



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Gachuhi, Cockar & Muli JJ A )**

**CRIMINAL APPEAL NO. 1 OF 1993**

**BETWEEN**

**DANIEL WACHIRA MUNENE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Mr Justice JA Mango) dated 23rd December 1992,**

**in**

**Criminal Case No 7 of 1992)**

\*\*\*\*\*

**JUDGMENT**

The appellant's wife was admitted at Kenyatta National Hospital in the morning of 6th January, 1991 for having burns over her body. At the time of her admission, she was unable to speak. She died from those injuries on 10th January, 1991. The appellant was then charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code in that on the 6th January, 1991, at Huruma Estate in Nairobi, he murdered his wife Nancy Wambui Wachira. He was tried and convicted as charged and sentenced to suffer death in a manner authorized by law.

The appellant has appealed to this Court against the conviction and the sentence on a number of grounds in which he challenged the credibility of the entire evidence that it was full of contradictions by the witnesses, that the dying declaration was not properly obtained and that it was wrongly acted upon by the Court because it lacked corroboration.

The facts of the case are that the deceased was married to the appellant who was much older than the deceased in 1989, as a second wife and had one child with the appellant. Their marriage did not turn out to be a happy one. The appellant had accused the deceased over her moral behaviour, mainly her relationship with one Muigai which matter had been discussed between the families and was resolved with warning to the deceased. On 5th January, 1991, the appellant saw Muigai beating the deceased, an incident the appellant reported to the police. Muigai saw the appellant, where he was standing outside his bar and realizing the danger, ran and hid in a neighbour's house. The neighbour testified that Muigai ran to his house on the pretext that the appellant intended to kill him. The appellant having witnessed that

incident of beating of his wife telephoned the police about it but the police on their arrival did not arrest Muigai. The incident was then to be followed next day by the appellant and the deceased reporting at Muthaiga Police Station, an occasion that never materialized. It was also alleged that Muigai damaged the door of the appellant's room when he wanted to get into the house.

The appellant returned to his bar shop which was opposite to his residence and continued drinking therein till 4.00 am. When he went to his residence the deceased opened for him. The events that followed thereafter are contained in the dying declaration. It is in evidence that people outside the compound heard screams from the appellant's residence and when they went there they found the deceased was burning. They put off the fire from her. At the time the deceased was talking, crying and walking about naked. A good samaritan provided her with a *lesso* with which she covered herself. The appellant summoned the police who took the deceased to Kenyatta National Hospital. Relatives were informed including her aunt, Cecilia Wambui Kigonyi, (PW13) who also followed the deceased to the hospital. At the casualty department, the deceased was unable to talk but when she was sent to the ward, she started talking. It was at that time that the doctor in the ward told Cecilia to get a police officer to record her statement.

Cecilia, after struggling to get a police officer, finally met Inspector of Police Francis Kariuki Muranga (PW18) in company of the appellant outside the hospital and they went to the ward. The doctor and a nurse allowed the Inspector to take the deceased's statement at 1.40 pm. Cecilia talked to the deceased. The deceased could not see because of the injuries on her face. The appellant spoke and the deceased recognised his voice. Thereupon she said that she would not speak if the appellant was there. The appellant was then ordered to leave the ward and stay outside leaving Cecilia Wambui (PW13) and the Inspector Francis Kariuki Muranga (PW 18) with the deceased. Inspector Francis Kariuki Muranga talked to the deceased in Kikuyu but recorded the statement in English as follows:

"I am a friend of Muigai for one and a half years. I married Wachira in August, 1989. I got a child in August, 1989, when I married Wachira. Before I married Wachira I had another friend called Nyaga a policeman. The child I got I cannot tell whether it was fathered by Wachira or Nyaga. After marrying Wachira I became friendly to Muigai. Last week we went home to my parents. We talked over Muigai's affairs with me, I was warned never to repeat the friendship with Muigai. Since then I stopped seeing Muigai.

Last night the 5th January, 1991, at about 9.00 pm Muigai sent Njeri the sister of the husband of Keen to call me. I told Njeri I am not going to see Muigai. Later Muigai came and knocked the door of our house. I refused to go out. He left, I thought of going to the bar to inform my husband Wachira that Muigai has come. When I reached our gate, I found Muigai at the gate. Muigai caught me and hit me with a blow on the head. I went to the bar and informed Wachira. When Wachira was

going to our house, Muigai ran away. Wachira went into the house and took a *simi*. Muigai came back but did not get into the house. Wachira hid at the chips shop in order to slash Muigai.

Wachira rushed at Muigai, Muigai ran into the house of Mwenda's mother and locked himself in. Later Wachira saw it was not wise to harm Muigai, and stopped going after Muigai. Muigai's brother came and took Muigai away. Wachira said we are going to talk over the matter today the 6th January, 1991. Wachira went back to the bar to drink beer, Wachira came into our house at about 4.00 am this morning. He took a *simi* and cut off my hair, he then cut me slightly on the left ring finger and left knee. He took a soda bottle and hit me with it on the head several times then he gave me a pen and paper. He told me to write a goodbye letter to my family. I told Wachira I will talk to my family but not write to them. He refused and told me that he is going to do to me how Wangui was done by her husband. (That Wangui was burnt and died).

After giving me the pen and the paper, Wachira went to the toilet, I started writing the letter, I first wrote greetings. In the process of writing Wachira came, I do not know what happened because I saw myself on fire. I do not know what happened later."

This statement was produced and received as exhibit. The deceased could not sign or thumb-print it

because her hand and fingers were badly burnt. The doctor who carried out postmortem examination on her body on 18th January, 1991, recorded that the cause of death was 80% burn of the body by fire flame.

After recording the dying declaration Inspector Muranga with Cecilia and the appellant left Kenyatta National Hospital for the appellant's residence at Huruma. In the room in which the appellant and the deceased were living, they collected the following items which were also produced as exhibits at the trial.

An empty bottle of Coca Cola,

A *simi* in its sheath

A hammer and nails of which some were nailed on a door frame,

A half written letter in Kikuyu

From the appellant's residence they proceeded to Muthaiga Police Station where the appellant was formally arrested and detained in the police cells. The house of the appellant was visited for the second time by Kasarani CID and further items were collected which consisted a pink dress, two pieces of mattress cover and a photograph of a lady. Blood sample of the appellant and of the deceased, together with the following items were submitted to the Government Analyst for blood analysis:

An empty Coca Cola bottle

A *simi* and its sheath

A pink dress

A lady's photograph

Two pieces of mattress covers

The analyst, Tom Muturi Mwangi, reported that the items he analysed contained human blood:

"The blood group of the deceased was O and that of the appellant was A. The Coca-Cola bottle was found stained with human blood of group O. The lady photograph was found to be stained with human blood of group O as were the two mattresses covers. The other items had no human blood stains."

Counsel for the appellant argued that the trial judge erred in convicting the appellant on insufficient evidence and the evidence that was led was full of contradiction and should not have been received. We are satisfied that the contradictions and discrepancies which the counsel pointed out are not of nature as to render the prosecution evidence as being not worthy of credit or belief.

The case for prosecution revolved around the dying statement which the deceased gave as the cause of her death. The statement was properly admitted at the trial under the provisions of section 33(a) of the Evidence Act (chapter 80) of the Laws of Kenya.

The appellant gave a sworn statement in his defence in which he said they were married in 1989 and there was no problem until 1990 when the deceased started going away and returning at night drunk. Regarding her relationship with Muigai, the matter had been discussed between the family and resolved. Part of the statement relating to the incident on 5th January, 1991 is quoted below:

"On 5th January, 1991, I was at work all day from 9.00

am. The deceased was at the house. At 1.00 pm I went for lunch. The deceased served me and I returned to my work. At 9.00 pm deceased came to the bar and said that Muigai was beating her. I told her to go to the shop while I watched whether Muigai would beat her. As she was going back, Muigai slapped and

kicked her. I ran there and Muigai ran into Madaraka bar and the deceased entered the house.

On second time as the deceased was going to the shop, Muigai appeared and beat her, my wife ran into the house and Muigai followed her. I went there and found Muigai trying to break my door by kicking. He saw me and ran into the house of Mama Mwenda. PW 1 (id). I followed him and I saw him get under the bed in that house. I came back to my house and I asked my wife what the problem was. She told me that Muigai met her and started beating her but she did not know the reason. I told some people to sit at the gate to the plot so that I go and ring the police. I rang and police said they were coming.

After an hour I saw two police officers on patrol. I told them of my report. They said they had heard about it. As we came to my house Muigai had left and was in company of many people. ....I came to my house with the officers and I showed them the broken door and they saw injuries on my wife's knee. She also had an injury lower down the leg. They said that they would not arrest Muigai because they had no vehicle. They told me to go to Muthaiga Police Station next day to make a statement. It was 10.30 pm. I went back to the bar. My wife remained in the house. At about 11.30 pm, I was with some women customers whom we belong in a co-operative society. We drank till 1.00 am waiting for other members, I left the bar at 4.00 am and went home. My late wife opened for me and went back to sleep... I sat on the bed and I fell asleep. I was drunk. I woke up at 6.00 am and I woke her up and told her to wash the child so that we go to Muthaiga to report the previous day's incident. I washed my face and went to the latrine outside as she prepared. She had told me she would go to Muthaiga to make a statement till she calls

her father if it was going to be a case. I told her it was true. She told me she would write a letter to her father and thereafter she would come to the station with me. She took pen and paper and I left her writing and I left. I had slapped her three times before I left for the toilets when she told me she wouldn't go to the station. I am familiar with the writing of the deceased.

I look at this exhibit No 2 but I don't recognise it - though the writing is hers. I am illiterate. I left her sitting on the sofa set chair - the long piece not the one produced in Court. The latrine is outside the house but within the plot. I was away to the toilets for about fifteen minutes. I had gone for a long call. As I was leaving the latrine, I saw two children and one girl had woken up in the opposite house to ours. The house belonged to Adhiambo.

As I came from the latrine I heard screams from within the plot, then I came round the corner, I saw a person come from my house burning a flame. I ran towards the person and also screamed and told people to come and help because my wife was burning. Ochieng came and told him to put off the fire burning at the door. I put off the fire from the deceased. I then went and rang the police. While burning, the deceased was wearing a petticoat, night dress and brassier. Those are the clothes that were burning. Another person who came to help was Pudo PW6. He came and helped Ochieng to remove the chair. We took the deceased out of the plot to the road. She never talked. Her mouth was badly burnt. She could not talk. Her mouth was open. Margaret Wanjiru came and tried to talk to her but to no avail, she could not talk.

Police officers came, three officers and a driver. We then went to Kenyatta National Hospital with the deceased. On the way I never tried to talk to the deceased. Nobody tried to talk to her .... she was attended to at the casualty department. .... Cecilia, Margaret and another woman arrived there. .... We then took her to ward 37 with the police officers, a nurse and Margaret Wanjiru. .... I tried to call her but there was no response. .... Her

mouth was open and tongue was protruding. Exhibit 3 photo No 3 shows the injuries I saw. She was burnt from under the breast level upwards - head, eyes, ears, hair. Belly was burnt - the lower parts were not burnt. She had injuries on the hand.

We stayed in the ward up to 2.30 pm continuously without leaving. The police officers had left at 10.00 am and never came back. I was left at 10.00 am and never came back. I was left with Margaret and the neighbours including Ken PW11, and many others - neighbours.

I saw Cecilia Wambui and Margaret again at 2.30 pm outside the ward. I told them that we go to station, I

write a statement, they refused but I got into the bus to Muthaiga Police Station. I went to OCS Mr Thuku and told him what had happened. One officer was called and he took my statement. After the statement, Inspector Muranga called me and we went to Kenyatta National Hospital to the ward where the deceased was. .... In the ward the doctor said others should leave. Cecilia told the Inspector that I must also leave. I asked why but the Inspector said that I must leave. I went outside. Inspector Muranga and Cecilia went and sat at a corner - away from the deceased. Muranga was writing. I was observing them. They then left but told me nothing. We came to Huruma without telling me where we were going. At Huruma we got into the plot and I showed Inspector Muranga where the deceased had lain after leaving the house. We got into my house with Muranga, Cecilia Wambui, myself and owner of plot - Njeri Nduati. Muranga said he was looking for a knife that was blood stained. I told him there was no blood stained knife in the house. He took out a *simi* from top of the cupboard. He started asking questions like what burnt the deceased. I told him that I do not know. The store was open, I showed it to him. It was near the door - this photograph No 15 in Ex 3 (id) ..... He took a bottle and said it could have contained paraffin ..... He also took synthetic hair piece. Cecilia said that had been hers. I personally gave Inspector nothing from the house. The *simi* he took is this Exh 7 (id). A coke bottle Exh 6 (id). They also took burnt seat Exh 5 (id). I look

at this hammer Exh 18 I don't know it, it never came from my house. Exh 12 photograph. I don't know it. The Inspector took a piece of the night dress of the deceased. Muranga took no other cloth in my presence.

From my house we came to Muthaiga Police Station, Inspector Muranga told me that he would lock me up as the deceased said at Kenyatta National Hospital that I burnt her. I was then locked up.”

This statement was given after all prosecution witnesses had given their evidence. There is evidence of Inspector Daniel Tororey (PW 14) who took the deceased and the appellant to Kenyatta National Hospital. He was instructed by the controller to proceed to Huruma where it had been reported that someone had burnt herself. On arrival there he approached a person who said he was the husband of the lady who had burnt herself. The lady was only covered in a *lesso*. Her state was serious. He ordered the lady into the car and proceeded to Kenyatta Hospital. On the way the lady was arguing with the husband in Kikuyu language which he could not understand. He asked the husband what the argument was all about, and the husband said that the lady was alleging that he, the husband was the one who had set her on fire. The argument in the car was bitter all the way. In the car there was a Kikuyu police officer who understood the argument. He interpreted to the witness that the lady was accusing her husband that he is the one who burnt her. He did not record a statement from her. Nor did he ask any translator to write it down. Inspector Tororey is the one who took the appellant to Muthaiga Police Station and handed him over to Inspector Muranga (PW 18) for investigation and then signed off.

PW 7 Paulu Ngisa Muluki, a night watchman gave evidence that while at a *kiosk* of PW 6, he heard screams. He and PW 6 ran in the direction of the screams and found the gate closed. They forced it open. Inside the compound they found a woman in a house seated in a sofa set chair burning. She was alone. The witness fetched water and a sack with which they put off the fire. The witness told the Court that the woman said three times in a loud voice that “you have burnt me”. She was alone. They did not see anyone nor did they ask who she was addressing. The appellant appeared from the toilet side after they had put out the fire.

PW6 David Musyoki Makau, a *kiosk* operator stated that after hearing the scream, he saw smoke. He was accompanied by PW7 when they forced open the gate. He said at the time they were putting out the fire the appellant was there and the witness suggested to the appellant to call for police. He

did not ask the deceased or the appellant as to what had happened.

PW11 Catherine Wambui Mwangi saw Muigai enter the compound of the appellant on the night of 5th January, 1991 and also saw the deceased leave their residence and went to her husband's bar. The following morning on having been alerted that the deceased had been burnt, she went to their plot. She found the deceased outside the house in a *lesso* walking here and there saying in Kikuyu “Wachira has burnt me”. The witness went to alert the deceased's sister of the incident at Pangani.

PW13 Cecilia Wambui Kigonyi was alerted of the incident at about 7.00 am by her sister Margaret Wambui who was accompanied by PW11. She stated that the deceased was her niece. They went to the residence of the deceased and then to Kenyatta National Hospital. She was present when the deceased was taken to the ward. She is the one who gave particulars of the deceased and who was told by the doctor to look for a police officer to record a statement from the deceased. She was present when the dying declaration was taken. She then proceeded with the policemen to the appellant's house. The half written letter was found inside the house. The stained exhibits were also collected from inside the house.

PW18 Inspector Francis Kariuki Muranga is to whom the appellant was handed over in the morning of 6th January, 1991 by Inspector Tororey (PW14) for further investigation after the deceased was left at Kenyatta National Hospital. The witness then left for Kenyatta National Hospital with the appellant where they met Cecilia (PW13). Inspector Muranga is the one who recorded the dying declaration and recovered some exhibits from the appellant's residence as stated above.

Counsel for the appellant kept on challenging the dying declaration stating that the evidence of PW13, PW18 and PW7 could not afford corroboration and could not be relied on. While disputing that the deceased could hardly speak so as to give the dying statement, he submitted that all those who testified that the deceased could speak were telling lies and their evidence should not have been admitted.

From this submission, one need to go to the statement. PW18 having recorded it, went to their residence accompanied by PW13 and the appellant. The half written letter as stated by the deceased in the dying declaration was found where the deceased directed it could be found. The blood stained soda bottle with which the appellant hit her was also found through the dying declaration. The *simi* was also therein found. The incident between the deceased and Muigai was given by the appellant in

showed that the deceased complied with her parents' warning not to have anything or retain her relationship with Muigai because she decided to inform her husband that Muigai had gone to her and she had refused to open the door. In fact the appellant witnessed Muigai slapping the deceased when the appellant stood outside his bar before the deceased reported to him. What the appellant stated in his sworn defence in Court corroborated the dying statement in every respect. What appears to be heavily contested is the fact that the appellant burnt the deceased. The statement stated that as the deceased was writing the letter which she had been ordered to write, the appellant returned from the toilet and the deceased found herself on fire and thereafter did not know what happened.

Counsel maintained in his submission that the deceased could not speak while at the residence and at the hospital. There is evidence of PW11 Catherine Wambui that when she came to their residence she found the deceased in a *lesso* and walking here and there saying loudly that Wachira had burnt her. There is also evidence by Inspector Tororey who took her to hospital relating to - the quarrel in the vehicle during which the deceased had complained that it was the appellant who had burnt her. As the Inspector could not understand Kikuyu, the appellant gave to the Inspector a wrong interpretation of the quarrel which interpretation was different from the one given by a police officer in the same vehicle. It was because of that quarrel that inspector Tororey decided to take the appellant to Muthaiga Police Station and hand him over to PW18 Inspector Francis Kariuki Muranga for investigation.

Counsel in attacking the recording of the dying declaration further submitted that the Court should not have received the statement because it was taken in the absence of the appellant and that it was not signed by the deceased and further that it was only the doctor who could have witnessed it. The fact that the statement was recorded in English while the conversation was in Kikuyu language, was a further ground for its rejection contended the advocate.

It is in evidence that the deceased was unable to speak when she was taken to casualty department but spoke later in the ward. She said that she would not speak while the husband was presently there and that was the reason why he was told to go out. When the doctor and the nurse allowed PW 18 to talk to the patient, they went out of the ward and were not there when the statement was recorded. It was necessary for counsel to refer to an authority that the statement should have been witnessed by the doctor; but none was cited. According to the appellant the patient

(the deceased) was burnt from the belly to the head including her hands. In that state she could not sign with the burnt finger nor her thumb print could be taken.

On the taking of the dying statement in a language other than the one used in conversation, it is clearly advisable to record such statement in the language it is given but, in view of the corroboration that is available in this case we are satisfied that no miscarriage of justice has been caused.

Counsel for the appellant in supporting of his submission relied on the decision of this Court in *Michael Kuria Kahiri v R* Criminal Appeal No 45 of 1991 (unreported) in which the deceased therein died in similar circumstances. The victim in that appeal was Bibian Wangui Kuria who may have been the one referred to by the deceased in her dying statement. In that appeal there was no corroboration of the dying statement while in the present appeal there is corroboration in every vital matters which differentiate the two and renders the authority referred to us unhelpful to the appellant. The advocate's plea for a reduction of conviction for the lesser offence of manslaughter is also futile because of a complete absence of provocation.

We have considered the submissions by the advocate for the appellant in great detail in this judgment as well as that of the state counsel who supports both the conviction and sentence. The trial court before arriving at its verdict considered the law that it is lawful to base a conviction on a dying declaration alone if the Court believes that is true. It also warned itself and the assessors that it is dangerous to do so without corroboration. The trial judge has not erred anywhere in arriving at his conclusion. Though the assessors returned a verdict of not guilty, the trial judge differed with them which he was entitled to do. We do find that the appellant was convicted on sound evidence and the punishment meted out is the only one authorized by law. In the final analysis we uphold the conviction and sentence and dismiss this appeal.

**Dated and Delivered at Nairobi this 19th day of October 1994.**

**J.M.GACHUHI**

.....

**JUDGE OF APPEAL**

**A.M.COCKAR**

.....

**JUDGE OF APPEAL**

**M.G.MULI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

