IN THE COURT OF APPEAL

AT NYERI

(CORAM: GICHERU. KWACH & LAKHA, JJ.A.)

CRIMINAL APPEAL NO. 11 OF 1996

BETWEEN

JANE WANGUI MATHENGE……..APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Lady Justice Angawa) dated 9th November, 1995

IN

H.C.CR.A. NO. 36 OF 1994)

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JUDGMENT OF THE COURT

Jane Wangui Mathenge (the appellant) was arraigned before the High Court at Nyeri on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 3.11.93, at Asian Quarters Estate in Nyeri township in Nyeri District within the Central Province she murdered Joseph Mathenge Wambugu(the deceased). At the end of a trial before Angawa, J, sitting with assessors, the appellant was found guilty, convicted of murder and sentenced to death. It is against her conviction and sentence that she now appeals to this Court.

The prosecution's case was that the deceased and the appellant lived together as husband and wife at the Asian Quarters Estate in Nyeri together with their two children, Jacquiline Nyaguthii and Edwin Mugengo. Marital difficulties developed between the couple which culminated in the appellant throwing paraffin on the deceased and setting him on fire shortly him on fire after midnight on the fateful night as a result of which, he died from his wounds. The fire also completely destroyed the building in which they lived and initially charges of arson were laid against the appellant, but these were withdrawn shortly before the commencement of the trial. The appellant's daughter, Jacquiline, also perished in the fire and her death was the subject of the second count on the indictment but no verdict was recorded in respect of it. Evidence was given by a prosecution witness that prior to the fire, the appellant had purchased a quantity of kerosene which the prosecution contended she used to set the deceased alight. The deceased was taken to the hospital where he succumbed to his injuries the following day. Between the time of his injury and his death the following day, the deceased is alleged to have told a number of witnesses, who were their neighbours, that it was the appellant who had set him on fire. These allegations conversations

formed the basis of the dying declarations upon which the appellant's conviction was based as there was no direct evidence to connect the appellant with the attack.

Both in her charge and caution statement and in hers unsworn testimony in her defence in court, the appellant maintained her innocence and said that the deceased caught fire when the paraffin stove they were using for cooking exploded. The Judge did not accept her account of the events and held that she took revenge on the deceased out of her marital frustrations.

There are five grounds of appeal raised in the supplementary memorandum of appeal filed by Mr. A. J. Kariuki, for the appellant. Before we deal with these, we would like to record the gratitude of this Court to Mr. Kariuki for accepting the brief to act for the appellant in this appeal at very short notice.

The first ground of appeal is that the learned Judge erred in failing to sum-up the evidence in the case and to give the assessors appropriate directions as required by section 322(1) of the Criminal Procedure Code. There is, of course, no note on the record of the summing-up to the assessors except a short note at page 50 of the record that:-

> "Section 322(1) of the Criminal Procedure Code summing-up of case done."

Apart from that bare statement there is nothing else. Mr. Kariuki submitted that without a summary of the summing-up by the Judge to the assessors it is impossible for the Court to determine, one way of another, whether the Judge directed the assessors properly both on the evidence and on points of law and that her failure to render such a summary made the conviction unsafe. Mr. Kabitu, for the Republic, on the other hand, took refuge behind the wording of the section which he contended does not seem to imposes a legal obligation on the trial Judge to sum-up tot he assessors. This Court dealt with this specific point in the case of JOSEPH MWAI KUNGU V REPUBLIC (Criminal Appeal No. 68 of 1993) (Unreported). In that case, the appellant had been convicted of murder and sentenced to death and the Judge had not summed-up the case for the assessors. The prosecutor in that case (as is this) submitted that summing-up was not obligatory. In response to this submission the Court said:-

> " But the learned Judge's mistakes did not stop there. As we pointed out earlier, at the end of the evidence and submissions of both sides, she did not sum-up the case for the assessors. Mr. Etyang argued before us that section 322(1) of the Code does not make it obligatory on the judge to sum-up to the assessors. The words of the section, as far as is material, are that:-
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> "…….the judge may sum-up the evidence of the prosecution and defence and shall then require each of the assessors to state his opinion orally and shall record that opinion."

We agree with Mr. Etyang that there are two mandatory requirements in that section, namely:-

1. the Judge must ask each assessor to state his opinion

   and,

2. the Judge must record the opinion of each assessor."

However, we would repeat what the Court said in LELEI's case, supra, to which we referred earlier. Dealing with the same point of failure to sum-up to the assessors, the court said in LELEI's case: -

> "The words of section do not appear to imposes a mandatory duty on the learned Judge to sum-up to the assessors. However, in view of the fact that the judge shall then require the assessors to give their opinions, implies that the summing-up should have taken place before then. In any case, good sense dictates that laymen who act as assessors require the guidance of the judge on legal issues particularly where the charge before the assessors is one of murder. The failure of the learned judge to sum-up to the assessors in our view, makes the proceedings fatally defective."

Both LELEI's and KUNGU's cases were decided by this Court. Although over the years the practice of summing-up has been endorsed only as a very sound practice which has been consistently followed, this Court in KUNGU's case finally laid down the law when it said:-

"We would, for our part, now emphatically assert that the practice of summing-up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law. That is what this Court, was saying in LELEI's case and we would add that the practice is so well established that if a trial Judge is to depart from it, then there must be some special and compelling reason for doing so."

So, there is the law, stated with a degree of lucidity that requires no elaboration. The Judge in the present case claimed to have summed-up to the assessors but apart from her say-so, there is no evidence on record that she actually did so.

A subsidiary aspect of this ground of appeal is the manner in which the Judge obtained the opinions of the assessors. The section states in mandatory terms that the assessors are required to state their opinions orally. Yet in this case the Judge invited the assessors to express their opinion in writing and they wrote what appear to us to be their own judgments in the case. This is a most unusual practice and one without any precedent; but as it is patently illegal, it can have no room in the administration of criminal justice in Kenya. This ground of appeal succeeds and would have been sufficient to dispose of this appeal, but in view of the gravity of other irregularities which occurred during the trial, we think we ought to consider the rest of the grounds of appeal albeit only briefly.

The second ground of appeal is that the learned Judge erred in relying on a dying declaration without testing its reliability. The evidence as regards the dying declaration was given by three witnesses. The first was Susan Wairimu (P.W. 7). She told the Judge that as they stood outside the building watching the fire, she saw the deceased outside the gate and he told her that he had been burnt by his wife. According to her this declaration was made in the presence of the appellant. The second witnesses was Mary Wamuyu Mwangi (P.W. 8). She said that when the fire broke out she came out of her house and she met the deceased who was burning. Another neighbour called Wanjohi was desperately trying to put out the fire by beating the deceased with a sack. She asked the deceased what had happened and the deceased apparently told her that he had been burnt by Edwin's mother which she understood to refer to the appellant. And there was also George Kamau Mwangi (P.W. 12), a minor, who testified that the deceased told him that he had been set alight by "that dog of a woman" which he took to mean the appellant.

Against the evidence of these three witnesses, there is the testimony of Peter Gitahi (P.W. 6). He also had a room in the same building. After removing his own possessions, he started helping one of his neighbours. Then he saw the deceased seated outside. Then he saw the deceased seated outside. He decided to take him to the hospital and on the way he asked the deceased if there had been a quarrel and the deceased told him there had been no quarrel. The deceased told Gitahi that he had returned home early because he was not feeling well and as he was trying to go out, either paraffin or petrol was poured the inflamable liquid on him. Dr. Kajong Okullo (P.W. 13), who was called to produce the pathologist's report testified that he could not tell which fuel was used to inflict the burns sustained by the deceased. The difficulty with the evidence of Wairimu, Mary Wamuyu Mwangi and George Kamau Mwangi is that they all seem to have spoken to the deceased separately and apparently not within the hearing of nay other person who could have vouched for the truth of their assertions. And the fact that the deceased chose not to repeat the story to Peter Gitahi who actually took him to the hospital renders their accounts doubtful.

In the case of MIGEZO MIBINGA V UGANDA [1965] E.A. 71, the Court of Appeal for Eastern Africa said that although there is no rule of law that to support a conviction there must be corroboration of the statements made by the deceased person as to the cause of his death, it is unsafe to base a conviction solely on them. In the case of OKETHI OKALE & OTHERS V REPUBLIC [1965] E.A. 555, another decision of the Court of Appeal for Eastern Africa, Carbbe J.A., in the course of his judgment said in relation to dying declaration at page 558 that :-

> "It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration, and there may be circumstances which go to show that the deceased could not have

been mistaken in his identification of the deceased. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration."

And this Court held in SIMEON MBELLE V REPUBLIC (1988) 1 KAR 578, following OKETHI OKALE's case (supra), that it would be unsafe to base a conviction solely on the evidence of a dying declaration. So the evidence of the 3 witnesses who claim to have spoken to the deceased concerning the cause of his subsequent death must be considered and evaluated in the light of these authorities. That evidence is suspect and we do not think it can be used as a basis for the conviction of the appellant. This ground of appeal also succeeds and is allowed.

The third ground of appeal is that the Judge erred in relying on the Kikuyu customary law. In her judgment, the Judge had remarked:-

"There appears certainly a marital problem between the deceased and the accused. The accused did not try to sort it out traditionally – most understandable if she was not officially married under customary law. She decided on her cause which ended up being most fateful."

With the greatest possible respect to the learned Judge we do not see the relevance of any customary law to the charge which the appellant faced before her. It made no difference at the end of day whether or not they were legally married. This ground of appeal also succeeds and is allowed.

The fourth ground of appeal is that the learned Judge did not appreciate that the evidence against the appellant was purely circumstantial. This complaint is well-founded because in her entire judgment there is not a single reference to circumstantial evidence. There was no direct evidence to connect the appellant with the offence. In the final analysis the Judge relied on a set of circumstances to convict the appellant. As the first appellate court we have to assess the circumstantial evidence against the appellant to see is it satisfies the test laid down in the well known case of R V KIPKERING arap KOSKE(1949) 16 EACA 135, that the inculpatory facts must be incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused person and incompatible with his innocence. We have already mentioned the fact that the deceased explained to Peter Gitahi (P. W. 6) what happened without mentioning the name of the appellant. It is possible that the appellant may have been attacked by some other person or that he caught fire when the stove exploded as the appellant suggested. We do not know. But we are satisfied that the circumstantial evidence against the appellant falls far short of the standard required by law. This ground of appeal succeeds and is also allowed.

The last ground of appeal relates to the evidence of George Kamau Mwangi (P. W. 12), a minor. No reliance should have been placed on the evidence of this witness because it is riddled with contradictions and gross exaggerations. And once that evidence is excluded, there is really nothing left to connect the appellant even remotely with the death of the deceased. This ground of appeal succeeds and is allowed.

In the end the sum total of the evidence against the appellant raised a very strong suspicion regarding her possible involvement in the deceased's death but in our judgment suspicion, no matter how strong, is insufficient to prove her guilt beyond reasonable doubt. All the irregularities we have pointed our render the appellant's conviction unsafe. Accordingly, we allow this appeal quash the conviction and set aside the sentence and order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.

Before we part with this case, we would like to express our concern about the rising number of convictions which are quashed by this Court because of elementary procedural blunders committed by some judge's in the High Court. These blunders result in miscarriages of justice and serious prejudice to the appellants. We hope this trend can be reversed.

Dated and delivered at Nyeri this 17th day of May, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR