the evidence of this witness but nevertheless accepted it, then this evidence would put both the accused persons on the spot when the incident occurred, and again, Kisa's evidence shows that there was "commotion" in the house between Mzee and his wife that evening, which Kisa suspected was as a result of the "unfaithfulness" of the woman which had led to the 1st accused giving him instructions to record what times the wife (deceased) left the house, and what times she returned. I also instructed the assessors that Kisa's evidence if they believed it would also show that the matter of gas as the cause of the deceased's burns had already come up before the deceased was taken to the hospital.

As I told the assessors, the prosecution did not give reasons why this witness behaved the way he did, but I directed the assessors to bear in mind that he had worked in this house for such a long time that he had become like a member of the family, and in changing his evidence, he was trying to assist both the accused persons.

Mr. Rao used his evidence to submit to the assessors that because he was an independent witness to whom the deceased could have revealed if the 2 accused persons had burnt her, yet she did not, it showed that they had nothing to do with the incident, and her utterances to the effect that “**Kila siku kelele kelele,**” i.e. “**everyday noise, every day noise**” meant that she was tired of her life, and that is why she burnt herself. This submission by Mr. Rao was adopted by all the 3 assessors, who though are not required by law to address court other than just giving their opinions, nevertheless chose to address court at great length.

Mr. Georgiadis, prosecuting counsel however, told the assessors, that if they accepted Kisa’s evidence, then it showed that there was commotion between the first accused and the deceased, except that when he arrived on the scene the deceased was already burning.

The prosecution evidence proceeded to the 2 hospitals i.e. the M.P Shah Hospital and the Nairobi Hospital, where we have evidence of various nurses and Doctors. For example, from the M.P Shah, where the deceased was first taken, there is the evidence of nurse Regina Kitheka, PW3, who confirmed what Kisa said in his evidence that the deceased was conscious and was walking. Dr. Chary, PW5 a lady doctor, attended the deceased also confirmed that she was conscious. Nurse Kitheka removed the only items of clothing the deceased had on, these were a brassier and panty, which she cut. Kisa had also testified that when he found the deceased burning, with flames coming from her body, he saw a brassier and knickers only, on the deceased.

Prosecution evidence shows that at both hospitals, the attending doctors and nurses enquired about the burns, and at the M.P Shah hospital, Nurse Kitheka got the following answer from the older gentleman.

“She was in the kitchen and she got burnt by gas.”

This confirmed what Kisa had also testified when he said that it was Mzee who told him that the deceased had been burnt by gas.

Nurse Tabitha Ngabwa who was also attending the deceased at the M.P Shah hospital enquired about the burns and the older gentleman said, “it was gas leak”.

Further prosecution evidence shows that the deceased was taken to the Nairobi hospital as she needed I.C.U care yet there was no bed available at the M.P. Shah hospital.

Sister Lucy Kiarie Njambi, PW6, of the Nairobi hospital described the deceased’s condition as critical, and asked the 2nd accused who had taken her to the casualty as to what happened and the accused said, “**It was a gas explosion in the house.**” The sister directed a question at the deceased about the burns but she did not talk.

The sister called the Doctor who was on duty, Dr. James Kabore Mogire, PW 8 and after about one hour the husband of the patient arrived and started talking to the patient, but the Doctor did not want him to do so, but he said he was the husband.

Dr. Mogire testified that he attended the deceased as an emergency. She was on her feet and had “horrific” burns and he was surprised that she could walk.

He put a question to her about the burns and the patient said, “**Let my son tell you**”.

The Doctor enquired about the burns from the son (the second accused) who said that there was, “gas leak in the kitchen”. The son added that he was in his room when he heard screams, he came out and found his mother a blaze in the kitchen. That both himself and his father put off the fire. The Doctor was taking the patient’s history from the son. He stopped briefly to attend to the patient, who was fully conscious and kept on repeating “let my son tell you”.

Dr. Mogire's evidence at page 28 of volume one of the typed record of proceedings reads,

“Eventually I saw the first accused who came much later I learnt of his presence in the casualty when the nurse informed me that he had come. I went to the secluded area where the patient was. He had engaged the patient in a conversation and I did not understand the language, but he appeared to be quarrelling. I found it odd and interrupted the conversation and I told him not to talk to a very sick patient in that manner. I asked him what happened and he kind of dismissed me and said it was just a gas leak”.

Dr. Mogire observed the patient, and when shown photos of the patient in court he recalled and confirmed that her hair was spared, not burnt. This plus the fact that when he asked if there was an explosion in the house he was told there was none, made him feel that he was not being told the truth about the fire. He noted that the face was very badly burnt, more than the other parts of the body. Using the knowledge of burns he had gathered after working at the Kenyatta National Hospital Burns Unit, for about 6 months, where he saw a considerable number of gas burns, he formed an opinion that the extent of gas fire given in the history and the gas fire did not seem to tally. He observed the burnt areas and the areas, which were spared, i.e. the back, the breasts and the area, which was covered by the underpants.

From his observations and the photographs produced in court, the Doctor formed the opinion that the deceased must have sustained the burns whilst standing at first, and the burning continued subsequently as she was lying on her back. He concluded that the burns must have been due to a fire accelerant. He called Dr. Banjara PW26, on telephone to come and attend to the patient who was eventually admitted into the H.D.U ward, later that night.

The sister in charge of the H.D.U, sister Judy Awuor Waindi, PW7, found the patient in the H.D.U on the morning of 6th December, 1995. On that same day, she received instructions from the husband whom she identified in court as the first accused, that nobody should see the patient unless he comes with him or her.

It was sister Waindi's further evidence that the patient was already having breathing problems when she saw her that morning. Dr. Ayim was called to incubate her and thereafter she could not talk. Dr. Banyara who was attending to her until she died also confirmed that she never spoke to him throughout the period she was in the H.D.U. Dr. Banyara answered to questions put to him by Mr. Rao that the cause of fire was 'dry flame burns', and that he saw some "burnt hair pieces". That the hair looked alright, but that looking at it on the pillow it showed indirectly that it was a flame burn.

There was evidence from those who said that they visited the deceased whilst in hospital. One such witness was Tarlochan Singh Matharu, PW41, who testified that he went to the Nairobi Hospital on 10.12.1995 with his wife.

That the sister in charge allowed them to see the deceased.

In fact he says in his first statement to the police that he saw the deceased 3 times in the hospital. His evidence which appears at page 48 of volume 5 of my typed proceedings is that he put a question to the deceased as to whether her husband Pravin had burnt her and the deceased nodded, from side to side, which to the witness meant no. The witness again asked the deceased whether it was her mother in law who had burnt her, to which, and again the deceased nodded from side to side, which again meant no to the witness. Again Tarlochan Singh asked the deceased if Pala the brother of Parvin did this to her and she nodded from side to side-meaning no, but when she asked her "did you do this to yourself", the deceased nodded up and down which to the witness meant "yes". All this evidence by Tarlochan Singh was contained in his further statement, which he gave to the investigating officer, Supt. Muchori, after the trial of this case had already started. He gave the statement on 3.10.1996, whilst the trial started on 30.9.1996.

Mr. Georgiadis submitted that this further statement by Tarlochan Singh came to him as a surprise after the trial had started. Apparently, he was not even aware that it had been recorded. He termed the

evidence in the additional statement ‘**ambiguous**’ and ‘**unreliable**’. In fact he opted not to call him as a prosecution witness. However, after protracted legal arguments, I gave a Ruling and directed the prosecution to offer Tarlochan Singh to the defence for cross-examination. The Ruling appears on pages 36-45, of volume 5 of my typed proceedings. In his address to the assessors Mr. Rao for the two accused persons submitted that evidence of Tarlochan Singh is at least capable of being true.

However, having watched Tarlochan Singh give evidence and answer questions put to him I noted that he was unable to answer any questions in a straightforward manner. He could not give a specific answer when asked why he did not include the evidence about the nods by the deceased, in his first statement to the police made on 8.12.1995.

Throughout his evidence, he kept on going back to the words “there were rumors that either Pravin had burnt her, or the mother-in-law had burnt her or that Pala had burnt her...”. I noted that the witness appeared confused at times and was repetitive on the words, “there were rumors”. He rumbled quite a bit and ended up confusing himself and had to start his answers and or evidence all over again several times. I found him unreliable as a witness and most unsatisfactory I cannot place any reliance on his evidence, which evidence I find is not capable of belief as it is not true.

There is evidence from several police officers that recorded statements from the accused persons. In fact, police action really started only after the deceased had died; yet a report was made to them whilst she was still at the Nairobi Hospital. The report was first made by way of a telephone call to Charles Chiraji Okwanyo, PW 32, a Senior Supt of Police, attached to the C.I.D Headquarters. He got a report on 8.12.1995, and immediately informed the District Criminal Investigating Officer, and got Inspector Stanley Nasubo PW30, whom he talked to about a victim admitted at the H.D.U. Nairobi Hospital with serious burns. The caller wanted the police to investigate what might have happened to her.

Supt. Okwanyo instructed Inspector Nasubo to proceed immediately to Nairobi Hospital, H.D.U ward, and visit the victim with a view to recording her statement.

Inspector Nasubo’s evidence was that on receipt of a telephone call from Supt. Okwanyo, on 8.12.1995, he rushed to the Nairobi Hospital accompanied by Inspector Waigura.

He found that the deceased was not able to talk and he was not allowed to see her. He looked at the admission card to find the person who had taken her to the hospital. He did not find the place because when he went through the telephone, it was disconnected by whoever picked it.

Thereafter he visited the hospital several times but the deceased never talked to him, and he was also unable to trace the person who took her to the hospital. Inspector Nasubo left his direct number with the sister-in-charge otherwise on his part, he tried that number about four times but did not check in the Directory to find out the owner of the telephone number. The easiest way he was trying to use was the telephone number and there was no reason why he did not use any other way to try and trace the person who took the deceased to the hospital.

Inspector Nasubo did not visit the accused’s house until 19.12.1995, after the deceased had died.

Supt. Henry Nyaosi, PW33 received a message from Duty Officer, Inspector Nasubo that Supt. Okwanyo had called about a lady who was in Nairobi Hospital. On his part, Supt. Nyaosi instructed both Inspector Nasubo and Insepctor Waigura to be “**keeping constant checks and record statements if condition allowed**”. He later got a report from Inspector Nasubo that for about 2 weeks they went to the hospital but could not record a statement.

It was Supt. Nyaosi’s further statement that “when he saw that the patient could not talk”, he instructed the 2 officers to take statements from the doctors.

Supt. Nyaosi learnt that the 2 people who took the patient to the hospital did not leave any contact, so he instructed the 2 officers to lay ambush at the hospital. Other than these instructions, he did not take

any other action or steps in this matter as he assumed that Nasubo and Waigura were senior officers who would check the matter.

S.S.P Okwanyo telephoned to find out if any progress had been made, but Supt. Nyaosi told him that they were still following up the matter. Because of this assurance SSP Okwanyo left the matter at that and did not follow it up.

Now Inspector Stanley Nasubo who was supposed to be following up the matter, according to his two superiors is recorded as saying that he passed the telephone number he had to the D.C.I.O Supt. Nyaosi on 9.12.1995 and he expected him to investigate where the deceased came from.

However, on 15.12.1995 Inspector Nasubo got some information and rushed to the Nairobi Hospital, but found that the husband had left the hospital.

Upto this stage, the evidence of the 3 Senior police officers show a lot of passing of the buck with no tangible investigations carried out. The prosecuting counsel criticized them for this during the hearing of this case. Be that as it may, both Supt. Nyaosi and Inspector Nasubo went to the Lee Funeral Home on 19.12.1995 in the afternoon. It was Supt. Nyaosi who got information that the deceased had died, and called Inspector Nasubo.

At the Lee Funeral Home, they found a number of Asian people, including a brother of the first accused, called J S who said he was not living in the house but knew where it was. He directed the police officers there, and on arrival the officers found a number of people mourning.

Supt. Nyaosi introduced himself to the first accused and asked him to step aside. He asked him what happened for the wife to get burnt and accused said that both himself and his son were in house as well as his wife the deceased, and his old mother. That suddenly they heard screams coming from the kitchen. That accused ran to the kitchen together with his son and they found the wife in flames after attempting to light a gas cooker, which was leaking. That they put her down and poured water on her, covered her with a blanket and rushed her to the hospital. The second accused repeated more or less what his father said to the police.

Supt. Nyaosi inspected the kitchen and observed the cooker but did not see any damage. He found no sign of smoke either in the ceiling or the floor, no sign of smoke on the walls. No sign that it had been re-decorated. He looked at photographs 8, 9 and 10 for the kitchen and identified them as those of the kitchen he saw in the accused's house.

He also observed the cooker but did not see any damage, not even in the rooms adjacent to the kitchen. He then gave instructions to Inspector Nasubo and Kirui to take statements.

Supt. Nyaosi seemed to have gone to the hospital to see the deceased. He saw that the body was very badly burnt, except for the hair.

The statement produced as Ex.26 was recorded from the second accused at their residence in Spring Valley along Lower Kabete Road, by Corporal Yusuf Isa Kirui PW34.

Accused detailed what according to him happened that that evening in the house, i.e. he had a bath at about 8.15 p.m. dressed up then went to his room and began reading a book.

Whilst in his room, he heard some screaming, it was his mother screaming, seated on the floor of the veranda. She was in flames. Accused ran and got a bucket of water which he poured on her and the fire went off immediately. That the clothes she was wearing got burnt at the front. Accused did not see the back. He said his mother was wearing a nylon (Indian suit) purple. He ran and got a blanket and wrapped it round his mother. His father joined him in pouring water to stop the fire.

The second accused says that they moved the remainder of the burnt clothes of the mother, but he

did not know what happened to them. They took the mother to the M.P Shah Hospital. They were not attended to so they went to the Nairobi Hospital where he went to the emergency room with the mother but left the father seated in the car. He later joined them.

The second accused concluded his statement by saying, "I have lived with my parents since my birth, and I have not seen my parents quarrel since then.....".

Supt. Nyaosi, himself recorded a statement of the "investigations" he carried out in this case. His statement was recorded on 10.9.1006 at 3.30 p.m. at the provincial CID Headquarters, Nairobi.

The second accused J did record a statement on 26.12.1995, further to the one on 19.12.1995. This statement was produced as Ex.24. In this statement, the second accused wished to parents house on the night of 5th Day of December, 1995. He added that during the incident, only himself, his father and mother were in the house. The further evidence he is recorded as having added in this statement is,

"My father ran and switched off the gas cooker after he had noted that it was on, to prevent any further spread of fire whilst we were busy pouring some water on her body. As I explained earlier the nylon dress she was wearing got completely burnt. There was not any piece left behind.....".

The further addition in this statement was, "I did not see my grandmother, I do not know where she was".

The statement recorded from the 1st accused at his residence in Spring Valley, along Lower Kabete Road was produced as Ex.20.

Accused detailed in that statement what according to him happened on the evening of 5.12.95 at about 5.45 p.m.

He found his wife at home together with his son. He had tea and subsequently went to rest as he was not feeling well, due to high blood pressure. That he got up at about 8.30 p.m. and had dinner prepared by his wife. After that he went back to the bedroom as his wife went back to the kitchen.

Accused said that whilst in his bedroom he heard "screaming of my wife crying and saying help me, help me. I then rushed and found her in the verandah, which is next to the dining room.

I found that she was on fire, the whole body. I then opened the fridge which is in the verandah and took out cold water and poured on her. Immediately my son arrived with a blanket and covered her as he also poured water on her. Both my son and myself took her to M.P Shah hospital. She was naked because the clothes she had been completely burnt. She had put on nylon clothes....."

Further on in the statement accused said, "My wife was burnt by gas in the kitchen....."

Enquiry statements under caution were recorded from both accused persons by S.S.P Edward Muchori, who had taken over the investigations of this case on 27.12.1995. He recorded the statements on 28.12.1995. Mr. Rao objected to the production of both statements and the court proceeded on a small trial within a trial, in the absence of assessors to decide on the admissibility or otherwise of the two statements. The evidence in respect of that trial is found in pages 27,28,29,30,31,32,33,34 and 35 of volume 4 of the typed copy of the proceedings herein.

I delivered a Ruling on 4.11.1996. This appears at pages 39,40,41,42, and 43 of the same volume 4 of the typed proceedings. I ruled both statements admissible for the reasons I gave in the Ruling. The statements in question were produced as Exhibits 40(i) and (ii), respectively.

In the 1st accused's statement which was Ex.40(i) he denied telling his father in law, M S, PW 20, that he was going to burn his wife. He also denied having told his father in law to come for his daughter, when she was burnt. Accused said the following in the last paragraph.

“I do not think my wife was murdered, but it was the gas which burnt, her. I also do not think she committed suicide. It was an accident”.

The second accused on the other hand said that on the evening of the 5th December 1995, his mother was cooking in the kitchen, whilst his father was in bed. That the mother was wearing an “INDIAN SUIT”. The second accused said that he went to have a shower, after which he remained in his room reading and listening to music from his stereo set.

That after about ten minutes he heard screams from his mother. He ran outside and found her burning in the verandah. He rushed to the tank to get water and his father came and together, they extinguished the fire, but by the time they did so his mother and had been burnt and she was completely naked.

J rushed to his room to get a blanket and covered her with it, and they took her to the Nairobi Hospital where she was admitted. On return back to the house, J discovered that his mother had been burnt by “a gas leak”. His father had told him so, but he did not ask how it happened. J said that he did not call any of the relatives to tell them what had happened. That none of them called him either. He also said that the relationship between his father and mother was good.

J did not sign this statement and said the following at the end of it,

“I do not wish to say all this. I do not wish to say all this because I am not sure. I stick to what I said before”.

There is further evidence from PW 37, Inspector David Kibiego and Inspector Agnes Muiruri, PW 38, that they took charge and caution statements from the accused persons.

This was on 5.1.1996. These statements were produced in court on Exhibits 31 and 32 respectively when Mr. Rao did not object to their production.

Both accused persons denied the charge. The first accused said that on the material day at around 8.30 p.m., he was in his bedroom after having had supper with his wife and son. His son was also in his room after reading, whilst his wife was in the kitchen. That all of a sudden he heard his wife screaming for help as she ran towards the verandah.

He came out of his room and ran towards her, and he saw flames around her body. That he rushed to get water from the fridge and together with his son, they put off the fire, but she had been badly burnt. He then rushed her to M.P Shah Hospital where she was admitted.

J, the second accused after having been cautioned said,

“I stick to my statement which was recorded early. I am not guilty”.

There is further prosecution evidence from PC Haji Mohamed, PW35, of Kilimani CID who testified that on 21.12.1995 at about 10.00 a.m. he was instructed to accompany Inspector Waigura to the Lee Funeral Homes to attend a post mortem examination to be carried out on the body of K D. The 2 officers first went to find Dr. Ng’ang’a who went with them to the mortuary. They were present as the body was identified to the doctor by the husband, who is the first accused and one Charanjeet Singh Rehal.

The 2 police officers said that they both left the room and went to the waiting room and could not see what was going on for about 40 – 45 minutes but each of them assumed that the doctor performed the post mortem examination. Later the doctor gave a report which was produced in court as Ex.23.

Dr. Nganga was one of the witnesses the prosecution choose not to call though his evidence was on the committal bundle. The defence counsel Mr. Rao, did not insist on him being called. The first accused made a statement upon identification of the body of his wife, for purposes of the post mortem

examination. The statement was produced as Ex. 27. In the statement accused said that whilst in his room at about 8.30 p. on the 5th December, 1995, he heard a screaming sound calling, "help", "help". He immediately rushed to the kitchen only to find his wife who was in the kitchen severely burnt all over the body. That his son also came out and the 2 tried to carry out first aid. That they used cold water and later they covered her with a blanket and rushed her to M.P Shah hospital where the victim was not admitted. They decided to go to the Nairobi hospital where she was admitted. Accused said, **"I thought the cause of the fire was due to gas leak from the cylinder which was flamed...."**.

Because the deceased's relatives were not present at the aforementioned post mortem examination they requested for one. Inspector Waigura prepared the necessary forms which were taken to the Lee Funeral Homes, and the post mortem examination was performed by Dr. Samuel Odera Ywaya. The body was identified to him by Mr. Tarlochan Singh Matharu, PW41 and Mr. Daya Singh Kalsi, both of whom testified so in court. Dr. Ywaya confirmed that he incised the body as is the standard practice. He did so in the presence of Prof. Kungu.

That he also had to turn the body round and incise the back and the spinal line. He had to open the chest, in order to find out the respiratory system. He also had to open the sterum. The doctor said that for the head he incised the scalp and pulled it off the skull. Again Dr. Ywaya turned the body over and incised the spinal cord column to look at spinal cord and vertebrae. He said that in order to make a finding of lungs a pathologist has to open up the lungs, and again that for a finding that the cardio vascular system is normal a pathologist has to open up that system.

Dr. Ywaya said that when he looked at that body on 27.12.1995 and was about to start the post mortem examination in front of Prof. Kungu, the body was intact. No previous post mortem examination of any sort had been conducted.

To several questions put to the doctor by Mr. Rao, he answered that he found the body intact, it had not been cut up before. He stated further that he carried out a comprehensive examination of the internal appearance, as he described in court.

To further questions by Mr. Georgiadis during reexamination, the Doctor answered that he did not see or have knowledge of Dr. Njenga's report. He was not even aware of Dr. Ng'ang'a's findings, which came to him as a complete surprise.

During my summing up to the assessors, I directed them to accept the evidence as to the cause of death given as severe burns with its usual complications. I gave this direction bearing in mind the cause of death given by Dr. Ywaya to be

"severe burns and complications with infection and dehydration and electrolits imbalance....".

I also had in mind the cause of death as given in Ex.23, Dr. Ngang's report which confirmed that the deceased died due to severe burns, with its usual complications. I have also referred to the evidence showing that Prof. Alfred Kungu, a pathologist attended the post mortem examination performed by Dr. Ywaya. He gave the cause of death as "complications arising from severe burns".

It was Corporal Yusuf Issa Kirui of the C.I.D Kilimani who arrested both accused persons on 27.12.1995, from their residence in Spring Valley, along Lower Kabete Road. He had earlier recorded a plain statement from the first accused on 19.12.1995, at his residence.

I will leave the evidence of police officers for a while, and turn to the evidence which I referred to in my summing up to the assessors as the "transatlantic telephone conversations between Kenya and California, and or vice versa".

According to evidence the first of such calls was said to have been made on 2.12.95 by the first accused to M S S, PW17, the father of the deceased K K D. The call was made from Kenya to California,

in the U.S.A., according to prosecution evidence on record. M's son, I S S, PW11 listened to the conversation. He testified so in court.

The conversation appears in the two statements M made to the police in connection with this matter.

The first one is dated 22.12.95, recorded at C.I.Doffice Kilimani. The second one is dated 27.12.1995. It was recorded by SSP Edward Muchori, who had just taken over the investigations of the case.

The original copy of the statement dated 22.12.1995 was produced as Ex. 38. It reads in part,

"I remember on the 2 nd day of December, 1995.

My son -in-law P S called me. He told me to come within two days and take away K. I asked him why, he told me that she has beaten me, she has beaten my mother. I asked him how can she beat you and your mother and you have been married for 25 years and she is your wife, and you should take care of your family. He told me that if t hat is what you say you will see what will happen within 2 days. He will put kerosin on her and burn her and was exactly what he did.....".

A portion on page 3 of that same statement reads as follows at the second paragraph,

".... I was preparing for the vi sit (to hospital) on the morning of 19 th December, 1995 when Mr. Divan Singh broke the bad news to me that K K passed away this morning. That was the time I reported to GIGIRI police station. I did not report earlier because I was hoping that my daughter will get well and I find out the details of what had happened. I was afraid that if I report earlier, her husband might stop medial treatment".

Another statement recorded from the same witness, M S S was on 27.12.1995. On page 2 of the statement the second paragraph it reads,

"On 2.12.1995 at about 7.00 a.m. in the morning, American time on telephone No.818 – 368 – 1401 and he told me that Kuldip had beaten him up and his mother. I told him that I could not believe it that she c ould beat them both. I told him that he was married for 25 years and he had grown up kids and he should take care of his family. He told me that if I could not come to Nairobi before the next Wednesday, he was to burn K with paraffin, and he hanged up the phone".

The evidence in these 2 statements form part of M's evidence in court, which is found at pages 18 – 23 of volume 2 of my typed proceedings. At page 19 of my typed proceedings M talked about the tapes he received from the first accused, his son in law. The same were broken in transit, so he could not make any sense of them. They were sent to him in January 1995. M also said on that same page that he did not know where the first accused was telephoning from.

In both his 2 statements to the police and in his evidence in court, M repeated the contents of the conversation he had with his grandson, the second accused when they met at the Nairobi hospital as to what really happened and the second accused said that there was everybody fighting and that his mother was beaten up many times. That on that day, K put the fluid on herself and he did not know how the fire was lit. M did not believe him, but he said he would tell later when the mother gets well.

M's evidence in court also revealed that his house was 4 extensions and normally anybody can pick the phone when it rings. That his son I who lives with him in the same house listened to the conversation, though he did not know at the time that this was so. That when I came downstairs after about 30 minutes, they discussed the call.

M was not able to talk to his daughter, the deceased at the Nairobi hospital. However he was certain the deceased recognized that he had come because she "raised her eyes".

I S S PW11 lives in the same house with his father M S S in California, U.S.A. They have the same address and telephone number. He testified that the first accused P called the residence in America in the morning of 5.12.95 or 3.2.95 as he answered on cross-examination. I was on another extension listening as the accused spoke to his father M S S. He heard the accused say that there had been a fight in the house, and if they did not come for his sister he was going to burn her. I was not personally surprised because accused had called several times complaining about the fights.

I again referred to the conversation with the accused again on 5.12.95, when he called the workshop at about 11.00 a.m. He said that would be about 10.00 p.m., in California as the time difference in winter is eleven hours, and in the summer, it is 10 hours. That accused told him.

“your sister has burn and if you want to come and see her you should do s o immediately as she is very seriously burnt”.

I asked, where did this happen and accused said in the dining room and he added that half the room was damaged. That when asked what happened the accused explained that he came home, there was a fight and some flammable liquid, dry cleaning liquid and that there was fire.

Accused told I that he should come as quickly as possible because when the body was taken from the house it was naked.

On enquiry by I as to who else was in the house accused said, his older son J and his mother. That according to I gbal was the gist of the telephone conversation which was conducted in Punjabi language. He was in shock as he tried to think of whom to call to verify this information.

That evening, he made a call to J at the residence in Nairobi and asked him what happened. He in turn said that there was fighting going on in the house and in anger the flammable liquid was poured and there was a fire. J said further that he told the father to call ambulance, but he refused. That again he told the father to put off the fire, but the father refused and said, “no let her burn”.

I said he just hang up the phone as he was in disgust. He called the accused’s daughter in Canada.

Several questions were put to him during crossexamination by Mr. Rao, to which he answered that he was not aware that his sister was having an affair. He also answered that he was not aware that his sister had tried to commit suicide by taking tablets. He clarified that the telephone call to the residence was on 3.12.1995. That it was to his father and he merely listened in. He was however positive that the first accused called him in the workshop on 5.12.95 and not 6.12.95. I like his father did not know where the accused was calling from.

P S or H S PW9 is a son of M S S, and a brother to the deceased K K D. He also lives in the California, in the U.S.A but not in the same house with his father.

He recalled the 5.12.95, just after he had got back home from work, he got information that his sister K had been injured and he called the house in Nairobi and spoke to his nephew J, whom he asked, how is K, to which he (nephew) answered that she had been burnt.

P said J was talking really fast and did not get to the point straight away but kept on pleading with him to come and take her otherwise she would die if she lived here.

J was speaking rapidly as he said that his mother and father were fighting that he had bee trying to stop them but he was not able to, so he begged his uncle P, to come for her.

When the uncle insisted to be told what had happened then Ja said that some liquid had burned her. That he tried to stop father and mother fighting. J did not say who specifically poured the liquid, but kept on saying there was liquid poured. J pleaded that his mother and father fight so much that this time it got out of control.

P made arrangements to come to Nairobi urgently, but on arrival he found that his sister had died. He saw her body in the mortuary.

To questions by Mr. Rao, he said that he was not aware that his sister K had tried to commit suicide.

K's sister P B, PW15, also lives in California with her husband.

She first made a statement to the police on 27.12.1995.

She explained that the officer was asking her some questions and she was answering and the officer was summarizing in his mind, and typing on a computer screen.

Eventually the typing was transcribed, printed out and P signed it and left. She then came back for the hearing of this case. She arrived on 28.9.96. She read through her original statement. This was on the 1st October, 1996 and discovered that there was some information missing from it and she informed Mr. Muchori about it and requested him if she could "extend" and statement as some points were missing. SSP Muchori allowed her to make another statement and on 3.10.96 at Provincial CID offices in Nairobi he recorded another statement.

Mr. Rao objected to production of the further statement made on 3.10.96. I then requested the assessors and the witness to leave the court room as I proceed to conduct a small trial within a trial in respect of this further statement, which was sought to be produced as additional evidence.

SSP Edward Muchori gave evidence in the small trial explaining how he recorded the first statement from P.

He read what was contained in the further statement recorded by Mr. Onguta, an Assistant Commissioner of Police, and denied ever having been told the same things by Pami on 27.12.95, when he recorded her statement. I recorded SSP Muchori as saying,

"The only statement I got from the witness is what is now MFI 6. That is what I recorded from her. It was easy to record. I was using a word processor. If she had stated what is in the further statement, I would have recorded it..... the advantage here is that we were both looking at the machine. I was typing and we were both reading. She could have told me if I was not typing what she was saying....."

SSP Muchori wound up his evidence by saying the following in answer to a question by Mr. Rao.

"I am satisfied that all matters in the second statement were not told to me on 27.12.95"

On the above evidence by SSP Edward Muchori, I ruled the additional evidence in the second statement in admissible in my Ruling read out the same day, after half an hour's adjournment.

The Ruling appears on page 10 and 11 of volume 2 of the typed proceedings. By saying in the Ruling that I found the scene "cloudy" what I meant was that the person who was alleged to have left information in the further statement denied having done so. I therefore found it unsafe to allow P B's additional evidence.

Nevertheless, P continued with her evidence at the bottom of page eleven of volume two of my typed proceedings. She recalled the 5th December, when she learnt of her sister's burning incident she called P S, the first accused at his home in Nairobi. She spoke to him in Punjabi, she knows his voice. She identified him in court. She asked him, "how did it happen" and the accused cursed her in Punjabi when he said, "I did it you stupid" and she hung up.

P was very upset and angry and she made further phone calls to Kenya, Canada, United Kingdom etc etc to friends and relatives. She again called the accused's house the same night at 10.00 p.m. California

time. J, P's son answered the phone. P knows his voice, and when asked about her relationship with her nephew she said she got on well with him in the past which means presumably that things changed after the deceased's death.

P asked J about the condition of his mother, and how much of her body had been burnt, and he said, from head to toe, about 90% of her body. The two spoke in English. Again P asked how the whole incident occurred who was in the house and J said that his grandmother and uncle J were fighting with his mother, and, just around that time his father came back drunk, and after a while he saw his mother on fire and he called for help. He asked the father to call an ambulance but he did not and J instead called it, though it did not come on time.

He still called for help but his father and grandmother said, "let her burn".

J urged his aunty P to help his mother who is her sister. He wanted P to come and take her, if she comes out from the hospital alive. He said, "please come and help my mother, they treat her like an animal".

After that P made on and off calls to the accused's house to ask about the condition of her sister. She clarified on cross-examination that she spoke to the first accused, because she happened to pick the phone. She asked him about the condition of his sister and accused assured her that she was doing well. She also called Nairobi Hospital several times.

P produced as Ex.7 an MCI Account Number, showing long distant calls made from her telephone number in California, No. 8056648034. The form shows that she made 3 phone calls to the accused's house in Nairobi on 5.12.95, on telephone number 732413.

The first call was at 2.01 p.m. and was a direct std dial, and lasted only one minute. The second call to the same number was at 2.02 p.m. almost immediately after the first one, and again this lasted only one minute. The third call was now at 10.11 p.m. and lasted 13 minutes. In total, P made 3 phone calls to the accused's house that night, as the card shows, and that was her evidence in court at pages 14 and 15 of the typed proceedings contained in volume 2 of my records.

P, like her two brothers were not aware of any attempts by her late sister to commit suicide.

The evidence from the post office which was in the committal bundle, was that of Thomas Kimani Njoroge, PW16 who was requested by SSP Edward Muchori to give information regarding the out going international telephone calls from telephone numbers Nairobi 7324413 (the accused's residence) and Nos. 558245 and 557459.

Mr. Njoroge went to the office and instructed the computer branch to make available any international telephone calls made from those 3 numbers. The computer section availed to Mr. Njoroge the information required which he put in a letter dated 3.1.1996. The details show that no phone calls were made from Nairobi to the U.S.A on those 3 numbers on either the 1st or 2nd or 3rd or 4th or 5th December, 1995. Mr. Njoroge confirmed so in court, during cross examination.

During the course of the hearing on 25th October, 1996, the prosecution sought leave to adduce further evidence from the Kenya Post Office Corporation in respect of international telephone calls made from Nairobi to the U.S.A.

This application was objected to most strongly by Mr. Rao. I asked the assessors to leave the court room as the two learned counsel argued over this point at great length. This appears on pages 37-46 of volume 3 of the typed proceedings subsequently I wrote a Ruling which I delivered on 31st October, 1996. This appears on pages 2-6 of volume 4 of the typed proceedings. By that Ruling, I granted the prosecution leave to adduce additional evidence.

That evidence was given by Kiyuli Mutisya, PW36, an employee of Kenya Posts and

Telecommunications, specifically in the accounts section. His duties include billing and accounting of telephone calls and international calls.

The witness was requested by C.I.D officers for a copy of a bill of telephone number 558245 in the name of General Engineering and a copy of bills of Telephone number 559634 of General Diesel Services, for the month of December, 1995.

Mutisya went back to his records and found the records of the 2 telephone numbers and gave the C.I.D officers the computer print out. He identified the two accounts in court General Engineering and General Diesel Services, as the bills he gave the police. They were produced in court as Ex. 30(ii) which the bill produced by Mr. Njoroge was Ex.30(i).

The bill for General Diesel Service showed that on 2nd December 1995 an international call was made from telephone [particulars withheld] to U.S.A telephone [particulars withheld], Mr's telephone number. Again on 5th December, 1995 an international call was made from this same number to a number in U.S.A [particulars withheld], I's workshop telephone number.

The bills show the time in Kenya when the calls were made. It also shows the duration and the amount paid. The call to M's telephone number on 2.12.95 was made at 17.53 p.m. which would be about 6.53 a.m. in California.

M's evidence was that the first accused called him at 7.00 in the morning, and I S's evidence was that first accused called him at his workshop at about 11.00 a.m.

California time. The bill shows that that call was made from telephone [particulars withheld] Nairobi at 22.02 p.m. which would be about 11.02 a.m. in California.

Both learned counsel addressed the assessors at length on the evidence of these international calls. The prosecution asked the assessors to accept this evidence, but Mr. Rao urged them to reject it, which they did as shown by their addresses to me on 29th November, 1996, after I had addressed them.

In addressing the assessors, Mr. Rao had submitted that the evidence of M S should not be relied on as the actual telephone conversation said to have been in Punjabi language, was alleged conversations of P, with the first accused and I as well.

These 3 witnesses Mr. Rao said had not reported the alleged conversations to the police until 27.12.95. That this showed that they were not telling the truth. As for the bill of General Diesel Services which came in by way of additional evidence to show that international telephone calls were made on 2nd and 5th of December, 1995 to M and I at the house and workshop respectively. Mr. Rao submitted that the computer print out could have been fabricated. He challenged the prosecution to show that the accused was connected with General Diesel Services in any way. As for P's evidence, Mr. Rao submitted that her conversation with the second accused did not implicate the first accused apart from the words, "let her burn". That in any event, what the second accused said against the first accused not evidence against the first accused who is jointly charged with him. Mr. Rao relied on several legal authorities on this point, i.e. R V RAMJI HIRJI & OTHERS GOPA son of GIDAMEBANYA & OTHERS V R, which was referred to in the local case of ANYANGU and OTHERS V R CR. APP NO.5 of 1968 (unreported).

In my summing up to the Assessors, I directed them to be guided by the Legal principle that a statement by an accused person tending to incriminate a co-accused as in this case is not evidence against that co-accused, and they should therefore disregard the evidence. That direction was in respect of what the second accused said on telephone about the first accused to witnesses from California.

Together with this evidence was the evidence of the deceased's younger sister who lives in Eldoret, S K, PW 13. She recalled the 29.11.95 when her late sister K and her husband the first accused and her sons, J and P, PW12, went to visit them in Eldoret on the occasion of her daughter's engagement. S said that the 2 boys told her to tell their mum to go away, otherwise they would kill her. The boys have since

denied this evidence in court. Anyway, S noticed that the deceased had a black mark on the cheek like a cut. She came as S was talking to the boys and S urged her to go away. S's evidence about what the deceased said was objected to by Mr. Rao who said such evidence was governed by the rules of "res gestae". The prosecution conceded that they were aware of the legal principle of "res gestae" and agreed only to ask for direct evidence. I found that there was no need to write a Ruling in those circumstances, and the trial proceeded.

S again recalled the 3rd of December, 1995 when she came to Nairobi and stayed at the house of Barinda Singh Bhagra, in Lavington. The deceased and her husband P were present. She had a black eye and she could not walk or eat properly. There were nail scratches on her neck. S talked to the first accused about the condition of her sister. The accused explained that there had been a fight between the deceased and his mother, and that after the fight, he beat her. The accused has since denied this evidence that he beat the deceased, and the defence submission on the evidence was that it was false.

There was further evidence from Mrs. H B, a distant relative of the deceased's family. She talked of having seen the deceased with a black eye, this was about two months before she died.

Mrs. B went to visit the deceased in hospital on 19.12.95. She met both accused persons there, but she spoke to the second accused and asked him what really happened, and accused said he was in his room when he heard a loud noise. That he came out and found his mother, father and grandmother shouting at each other. That his mother went into the store, took dry cleaning liquid poured it all over her body, and set herself on fire and went out running, calling the servants.

The first accused's second son P S D was not in the house on the evening of 5.12.95, when the incident occurred. He returned home at 10.15 p.m. He found nobody else at home except his grandmother whom he never used to see, anyway. Mr. Rao reserved his cross-examination of this witness. When he was eventually cross-examined he denied the conversation by his aunty S K, at her house in Eldoret. He said his mother was well and happy on that day and he produced a photo to show that his mother was well. He also said that on the morning of 5.12.95, he left his mother well as he went to school. He also referred to an incident when he said his mother took his father's blood pressure pills, in an effort to commit suicide.

J K D is the first accused's only daughter with the deceased K K. She too was not in the house when the incident occurred as she was away overseas, studying, otherwise she testified that the relationship between his father and mother was good.

These two are the first accused's children with the deceased. With the mother dead and father, and elder brother facing a murder charge, I can understand why they would give the kind of evidence they gave. The whole purpose would only be to save them. The relationship between their parents could not have been good when Prof. Kungu found at the post mortem examination that the head had "old bruises". There is also S Ki's evidence of the condition of the deceased, only two days before the burning incident. Even the watchman talked of the commotion he heard between "Mzee and his wife".

The man who was alleged to have been having affair with the deceased was A S L, PW24. His evidence appears from pages 45 – 64 of volume 2 of my typed proceedings. He denied the affair and said that he had known the deceased since childhood as a friend. The allegations of an affair made the deceased ring him and threaten to kill him or have him killed.

A had frequent phone calls with K, the deceased, who mentioned to him at some point that their conversations were being taped. He held a position in the temple, but because of the quarrels between him, the first accused, the first accused's mother and J, A resigned his post at the temple when the intervention by the Pope did not sort out the quarrels, otherwise prior to that, he only met the deceased in the Temple, Social places and at other people's functions, all public places.

He described the deceased as a good friend, a family friend who discussed her problems openly with him and his wife.

The conversation between the first accused and A S was taped and played in court during cross examination when the prosecution did not object. However, an attempt by the defence to play any more tapes, alleged to contain a conversation between the deceased and A S was objected to most strongly by the prosecution.

The legal arguments on this point were made in the absence of the assessors who had been requested to leave the courtroom.

I delivered a Ruling on this point on 22.10.96. It appears on pages 58 – 61 of Volume 2 of my typed proceedings. I found the tapes to be inadmissible in evidence. The reasons are in the Ruling.

The evidence pertaining to the family business concerns of the first accused and his family was given by an accountant Mr. Atul Patel, PW39. He knew that the deceased had shares in Standard Engineering, about 20% shares, and in General Engineering she had 52%. The witness took the court through the evidence of how he advised the family to re-organise the family business affairs.

By the end of it all, he did not know whether his advise was taken. He confirmed that no problems had arisen as such, but he just advised them because of his experience with many Asian families where there is co-owing of property, there is always problems.

The prosecution called two expert witnesses Mr. Adriano Peter Landra a plastic surgeon PW21 whose various qualifications were given to the court, and Mr. Peter Namae Okondo, PW23 a mechanical engineer, whose qualifications were also given to court.

Mr. Landra identified a booklet of photographs containing photos 30 – 38, which SSP Muchori, the Investigation Officer showed him. He later confirmed in his evidence that these were the only photographs he relied on in reaching his conclusions as well as the hospital notes, plus Prof. Kungu's report, which was Ex.18. Dr. Landra's surface chart, which he prepared to assist in explaining how the deceased body was burnt – i.e. the areas which were burnt and those which were spared, was Ex.10. This exhibit has 3 pages, all of which are self-explanatory when read.

Dr. Landra's second document, Ex.11 showed the six inconsistencies he found after studying the deceased's pictures in the booklet marked numbers 30-38, Prof. Kungu's post mortem report and notes in the hospital file. This document is also in 3 pages and on the 3rd page, it has drawing of a person lying in a semi recumbent position. The notes on this document again are self explanatory. In simple terms I understand him to have been explaining in what position the deceased could have been burning to warrant certain parts of her body to have been spared whilst some were badly burnt as appear in the photos produced in court.

According to Landra the hair was virtually intact. Prof. Kungu also observed that the hair was not burnt. The inner thighs normally spared in such cases of burning but not in this one. The aspect of the lower leg was intact, suggesting a semi recumbent position of the lady. This position is shown in exhibit 11. On the virtually unburnt hair, he said that either it was held or wrapped or both.

He observed the deep burn of the deceased's chest in between the two intact brassier area suggesting a dribbling percolation of a burning liquid. He concluded his evidence by stating that the appearance of wounds and dept, i.e. second and third degree burns, which are consistent with inflammable liquid set alive.

Dr. Landra was cross examined at length on his evidence. This appears on pages 13-17 of volume three of my typed records.

Part of his answers to questions by defence counsel are on page 16, line 9 from the top, where he said

“..... what I find inconsistent is the very very light involvement of the viola, i.e. inner parts. If there was explosion the viola would be much burnt more than this. I found that

this light involvement of viola did not fit in with a lady lighting a gas. I do not think that the fact that one might have lit fire on oneself is consistent with what I had said of lack of involvement of the inner parts of the arm.....

A chemical poured on someone and lit, the flame would follow the pattern of the chemical.

As the liquid moves, the fire would move with it. The flame always points outwards. If fluid is directly poured on the face, the burns would be as it is here. There would be an irregular pattern of burning. I still say that the pattern of burns on the face and middle of breasts make it inconsistent with this lady standing up.

When all this began the only possible would be that if something inflammable had been thrown at her whilst she was standing. If a patient is in a semi-recumbent position she/he could still struggle unless dragged. But the back of the deceased legs are not burnt so she must have been lying on her back with her knees bent – i.e. semi-recumbent position

Engineer Okondo examined the kitchen in the accused's house on 10th September, 1995 in the company of S.S Muchori, the investigating officer. Before giving evidence of what he did or saw in the house, he gave a detailed account of the characteristics of buten gas, which is used for cooking in this country. He explained about buten gas explosions, how they occur and what damage they cause.

Mr. Okondo's examination of the kitchen in the accused's house did not reveal any structural damage either to the room or surrounding area. He examined the floor, and what he felt would give clue to the existence of a gas fire in the kitchen as well as the gas supply system. He found the cooker to be in good working order there was no sign of a fire arising from it. Okondo found nothing to suggest a gas fire or explosion. He examined the windows and assuming that by 8.30 p.m. they were shut, the glass would have been shattered. The floor was not damaged.

He saw photos 30-38 of the deceased's burnt body. He then concluded.

“Looking at these photos, in my opinion on having seen that the physical damage that goes with a gas explosion which would accompany a gas fire in the form of a fire bomb did not exist. I found that these burns were unlikely to have arisen from a gas fire because in my opinion a gas fire did not exist”.

Okondo observed that it would be unexpected of burns from a gas fire which would be at 2000 degrees C, and the hair is not affected and hair ignites at around 300 degrees centigrade.

A fire officer employed by the Nairobi City council Solomon Kisali Liona, PW 27 also visited the kitchen in the accused's house in the company of the 1st accused and SSP Muchori. He inspected the kitchen. He found the gas cooker to have no signs of gas leak. He touched the knobs and found them to be all right. He tried the gas lighter and it was working. It was producing sparks. He concluded that the gas cooker was in good working order. He examined the kitchen area, and did not see anything like fire or blackened smoke. I looked at the small dining area. I did not see any signs of fire. Liona prepared a report, which he produced in court as Ex.19. He visited the house on 29.12.95.

Mr. William Kibet Sagomo, the Chief Government Analyst, also visited the accused's house on 29.12.1995 and examined the kitchen, and found no signs of fire. The scenes of crime then took photos of the kitchen in his presence. PC Ng'etich PW1 took the photos.

There was prosecution evidence to show that some specimen swabs taken from the deceased at the time of the post mortem, plus several other items were taken to the Government Chemist for analysis, but the results were found to be negative. Finally, apart from the exhibits produced by individual witnesses, the rest were produced by the two investigating officers, SSP Edward Muchori, and Inspector Waigura. These included the will made by the first accused sometime in 1993 bequeathing his property to his wife.

Each of the accused persons made an unsworn statement in defence denying the offence. These statements were handwritten and read out in court. I was subsequently given the typed versions. The first accused talked of the affair between his wife and A S which he discovered in 1994 and continued. He denied threatening to kill him though. He denied the telephone conversations with his father-in-law M S, or sister in law P. He referred to an incident when his wife once tried to commit suicide by swallowing his high blood pressure pills. On the evening in question, there were a number of phone calls. He suspected they were from A S. These brought arguments between them. The deceased said all the problems was from her and she threatened to kill herself. He went back to his room and the deceased to the kitchen. He heard noise sometime later. He ran towards the kitchen and found his wife in flames. He did not know how the fire started he thought it was from the cooker. The deceased ran towards the verandah. He said the house was cleaned a few days later, though there was some smoke which the court was shown (on the second visit to the house presumable). Accused denied having beaten his wife in the 25 years of marriage.

J referred to phone calls from a caller on the evening of 5.12.95. These brought arguments between his mother and father. He assumed the matter ended there, but sometime afterwards his mother poured some liquid on herself and set herself a blaze. He tried to stop her but it was too late. She ran for help to the verandah crying for help. That she was badly burnt and even now the marks of the smoke were still on the wall and ceiling.

Accused denied the contents of the conversations he is said to have had with P, I, P S, and even with S K. He confirmed evidence that his mother once tried to commit suicide by taking blood pressure pills.

As I told the assessors in may address the prosecution evidence in this case is circumstantial. I explained what this meant and gave the necessary directions those appear in my summing up notes I also directed them to treat K's evidence with caution as he was declared hostile after the prosecution sought leave to do so. He was thereafter cross examined, and during that cross examination he said,

“I told a male officer that I reported on duty at 5.45 p.m. The police misunderstood me, I meant P the first accused. I found Mzee, J, the mother I heard noise from the gate. I believe Mzee and the wife were in. I said even before there were noise between Mzee and his wife. There was one time when Mzee was on safari, a Kalasinger, a fat one came at the gate and gave me an envelope which I gave to mama. I had a record and I passed it to P, the first accused. J came to the bedroom crying saying I am tired of this noise. J came out and went to the sitting room I went round to the garage.

J called me to come and put off fire, the mother was burning. I found flames coming from her body. I assisted in extinguishing the fire. The husband came took a bottle of water and poured it on her. We carried her to the car. As I carried her she said “Kelele Kelele kila siku”. The second statement was read to me. I was asked to sign it and I did. This is my signature what I said to the police in this statement is true. I was summoned and I was told by the accused it was the first accused who told me she had been burnt by gas.”

This evidence which I have outlined agrees in essential respects with the contents of the second statement K gave to the police on 9.9.96 as I have already stated. This evidence is further corroborated in material particulars by the evidence of other witnesses on the issue of gas fire, commotion etc etc. Though the assessors are not required by law to give reasons for reaching their opinions the 3 assessors hearing addressed me at some length. They accepted 's evidence relating to the deceased' utterances “Kelele Kelele kila siku” which utterances they said meant that the deceased was tired of her life, so she burnt herself. They found corroboration of her intention to commit suicide in the evidence of P, and the accused accused persons.

K's evidence also shows that the matter of the deceased having been burnt by gas, was the first accused's version of what happened. In both the enquiry statements and the charge and caution statements recorded from the accused persons, as well as in their unsworn statements in defence accused persons denied any involvement in the incident which burnt the deceased. They maintained that they arrived on the scene after the event and only helped to put off fire. The result of this is that there is no direct or eye

witness evidence to connect the accused persons with the burning. That being the case, the prosecutions are therefore relying on circumstantial evidence as I have already stated.

But one may ask, what is the circumstantial evidence the prosecutions are relying on? I find this to be the following,

1. The commotion between Mzee and his wife that evening as testified by K. Even the two accused persons did in their unsworn statements in defence refer to all argument the first accused and his wife that evening as a result of phone calls.
2. The two accused persons took the deceased to the MP Shah hospital first and on enquiry by doctor and nurses about the fire the “older gentleman”, the first accused said she was burnt by gas in the kitchen.
3. At the Nairobi Hospital, evidence shows that only the second accused arrived with the deceased. On enquiry about the burns he said it was a gas explosion in the kitchen. The first accused arrived after about one hour and engaged the patient (deceased) in a conversation where he appeared to be quarrelling. The doctor stopped him and the patient was sedated. I directed the assessors that this was evidence of conduct of the first accused, which is relevant in a criminal case such as this. On enquiry about the fire the first accused said it was a gas leak.
4. The patient is admitted in the HDU of the Nairobi Hospital. The first accused gives instructions to the sister in charge that nobody should see the patient unless he comes with him.
5. There is evidence on record of the telephone call to M S who says he received from the first accused on 2.12.95 whereby accused asked him to come for his daughter in 2 days or the next Wednesday otherwise he would pour kerosene on her and burn her. As it happened whether by coincidence, design, plan or otherwise, the deceased indeed got burnt 2 days after that call. Igbal confirmed this telephone call in court. The first accused denied this call in his defence evidence.
6. There is further evidence by I that the first accused called him in his workshop in California on 5.12.95 that the deceased had got burnt. This call is also denied by the accused in his defence evidence.
7. Evidence of P B as to the call she made to the first accused on 5.12.95 was also denied by him in his unsworn statement in defence.

Each assessor rejected the evidence of these three witnesses in their address to me.

On this evidence, I have the following to say, that first the source of the call of the 2.2.95 to M and the one of 5.12.95 to I was traced by the prosecution when a copy of a bill of general diesel services was produced, showing the first accused’s box number on it. The house telephone number of M and the workshop telephone number of I are recorded on this bill, plus the times the calls were made in Kenya. When one works out the time difference between Kenya and California, one gets the time the witnesses say they received the calls in California. This exercise was undertaken in court during the hearing of the case.

Secondly, these witnesses are the accused person’s relatives, father in law and brother in law, respectively. He knows their voices, they know his voice. They identified him by the voice. No doubt they must have talked to him several times before. I find that there is no possibility of mistaken identity. It was submitted by the defence that there is no evidence to show that the accused is connected with General Diesel Services in anyway. However, his box number is on this bill, but more important, the two telephone numbers is on this bill, but more important, the two telephone numbers in issue in this case are

of his relatives, numbers that he knows and would be calling in the ordinary course of events. One further point is this, that this evidence after the said witnesses had already given evidence. It is evidence which was not in the committal bundle, originally. The chances of those witnesses having seen that bill and therefore changing their evidence to fit the times they say they received the calls in California to tally with the times the calls were made from Kenya as appears in the bill does not arise. I therefore find that both M and I received telephone calls from the first accused on the 2nd and 5th December respectively as they stated in court. My further finding on this point at this stage is that the first accused made the calls from that number particularly because he wanted to hide the fact of those calls. I say this because that is not a number reflected in the various statements recorded from him by the police whom he gave his telephone numbers as 557459, 558245 and 732413. The box number however, remained the same.

Having regard to the tragedy which had occurred in which the first accused would be an obvious suspect, it would not have been in his own interest to make a call either at his house or factory.

P B's evidence about the call to the 1st accused which I also find was made tended to support the threat accused uttered to M by the call on 2.12.95.

The prosecution adduced evidence of the two experts Adriano Landre and Peter Namae Okondo. I have already gone into their evidence in great detail. I directed the assessors to accept their evidence and findings.

On my part, I have carefully considered the evidence of these two experts and having also examined the photographs taken of the deceased and produced as exhibits, more specifically exhibits 30 – 38. I am satisfied that the fire which burnt the deceased was as a result of inflammable liquid poured and or thrown at her and set alive.

The eyes must have been spared as Prof. Kungu's evidence and report show would appear to support opinions of Dr. Landre.

Mr. Okondo's evidence, in my view, rules out the theory that this was a gas fire and stated by the first accused who said in his unsworn statement in defence that he thought she was burnt by gas from the cooker. Again the evidence of Prof. Kungu in his report shows that "the hands, i.e. the finger and palms", are not burnt. This together with Mr. Landre's evidence as a whole rule out the possibility that the deceased set herself on fire, as stated by the second accused in his unsworn statement in defence.

I must comment here on evidence by both the accused persons in their defence when the referred to the black marks on the wall and ceiling shown to court by Mr. Rao, when he asked the court to visit the accused's house a second time when the trial of the case was almost concluded and the investigating officer, SSP Muchori was giving evidence. My finding on this second visit to the court where some patches of smoke in the small dinning room was shown to court, is that it was an afterthought. That evidence looked at or read against the evidence of Liona, the fire officer, Okondo and Sogomo who had all been to the house and examined it and found no such marks, shows that the evidence by the accused persons in their statements in defence is neither true nor capable of belief. The marks aforesaid would have been visible on the first visit to the house if at all they were there. I also found the act of using Inspector Waigura by Mr. Rao and asking her to lie on the floor in the accused house, in the small dinning room and demonstrate a semi-recumbent position and show that it cannot work, I found this to be a stage managed act, which did not throw any doubt on the prosecution evidence on record to that effect.

Looking at the evidence against each accused separately, and in light of the circumstantial evidence which I have outlined and applying the standard of proof required in a criminal case as laid down in the case of *REX vs KIPKERING ARAP KOSKE* (1949) 16EACA 135. I find that the exculpatory facts against the first accused is incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis but that is his guilt. I am satisfied that the case against the first accused has been proved beyond any reasonable doubt. I therefore find him guilty and convict him accordingly. This means that I have differed and or disagreed with the unanimous opinion of the assessors who found him not guilty of the charge. I am required by law to give reasons in a situation like this, and I hereby proceed to

do so.

1. I found the assessors opinion to be perverse and totally against the evidence including the evidence of experts.
2. Their opinions were given from prepared texts though I had not asked them to do so, and the law does not require them to do so, either. As they each addressed and is now part of the court record, I observed that they used words and or phrases ordinarily used by trained lawyers. The contents of their addresses to me made me come to the inevitable conclusion that perhaps they were not true to their calling as assessors. I was therefore left with no alternative but to differ with their opinions.

As for the second accused, when I apply the same test, I find that there is no sufficient evidence against him to warrant a conviction on a charge of murder. I therefore give him the benefits of doubt and acquit him of the charge of murder. I order his immediate release unless otherwise lawfully held.

As the first accused now stands convicted of murder, I will await any addresses from his counsel in mitigation.

Mr. Rao

There is nothing I can say which can be of assistance to the accused. For the record may I say with respect that we shall be filing an appeal against conviction and sentence to the court of appeal.

J. ALUOCH

JUDGE

COURT

To file appeal is the right of an accused person. I cannot deny it.

J. ALUOCH

JUDGE

Georgiadis

There is now remaining sentence, which I request the court to pronounce.

J. ALUOCH

JUDGE

COURT

The evidence against the first accused showed, in my opinion, that the killing of the deceased was pre-planned, brutal and merciless. The law only prescribes one sentence for murder. For that reason, I sentence the first accused to death.

Dated at Nairobi this 30th day of January, 1997.

JOYCE ALUOCH

PUISNE JUDGE

Mr. Rao

May I ask for certified copies of proceedings and judgement for purposes of appeal.

J. ALUOCH

JUDGE

COURT

I order that typed certified copies of proceedings and
judgement be supplied to the defence on payment of court
fees.

JOYCE ALUOCH

PUISNE JUDGE