REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, TUNOI, JJ.A & BOSIRE, AG.J.A.
CRIMINAL APPEAL NO. 10 OF 1997

BETWEEN

PARVIN SINGH DHALAY .....……..... APPELLANT

AND

REPUBLIC .....……..... RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of Kenya at Nairobi
(Aluoch J) dated 31st January, 1997
in
H.C.CR.C. NO. 33 OF 1996)
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JUDGMENT OF THE COURT

The appellant before us is Parvin Singh Dhalay and we shall hereinafter refer to him simply as "the appellant". On the 30th day of January, 1997, the appellant was convicted and sentenced to death on an information that had charged him and another person not before us with the murder of one Kuldip Kaur Dhalay. The appellant and his co-accused Jagdeep Singh Dhalay were alleged to have murdered the deceased on the night of 5th December, 1995, at Lower Kabete Road, Nairobi. Jagdeep Singh Dhalay was acquitted by the trial judge (Aluoch J). Jagdeep was the son of the appellant while the deceased was the wife of the appellant. They lived together as a family in one house in Lower Kabete area of Nairobi.

On the evening of 5th December, 1995, the deceased was severely burnt while in their house and the appellant and his son Jagdeep rushed her to the M.P. Shah Hospital. Despite her grievous wounds, the deceased was still able to walk and talk to those who saw her at the hospital. Her injuries required that she be put in an intensive care unit. The unit at the M.P. Shah Hospital was full and had no bed for her. She was next taken to the Nairobi Hospital. By the time the deceased arrived at the Nairobi Hospital, the appellant was not with them and in the High Court, he explained his absence by saying that he had gone to look for money for the hospitalisation of the deceased. The deceased was admitted in the intensive care unit of the Nairobi Hospital, but her injuries were too serious for medical science to successfully cope with and she succumbed to them on 19th December, 1995.

It is clear to us, as it must have been to the Judge and the assessors, that the explanation given at both M.P. Shah and Nairobi Hospitals to account for the injuries of the deceased was that the burns were caused by gas. At this stage of our judgment, we shall try to narrate the events in as neutral terms as we

are able to. Because the story about the burns being caused by gas had somehow become an issue, it is not surprising that when the investigations did start and when the trial of the appellant and his son commenced in the High Court, much of the prosecution evidence was directed at showing that there was in fact no gas accident in the family house at Lower Kabete during the evening of 5th December, 1995. The gas cooker in the family residence was proved to have been safe and no gas leak could have occurred from it to cause the fire which burnt the deceased. Again the prosecution called two prominent men of science in this field, namely Mr. Adriano Peter Landra (PW21) and Mr. Michael Namae Opondo (PW23). These two witnesses swore that the injuries on the deceased were inconsistent with a gas burn and they gave what appeared to the learned Judge and appears to us as well, to be perfectly good grounds on which they based their opinion. The learned Judge believed their opinion and she appears to have been astounded that the assessors who returned a verdict of not guilty against the appellant and his son, did so even on the face of the uncontradicted professional opinion. We think we should at this stage say something about the opinions of experts when they appear to assist the courts.

It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of ELIZABETH KAMENE NDOLO V GEORGE MATATA NDOLO , Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

> *"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."*

That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it.

The evidence of PW21 and PW23 was virtually unchallenged and as we have said the prosecution brought that evidence to show that the burns on the body of the deceased could not have been caused by a gas fire. Faced with that evidence, it would have been futile for the defence to persist with the story about a gas-leak causing the fire. The prosecution's contention before us was that that story was persisted in until it became obvious that it was untenable and it was only then that the defence abandoned it, if it was ever abandoned. The prosecution's case before the High Court was that that story about the gas was intended to cover up the crime of murder by the appellant. To back up their story of murder, the prosecution contended, or at least as the learned Judge understood it, that at the two hospitals, the story of a gas-leak was put forward by the appellant and Jagdeep. Then they called Dr. James Kabore Mogire (PW8) who was the first doctor to see and talk to the deceased at the Nairobi Hospital. The burden of this witness' evidence was that he spoke to the deceased and her son Jagdeep who was with her. When he asked the deceased what had happened to her, the deceased told him to ask Jagdeep. Jagdeep gave the story about a gas-leak. PW8 was not satisfied with that story and he apparently asked the deceased several times what had happened to her. The deceased told him, as many times as he asked her, to ask Jagdeep what had happened. Then at some stage the appellant came to the hospital and PW8 saw him talk to the deceased in a manner which he (PW8) thought amounted to a quarrel and which PW8 thought was unkind to the deceased. They talked in a language which PW8 did not understand but as he thought they were quarrelling, PW8 intervened and told the appellant to stop it. PW8 asked the appellant what had happened and the appellant kind of dismissed him and said it was just a gas fire.

As far as we understand the evidence before us, apart from what the appellant and Jagdeep said regarding the cause of the burns, namely a gas leak, and apart from what Dr. Mogire said regarding the apparent quarrel between the appellant and the deceased, and apart from the fact that the appellant did not go with the deceased to Nairobi Hospital but arrived there much later; we say apart from these factors we have enumerated, there was no other evidence led by the prosecution to show that the appellant had in fact set the deceased on fire. We go back to the house at Lower Kabete during the evening of the fire. The only witness called by the prosecution to shed some light as to what might have happened there was John Wafula Kisa (PW20). He was an employee of Factory Guards Limited and at the time of the incident and upto the time he gave evidence in the High Court, was assigned to guard the home of the appellant and his family. When called to testify in the High Court, he gave evidence which the prosecution did not expect and Mr. Georgiadis who led the case for the Republic promptly applied that PW20 be declared a hostile witness, and the witness was in the end declared hostile. The effect of that was to render his evidence, wholly unreliable if not totally worthless. His evidence, irrespective of its value was that while he was on duty at the gate, Jagdeep came out of the house running and called the witness to go into the house and help in putting out the fire. He went in and found the deceased burning and he helped in putting out the fire. Jagdeep brought a blanket and as they carried the deceased to the vehicle to take her to the hospital, the deceased was saying in Swahili:-

"Kelele, kila siku, kelele kelele."

The learned Judge simply interpreted those words to mean: "Noise, everyday, noise noise", and this interpretation formed the basis of one of Mr. Kapila's complaints against the learned Judge's appreciation of the evidence before her. We shall revert to this aspect of the matter later on in the judgment. But the point we are making at this stage is that the evidence of PW20, assuming it had some value, did not show that the appellant had set the deceased on fire. The witness testified that he had heard some kind of commotion between the appellant and the deceased, but that was slightly earlier on, and there was nothing in the evidence of this witness to show that it was the appellant who had set the deceased on fire. His evidence also showed that once or twice when the appellant was on safari one fat "Kalasinga" had visited the home and gave to him items to pass to the deceased. The defence's contention was that the deceased and one Anmol Singh Lota (PW24) were lovers and it is possible he (PW24) was the "fat kalasinga" PW20 was referring to.

If we correctly understood the burden of Mr. Georgiadis' contention before us, and we hope we did, the prosecution treated these aspects which we have so far dealt with upto this stage, as forming some sort of a chain of circumstantial evidence of a weak nature which lent some weight to the direct evidence which they placed before the trial court. The learned trial Judge, Mr. Georgiadis told us, misunderstood the whole case and consequently dealt with it as though it was based wholly on circumstantial evidence. We do not think there was any substantial dispute between Mr. Kapila for the appellant and Mr. Georgiadis for the Republic, that the test to be applied when dealing with circumstantial evidence is not simply the one laid down in KIPKERING ARAP KOSKE & ANOTHER V REX , (1949) EACA 135. There the then Court of Appeal for Eastern Africa had laid it down:-

> "That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.
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> "

That is the only test which the learned Judge gave to the assessors and in her judgment she put it thus:-

> "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 V KIPKERING ARAP KOSKE , (1949) EACA 135, I

> find that the inculpatory facts against the first accused [appellant] is incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis but that of his guilt ....."

Clearly the direction the learned Judge gave to the assessors and which she sets out in this part of her judgment is no longer adequate and it is no wonder Mr. Georgiadis conceded before us that had the Republic's case been based wholly on circumstantial evidence as the learned Judge thought it was the Republic would have had no leg to stand on. Mr. Kapila cited to us first the case of TEPER V REGINAM , (1952) AC 480 which was decided by the Privy Council after KIPKERING's case (1949) and there the Privy Council laid down the further test that:-

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

The Court of Appeal for Eastern Africa accepted this further test in the Ugandan case of SIMONI MUSOKE V R , [1958] EA 715. For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal. In the present appeal, the learned trial Judge does not seem to have even been aware of this additional requirement and did not consider it. So that if her view that the case was based solely on circumstantial evidence was correct, then the appeal must inevitably succeed.

But Mr. Georgiadis, virtually abandoning the case as found by the learned Judge, told us that the prosecution's case was based on direct evidence and to a very minor extent, on circumstantial evidence as found by the Judge. The expression Mr. Georgiadis repeatedly used before us was that the learned Judge had put the cart before the horse and that as a first appellate court, it is open to us to unhitch the horse and put it in its proper place, namely in front of the cart. We take it that the horse in this respect is the direct evidence and the cart must be the minor circumstantial evidence as found by the learned Judge. We agree with Mr. Georgiadis that as a first appellate court, it is not only open to us, but also the duty of the Court:-

> "to reconsider the evidence, evaluate itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld" - see OKENO V REPUBLIC , [1972] EA 32.

Of course in doing this, we must bear in mind that ".... this jurisdiction is exercised with caution", the obvious reason for this being that we have neither seen nor heard the witnesses who testified before the trial Judge - see PETERS V SUNDAY POST LIMITED , [1958] EA 424. So that if the interests of justice required that we unhitch the horse and place it in front of the cart as Mr. Georgiadis asked us to do, we would be perfectly justified in doing so. But it is equally important to bear in mind the caution which Mr. Kapila asked us to bear in mind and that caution was this, as we understood it. Justice is and must be done according to law. The Judge found the case for the Republic proved beyond reasonable doubt on circumstantial evidence. That was the finding which the appellant and his legal advisors knew and their grounds of appeal were drafted to challenge the case as found by the trial Judge. Had the trial Judge's finding of guilt been based first on direct evidence and then to a lesser extent on circumstantial evidence, the appellant and his legal advisors would have drafted their grounds of appeal with a view to meeting that case. We think Mr. Kapila's contention in this regard has a lot of force behind it, and though in these matters the courts must not lose sight of the wider interest of justice, yet we must keep well in our mind Mr. Kapila's caution.

We now must inevitably come to what was called the direct evidence and that evidence obviously consisted of two telephone calls which the learned Judge called "transatlantic telephone calls". The first telephone call was made by the appellant, either on the 2nd or 3rd of December, 1995. The call was made to Mukhtar Singh Sagoo (PW17), the father of the deceased. He lived at 11545 Mc Lennon Avenue, Grenada Hills, California 91344, United States of America. He gave his telephone number there as 8183681401 and he lived in his house with his son Iqbal Singh Sagoo (PW11). In examination in chief,

this witness stated, where relevant, as follows:-

> ".... On December 2nd 1995, I received a call in the morning hours. Parvin Singh [the appellant] called me. I don't know where he was ringing from. He asked me to come to Nairobi in 2 days. I asked him what's the matter? He told me that Kuldip [deceased] had beaten him and his mother. I said that may not be true. He insisted that I must come and I said you are married for 25 years. You have grown up children you should take care of the family. Then he said, if that is the case you will see what happens. He said he would put kerosene on Kuldip and burn her and he hung up. I didn't believe him how can he do that to his family. I received the tapes, about 3 or 4 tapes and they had been broken in transit in shipping. This was at the beginning of 1995. Iqbal was on an extension he heard the conversation. He was in bed he came down about ½ hour later.
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> We discussed the call. He said Parvin is a mad man he can't do that. A few days later I received a call from Devan Singh in Nairobi. He is a relative living off Juja Road. I got information that Kuldip was in Nairobi Hospital in a bad condition. Devani advised me to come to Nairobi Hospital to visit my daughter. ....."

In cross examination by Mr. Rao who appeared for the appellant in the High Court, the witness' first answer was:-

> "The 1st accused telephoned me on the 1st of December, 1995, not on 3rd December, 1995. It was in the morning, Los Angeles time. Here should be evening ....."

The basic evidence given by this witness was that the appellant called him in the morning of 1st or 2nd December, 1995 told him the deceased had beaten him (appellant) and his mother and asked the witness to come and collect his (witness') daughter in two days time. The witness said he would not do so and the appellant then told him that he (appellant) would pour kerosene on the deceased and burn her. As is clear from the evidence of this witness and that of his son Iqbal (PW11) the latter listened to this conversation on an extension in his bedroom. In examination in chief PW11 said and once again, we quote him:-

> "... On 5th December, 1995 the 1st accused called the Residence in America. It was morning around 9.00 a.m. He said that he had had a fight with my sister. I was on the other extension on the other line. He was speaking to my father. I heard him say that there had been a fight in the house and that by Wednesday if we don't come and get my sister that he is going to burn her. It was a little strange, but I was not personally surprised because he had called several times complaining about the fights".

In cross-examination the witness stated, among other things:-

> "It is not true we found a scape-goat in the 1st accused. The telephone call was to my father and I was listening in. The time of 9.00 a.m. was correct ..... I received a call from Parvin Singh on 3rd December, 1995 at 9.00 a.m. If I was listening to a call on 3rd December, 1995 my father would be listening to the same call. Its common that when the phone rings its picked up at the same time. .....accused told me. If by Wednesday we don't come, he is going to burn her. He did not specify the liquid he would use. You would have to ask my father if whether liquid to be used was specified. It is not correct that there was no telephone call. Its not true that the first telephone call was on 6th December, 1995. ....."

It is clear to us from the evidence of PW11 that at this stage of the proceedings Mr. Rao's instructions were that the alleged telephone call to PW17 or to both PW17 and PW11 was not made and that led to PW17 going to his old colleagues at the postoffice who subsequently confirmed that such a call was in fact made. In his unsworn statement the appellant said he telephoned PW17 and talked to him about the alleged affair between Anmol Singh (PW24) and the deceased. He denied that he told PW17 and PW11 that he would burn the deceased or that he asked PW17 to come for the deceased in two days

time or by Wednesday. Mr. Georgiadis contended before us, and this was the view that commended itself to the learned Judge, that the appellant had denied making the call to PW17 either on the 2nd or on the 3rd or on the 5th and that he only admitted making the call after PW17 had brought evidence from his former colleagues at the Kenya Posts and Telecommunications Corporation. Mr. Georgiadis asserted that once it was proved that the call was in fact made, then the logical inference to be drawn from the denial that it was made would be that the appellant had in fact told PW11 and PW17 that they must come for the deceased in two days' time or on a Wednesday and if they failed to do so, he would burn her. Of course the appellant did not directly tell the learned Judge that he did not make the call in issue. But from the questions put to PW11 by Mr. Rao, it is clear that at some stage the making of the call was being denied and that led to PW17 looking for evidence to prove that the call was in fact made. That call was in fact made by the appellant and in the end he admitted making it. We, however, do not agree with the learned Judge that once it was proved that the call had been made, that relieved the court of its duty to carefully go into the contents of what was alleged to have been said.

The subject alleged to have been discussed during the telephone conversation was that the appellant in effect said he would kill the deceased and he went further and specified the manner in which he would kill her. PW11 said the appellant demanded that the deceased be collected on a Wednesday; PW17 said the appellant demanded the deceased be collected in two days' time. PW17 stated the appellant had specified he would pour kerosene on the deceased and burn her; PW11 said the liquid to be used was not specified but that if it was specified Mr. Rao would have to ask PW17. Why would PW17 hear about Kerosene and not PW11 himself while they were listening to the same conversation? The learned Judge did not attempt to deal with any of those matters, she having taken the view that since the appellant had denied making the call and it was proved that he had in fact made it that was sufficient, and the appellant must have told PW11 and PW17 what those witnesses said he told them. But that still begs the question: What did the appellant say to PW11 and PW17? Did he tell them that he would pour Kerosene on the deceased and burn her as PW17 said? Or did he tell them that he would burn her without specifying the liquid to be used, as PW11 said? Or did he tell them to come and collect the deceased in two days time as PW17 said? Or did he ask them to collect her on a Wednesday as PW11 said? It is of no use saying that these could be treated as minor contradictions. It is not to be forgotten that the appellant's contention before the High Court was that the deceased had committed suicide because of the constant wrangling between her and her husband over her alleged extra-marital relationship with PW24 and as we have seen in the cross-examination of PW11 by Mr. Rao, PW11 was specifically told that he and his family were using the appellant as a scape-goat to cover-up her alleged suicide.

These matters were in issue before the learned trial Judge and we do not think they could be resolved by simply saying that because it was proved that the appellant had made the call contrary to his initial denial that he did, therefore there was nothing more to resolve. That strikes us as being perilously close to making a vital finding of fact merely on the weakness of the case for an accused person rather than doing so on an affirmative proof by the prosecution. That would be entirely contrary to the accepted principles of our criminal law. We now come to the second telephone call relied on by the prosecution and that was the telephone conversation between Pami Bhaika (PW15) and the appellant. PW15 is the sister of the deceased and she also lived in California in the United States of America. She is a well educated woman and according to her evidence, which was only admitted after a trial within the trial, she learned of the burning of the deceased on 5th December, 1995 and on the same day she telephoned the appellant's Nairobi home and spoke to Jagdeep. She asked Jagdeep what had happened and Jagdeep told her that the deceased had been fighting with the appellant's mother and the appellant's brother Jaspal and as the fighting went on the appellant came home drunk and after a while Jagdeep saw the deceased on fire. Jagdeep asked the appellant to call an ambulance, but that the appellant and his mother said "let her burn".

The important part of PW15's evidence was that she also spoke to the appellant at about 2.00 p.m. on the 5th December, 1995. We quote from the evidence of PW15:-

> "..... I spoke to Parvin in Punjabi. I identify Parvin in court. I know his voice. He is the 1st accused. I asked him how did she get burnt and he replied "I did it". He cursed me in Punjabi and I hung up. I was very upset and angry and I made further phone calls to Kenya, Canada, United Kingdom. etc ....."

So according to this witness, the appellant confessed to us on the 5th December, 1995 that he had burnt the deceased. The learned Judge's direction to the assessors on the telephone calls was as follows:-

> "On this evidence of telephone conversations and since prosecution adduced evidence from the Post Office through Kiyuli, PW36 and the MC1, Exh 7 to show the source from where these calls were being made from or to, and further the witnesses "concerned have testified that the calls were made by the 1st accused or to him, all you have to consider, Lady and Gentlemen Assessors, is first, whether you believe that the calls were made as testified, and secondly, whether, by reason of familiarity, these being family members, they are able to recognise the voice of the 1st accused, having spoken to him several times before thereby eliminating the possibility of mistaken identity. If you are so satisfied, then you have to accept that these witnesses received such calls or were told such words by the 1st accused".

And dealing with the matter of the calls in her judgment, the learned Judge had this to say:-

> "..... I therefore, find that both Moht'iar and Iqball 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. ....."

Leaving aside the issue of the appellant wanting to hide the number from which he made the calls, the truth of the matter is that the calls to PW11 and PW17 and the call from PW15 all amounted to the appellant really confessing, first, that he was going to kill the deceased and, secondly, that he had in fact killed her. These were clearly confessions in the ordinary parlance; the appellant denied that he said any of the things attributed to him by PW11, PW17 and PW15. We have already dealt with the inconsistencies in the evidence of PW11 and PW17, but even if those inconsistencies were not there, the position still remains that the appellant repudiated the confessions attributed to him by the witnesses. But as far as the learned trial judge was concerned and as is clear from the extracts which we have quoted from her summing-up to the assessors and from her judgment all that was important was that the confessions were in fact made. It did not bother her one bit that the confessions were in fact repudiated by the appellant. True, the confessions were made to persons who were not in authority such as police officers or chiefs or District Officers and so on.

But a confession to criminality remains a confession whether it be made to a person in authority or to a private person and once the confession is repudiated or retracted or both repudiated and retracted, the confession requires corroboration unless the court is, for cogent and solid reasons, satisfied that the confession, though not corroborated, cannot be but true. The case of TUWAMOI V UGANDA, [1967] EA 84 is too well known to require any further explanation from this Court. And yet in neither her summing-up to the assessors, nor in her judgment does the learned Judge refer to the fact that even if the confessions over the telephone conversations had been made, they had been repudiated by the appellant and they required corroboration, and that even if there was no corroboration for them in the evidence before her, she would have been prepared to act on them without corroboration.

Was there corroboration for the confessions in the evidence before the learned Judge? In this connection Mr. Georgiadis told us that while none of the first four circumstances set out by the learned Judge as the basis for her drawing the inference of the guilt of the appellant, could, standing by itself, provide corroboration for the direct evidence of the telephone calls which the learned Judge also wrongly treated as circumstantial evidence, yet cumulatively together, they could provide such corroboration. We think we agree with Mr. Kapila's retort in this regard that a lot of nothings must remain nothing and cannot provide corroboration.

On the contrary, the conduct of PW11, PW17 and PW15 does not appear to us to support or corroborate their contention that the appellant had confessed to them that he would kill the deceased and that he had in fact killed here. PW17 arrived in Kenya prior to the death of his daughter; he did not give the exact date of his arrival in Kenya but it is obvious from the evidence that he was here before the 10th December, 1995 because he testified that on that date, the doctors at Nairobi Hospital told him that his

daughter's condition was improving. PW17 only reported to the police on the 19th December, 1995 after the deceased had passed away and when asked in crossexamination to account for his delay in reporting the matter to the police, he gave the strange answer that the deceased was in hospital and the appellant might stop treatment. PW15 made her first statement to the police on the 27th December, 1995. She came to Kenya after the 19th December, 1995 and it appears she was blaming Senior Superintendent of Police Edward Muchori (PW2) for having not recorded her first statement correctly and which led to her making a further statement after the trial had commenced. We think the conduct of the police in the investigation of this matter was simply pathetic and we strongly deplore it, but having said that, we still must decide the case according to the evidence that was brought before the Court. What we are saying is that the fact that PW17 in particular reported the matter to the police only after the passing away of the deceased cannot be taken as being corroborative or supportive of their assertion that they knew as early as 5th December, 1995, that it was the appellant who had set fire to the deceased. On the contrary, it can only be seen as weakening their case that they knew it as early as 5th December, 1995 and yet took no steps to inform the police or any other lawful authority about it.

And what was the appellant's case before the learned Judge? It was that the deceased had for a long time been carrying on a love-affair with PW24, and; naturally and understandably, there would be family friction as a result of such an allegation. To back-up the claim that there was a clandestine affair between the deceased and PW24, the defence sought to put in evidence certain tape-recordings of alleged conversations between the deceased and PW24 and as far as we understand it, the defence contention was that had they been allowed to put in the tapes, they would have been able to prove that not only was there a love affair between the deceased and PW24, but as a consequence of that affair and the family friction arising therefrom, the deceased had several times threatened to take her own life. There cannot be any doubt from the recorded evidence that there were various tape-recordings of certain conversations. PW17, the father of the deceased agreed he received three to four tape-recordings from the appellant although PW17 could not tell what the contents of the tapes were as they had been broken in transit. Again one tape-recording of a conversation between the appellant and PW24 was produced in evidence and after PW24 had been shown its transcript, he was forced to concede that the appellant had not threatened him during their conversation, contrary to his earlier assertion that the appellant had threatened him. But when it came to the recorded conversation between the deceased and PW24, the Republic objected to the production of the tape on the ground, first, that such evidence was hearsay, and secondly, that even if it was not hearsay, the evidence could only be adduced as a dying declaration in accordance with the provisions of section 33 of the Evidence Act. On the question of the tape-recording being a dying declaration, Mr. Georgiadis contended that the recorded conversation had taken place more than one year before the death of the deceased and that being so, the conversation could not have shown the state of mind of the deceased at the time of her death.

We agree that if the recorded conversation was to be put in as a dying declaration, then it was correctly rejected by the learned Judge. Mr. Kapila conceded that before us. But we do not think the defence sought to put in the tape-recording as a dying declaration by the deceased. Their contention was that the recorded conversation was relevant as forming part of the Res Gestae of the entire relationship between the deceased and PW24, which relationship was constantly causing friction between the appellant and the deceased and as a consequence of which friction, the deceased had previously threatened to take her life. The defence contended that the relationship between the deceased and PW24 continued upto the time of her death. It is in this connection that Mr. Kapila severely criticised the learned Judge's interpretation of the deceased's words, "Kelele, kila siku kelele, kelele" as meaning no more than "noise, everyday, noise noise". With the greatest respect, we think the learned Judge gravely erred in excluding the recorded conversation between the deceased and PW24. In doing so, the learned Judge in effect prevented the appellant from putting before her and the assessors a vital piece of his evidence to support his contention that the deceased had committed suicide. In this connection, the Swahili words of the deceased which PW20 heard and repeated in court and which were never challenged either by the prosecution or the defence, took an added significance. We ask ourselves: In saying "Kelele, kila siku kelele, kelele", could the deceased be saying: "Noise, everyday, noise noise" and now you [appellant] have killed me? That is possible but it is equally possible that she could have been saying that because of the constant wrangling in the family over her alleged affair with PW24, she had decided to take her own life. That was how the assessors understood the matter though the learned Judge strongly disagreed with them, as she was

entitled to do. The learned Judge herself, of course, does not appear to have attached any significance at all to the words, her view being that there was no credible evidence to support the allegation of sexual infidelity on the part of the deceased. On this aspect the learned Judge simply told the assessors in her summing-up:-

> "The prosecution witnesses were also questioned on the possibility of death having been caused by suicide, in fact self immolation. This is the version alluded to by the 2nd accused in his unsworn statement in defence. The suggestion made through questioning of the witnesses was that this was because of shame due to an alleged infidelity. This was being done through Anmol Singh Lota, PW24. Lady and Gentlemen Assessors, there is no credible evidence to sustain that allegation which was denied by Anmol Singh who gave evidence on oath and was crossexamined on it. I therefore, direct you to disregard it."

The assessors of course disregarded the learned Judge's view on this point as they did on others and we think they were right to do so. First the learned Judge had ruled out, wrongly as we have said, the tape-recorded conversation between the deceased and PW24. Had that tape-recording been allowed in, it may well have shown that there was some credible evidence regarding the illicit relationship between the deceased and PW24. As to the veracity or otherwise of PW24, the learned Judge saw and heard him give evidence before her, but the assessors also had the same advantage and it was clearly wrong for the learned Judge to in effect direct the assessors to accept his evidence that there was in fact no illicit relationship between him and the deceased. We have already pointed out that this witness at first asserted that the appellant had threatened to kill him and it was only after the tape-recording had been played and a transcript of it handed to him that the witness conceded that the conversation between him and the appellant had been polite throughout and that the appellant had not threatened to kill him. We are, ourselves, satisfied that the assessors were perfectly entitled to take a different view of this witness from the view the learned Judge had formed of him and the learned Judge was not entitled to direct the assessors to accept his evidence as she in effect did.

Where does all this lead us to?

The contention of the defence was that the deceased had committed suicide. The learned Judge ruled as inadmissible evidence which might or might not have shown that because of the constant quarrels in the family over the allegation of infidelity, the deceased may well have taken her own life. Her words, "Kelele, kila siku kelele, kelele", could be explained in at least two possible ways, namely that the appellant was always having a go at her and had at last taken her life or that because of the constant rows in the family she had decided to take her life. We are far from saying that she did so. But it is not to be forgotten that the burden was not upon the appellant to prove that she in fact committed suicide. All the appellant was required to do was raise a plausible possibility of suicide and once he did so, the burden then shifted to the prosecution to prove beyond any reasonable doubt that she did not do so. The evidence of PW21 and PW23 was directed chiefly to excluding the possibility of the burns having been caused by a gas explosion and we doubt whether both or any of them could have positively sworn that the deceased could not have set herself on fire. Where on the totality of the evidence available it is possible to conclude that the deceased could have killed herself, then the prosecution cannot claim that they have discharged the burden required of them in a criminal case. Put in a different way, this appellant by himself and his co-accused raised a plausible possibility of suicide. Like the assessors we are unable to hold that the evidence of PW11, PW15, PW17, PW21 and PW23 eliminated that possibility beyond any reasonable doubt. We think the assessors were entitled to take that view and we find the strictires of the learned Judge against them to be unjustified. In any case, if the learned Judge thought as she undoubtedly did, that the assessors were not being true to their calling as assessors because they had been interfered with, then it was clearly her duty to abandon the trial, impanel other assessors and start a fresh trial. Section 262 of the Criminal Procedure Code is to the effect that:-

> "All trials before the High Court SHALL be held with the aid of assessors."

It is accordingly mandatory that the High Court must hold all its trials with assessors and we think a trial cannot be said to have been held with the aid of assessors if the opinion they give to the court is that

of others and not their own.

Again section 322 (2) of the Code requires that the assessors give their opinion to the court orally. There is accordingly no provision for assessors giving written opinions or reading out to a judge their opinion. Their opinion is to be given orally and the judge, according to section 322 (2):- "shall record that opinion."

If it was intended that they should read out their opinion from a written document, Parliament would have said so. The learned Judge in this case ought not to have permitted the assessors to read out to her their lengthy statements in the manner they did.

But having said that, we are ourselves satisfied on the recorded evidence that these assessors were basically right in the advise which they tendered to the learned Judge, namely that the prosecution had not proved beyond any reasonable doubt that the appellant was guilty of the charge brought against him.

Before we depart from this matter Mr. Georgiadis brought to our attention the conduct of one Dr. F. N. Ng'ang'a who purportedly performed a post mortem examination on the body of the deceased and this was said to have been done on the 20th of December, 1995 - see Exh. 23. Dr. Ng'ang'a signed the post mortem form and certified that death was:-

> "DUE TO RESPIRATORY FAILURE DUE TO HYPOSTALITY PHENOMONIAN FOLLOWING SEVERE BURNS."

As it turned out from the evidence of Dr. Samuel Odero Ywaya (PW31) no post mortem examination had been done on the body of the deceased by the time he did so on 27th December, 1995. Dr. Ng'ang'a was supposed to have done the post mortem on the 20th December, 1995, one week before PW31 did so. We have not heard any explanation from Dr. Ng'ang'a as to what he actually did, but if it be true that he signed the post mortem report without actually examining the body, that would be such a grave matter that it should be brought to the attention of the Medical Practitioners and Dentists Board so that they can seek an explanation from Dr. Ng'ang'a. We shall ask the Deputy Registrar of the Court to bring that matter to the attention of the Board.

On the appeal itself, we have said enough, we think, to show that the conviction of the appellant, even if we were to base it on the direct evidence as Mr. Georgiadis asked us to do, would still be unsafe. The direct evidence relied on consisted of the two telephone conversations which we have dealt with at length. Dealing with evidence concerning telephone conversations, the Court of Appeal in England had this to say in the case of R V BRYCE , [1992] 4 ALL ER 569 at pg 372 letters C to F:-

> "The two questions of which Mr. Thomas makes strong complaint did not go as far as that. They were single, isolated questions in separate conversations.There was no extended interrogation. However, they did go directly to the critical issue of guilty knowledge. Moreover, they were hotly disputed and there was no contemporary record. In R V CHRISTOU there were questions from the under-cover officers as to the area where it would be unwise to resell the goods , the answers being obliquely an indication that the goods had been or may have been stolen from that area to the knowledge or belief of the suspect. However, in that case the whole interview was recorded both on tape and on film. The circumstances to be considered by the learned judge in that case in deciding whether the admission of the evidence would have an adverse effect on the fairness of the trial and how adverse were therefore quite different from those in the present case. The film and sound record eliminated any question of concoction. Not so here. The questions asked were direct, not oblique, the conversation was challanged and the appellant had no means of showing by a neutral reliable record what was or was not said....."

This case dealt primarily with the evidence of under-cover police officers and what they are permitted or not permitted to do, but it also brings out the point that unless a telephone conversation is contemporaneously recorded as it proceeds, an accused person is placed at a disadvantage, particularly

where he challenges what was or was not said during the conversation. A contemporaneous recording of the conversation would eliminate the possibility of a concoction or even an innocent misrepresentation of what was actually said and what was meant by it.We would not go so far as to say that telephone conversations must always be excluded from the evidence unless such conversations are recorded as they take place. Indeed, in the case of relatives such as we have here, one would never dream of keeping a record of conversations. But when guilt or innocence depends on such conversations, it goes without saying that even if such evidence is admitted, there is still a duty on the judge to treat it with the greatest of caution, particularly where it is challenged as was the case here. A judge is perfectly entitled to admit such evidence, if it is in the interest of justice to do so. But having done so, it is still his duty to consider what was said, what it meant or was understood to mean, and where such evidence is alleged to be a confession, whether the confession proves the charge alleged, and if it is retracted or repudiated, or both retracted and repudiated, whether it is corroborated by other independent evidence. In the present appeal, we are satisfied the learned Judge was not right in being concerned solely with the issue of whether the telephone calls were made. In respect of the conversation between the appellant and PW15, it was PW15 who telephoned the appellant and the appellant could not have denied making the call. It was PW15 to whom the appellant confessed that he had burnt the deceased. The appellant denied telling PW15 that he had burnt the deceased; he did not and could not have denied making the call. The learned Judge appears to have treated the making of the two telephone calls as the determining factor; if they were made, then the appellant must have told the witnesses what they said the appellant told them. That was an entirely wrong approach.

Finally, before we leave the matter, we wish to express our very great appreciation and indebtedness to the very professional and able assistance given to us by learned Counsel who conducted the appeal before us. We of course expected nothing less from them, taking into account their very long experience at the criminal bar, but the thoroughness and integrity with which each of them put the respective cases of their clients was simply overwhelming. If we have misunderstood or misconstrued any part of their submissions to us, the fault lies with us, not with them. We have not found it necessary to comment on all the authorities they put before us, not because any of those authorities was irrelevant but simply because if we did so, this judgment might be much longer than it already is. Nor have we found it necessary to deal with the individual grounds preferred by the appellant. We have dealt with their over-all effect and we hope the judgment has found a place for each and every one of them.

For our part we suspect this appellant most likely had something to do with the death of his wife. But suspicion alone, however strong it may be, cannot take the place of solid and affirmative proof required on the part of the prosecution. Our final orders in this matter shall be that this appeal be and is hereby allowed, the conviction of the appellant be and is hereby quashed, the sentence of death imposed on him be and is hereby set aside and the appellant is to be set at liberty forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 21st day of November, 1997.

R. S. C. OMOLO

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

S. E. O. BOSIRE

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR