IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 45 OF 1991

MICHAEL KURIA KAHIRI …….....…...……. APPELLANT

VERSUS

REPUBLIC……..…. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at

Nairobi (Justice JA Mango) dated 13th May 1991)

in HCCR C No 27 of 1990)

JUDGMENT

The appellant's wife, the deceased, was on the evening of 11th October, 1989 admitted at Kenyatta National Hospital (the Hospital) in a serious condition after sustaining 80% burns of her body by fire. Soon after 11.00 p.m. on the same day, I P Eliud Wanyonyi (PW12) who then attached to Nairobi Area Police Control Room visited her at the Burns Ward of the hospital where she was admitted. On asking her what happened, she told him that the appellant had set her ablaze after accusing her of coming home late while drunk. According to PW12, the deceased had burns all over her body and was in great pain as she spoke to him.

On 16th October, 1989, Sgt James Mutua (PW14) accompanied by the appellant visited the deceased at the hospital. According to him, although he was not of the Kikuyu tribe he understood a bit of Kikuyu language. The appellant and the deceased were both of the Kikuyu tribe. As the two conversed in their Kikuyu language in the presence of PW 14, the latter heard the deceased ask the appellant why he had decided to kill her. The appellant's response was that they should leave the matter as she was sick. She was weeping as she spoke to the appellant.

Realising that the deceased was able to speak, PW14 decided to obtain a statement from her. That statement which was recorded by him in the absence of the appellant was as follows:-

> "I am the above named female adult aged 48 years now. I am married with six children. I reside at Mihang'o village and I am a peasant.
>
> I can remember on the 15th day of October, 1989 at about 7.00 pm when I went for a meeting at Monicah's bar and returned home at 8.00 pm.

> When I came back home I found my husband Michael Kuria in the house. He asked me why I was late out and I explained to him that I and other women were holding a meeting at Kwa Monicah and it was why I was late to arrive home. He did not want to hear anything from me, instead he got hold of a stool and hit me on my hand as I tried to defend myself. He dropped the stool and went towards the kitchen from where he took a bottle of soda filled with paraffin. I was not aware when he poured the paraffin on my dress and as I looked behind to find out where the smell of paraffin came from, he took a match-box and lit it and directed the flame on my dress and before I could do anything to stop him, the whole dress got fire. Instead of letting me put out the fire, he continued beating me. When he saw that the fire was growing big, he then helped me remove my dress but it was too late, all the body had been burnt. I was making a lot of loud noises when my son Martin Njoroge and a maid who were present, made loud noises until people gathered at our compound. I then lost consciousness and I did not know what followed.
>
> This is all I can state."

The deceased was unable to sign this statement as her fingers had open wounds, were stiff and in pain. She died on 18th October, 1989 while undergoing treatment at the hospital. The result of the post-morten examination on her body was that the cause of death was 80% burns of the body by fire.

The case for the prosecution against the appellant revolved around the foregoing statements as to the deceased's cause of death which were properly admitted at his trial in the superior court under the relevant provisions of section 33(a) of the Evidence Act chapter 80 of the Laws of Kenya. To this, the appellant's answer was that soon after 7.30 pm on the material date, he returned home where he found his son Martin Njoroge Kahiri (PW 1) and the housemaid. He asked them where the deceased was and he was told that they did not know where she had gone. He then went to the sitting room where he started reading a newspaper. At about 8.45 pm he came out of his motor vehicle. While checking the said spare parts, he heard a woman's voice outside the fence to his house compound saying that maybe the old man was at home. When the appellant tried to ascertain who it was, he found two people standing one of whom bolted when he (appellant) asked them who they were. As he drew nearer, he found that one of the two people was the deceased but he was unable to recognise the person who ran away. He nevertheless chased after that person for a distance of about 80 to 100 metres and then gave up the chase. He then returned towards his house and while he was closing the gate to his house compound he heard screams inside his house. He ran thereinto and found the deceased on fire in the corridor near the third bedroom. He started tearing off the clothes she was wearing while PW 1 brought some water which he too poured on her. The appellant also brought some more water which he too poured on her and the fire engulfing her was extinguished. He then drove her to the hospital where she was admitted and died as is mentioned above. He was arrested and charged with the offence of murder contrary to section 204 of the Penal Code. His statement to the police under inquiry on 24th October, 1989 was to the same effect save for the addition that during the months of June, July, August and September, 1989 he had quarrelled with the deceased over her drinking habits which did not stop.

Besides the appellant, PW 1 and the housemaid were inside the appellant's house at the material time when the deceased sustained the burns referred to above. The housemaid did not testify at the trial of the appellant in the lower court. PW 1's version of the story was that the deceased had left home on the material date at about 6.20 pm and the appellant had returned at about 7.00 pm. On so returning, he found the deceased not in the house. Only PW 1 and housemaid were in the house. After the latter two told him that they did not know where the deceased was, he picked a newspaper and started reading it. Shortly thereafter, the deceased returned. According to PW 1 he heard her talking to the appellant. The latter then went to his bedroom. About 7 to 10 minutes later he (PW1) heard the deceased screaming in her bedroom as she was not sharing the same bedroom with the appellant. On checking what was happening, he found the deceased burning with the appellant removing the burning clothes from her. After the fire was extinguished, the appellant went for a vehicle. Meanwhile, the deceased was dressed up in fresh clothes. A few minutes later, the appellant came with a vehicle and took the deceased to the hospital. Inside the deceased's bedroom, a bed cover, a blanket and a sweater were burnt. The deceased, according to PW1, did not in his presence tell anyone that the appellant had caused the fire that burnt her.

In his judgment, the trial judge held that since the appellant and the deceased were sleeping in separate bedrooms and that the two had quarrelled during the months of June, July, August and September, 1989 as is mentioned above. This, according to the learned trial judge, provided the motive for his desire to punish her.

As between the appellant and PW1, the trial judge noted that if what the appellant had said was true, then PW1 must have been lying because when the deceased came into the house and set herself on fire, the appellant was still outside. He then observed:-

"I saw the two. I took down what they said. One of them must be lying on this crucial point. I have no doubt who it is. It is the accused. The boy told me the truth. Why lie? What is not all. "Why did you decide to kill me?" – his wife asked him in the presence of a policeman. He said "let us leave it, you are sick." What a reply confronted with this monumental accusation and in the presence of a policeman.

Yet if PW 1 was truthful, then the veracity of the deceased's statement as recorded by PW 14 is questionable. This is because in that statement the deceased said that on her arrival at home she tried to explain to the appellant where she had been but the latter could not hear of it. Instead, he took a stool and struck her with it and then went to the kitchen where he took a bottle of soda containing paraffin. PW 1 who was in the house when this was taking place was mute about any scuffle between the appellant and the deceased notwithstanding his testimony that he heard them talking together although he did not hear what they were saying. He also said nothing about his joining the deceased and the housemaid in screaming until people gathered at his parents' house compound. Indeed, if it is true that the appellant continued beating the deceased when the latter's dress caught fire as she alleged in the statement referred to above, then, it is surely strange that PW 1 was not aware of it and if he was, then, he was less candid when he remained silent about it in his testimony to the superior court. Lastly, according to the deceased, the appellant poured paraffin on her dress and as she looked behind to find out where the smell of paraffin came from, the appellant took a match-box and lit it directing the flame onto the dress she was wearing and before she could do anything the whole dress was on fire. According to PW 1, he never saw or smelt any paraffin in the bedroom where the deceased was burning. When the incident leading to the deceased's death took place, the only other witnesses to it, besides the housemaid who as we have pointed out above did not give evidence before the superior court, were the deceased, the appellant and PW 1. If therefore the evidence of PW 1 was truthful as the trial judge found, then that testimony cast some doubts to the truthfulness of the deceased's dying declarations to PW 12, to the appellant in the presence of PW 14 and to the latter when he recorded her statement at the hospital.

Having believed the evidence of PW12 and PW14, the learned trial judge proceeded to conclude that the appellant was a liar and that there was no truth in his statements tendered and made to the trial court. To him therefore, the appellant killed the deceased with malice aforethought. Accordingly, he found him guilty of the murder of the deceased, convicted him of the same and sentenced him to suffer death in the manner authorised by law. The appellant has now appealed to this Court against that decision.

The thrust of his complaint to this Court in his 7 grounds of appeal is that the deceased's dying declaration lacked probative value and therefore there was no credible evidence as to the cause of the fire that burnt her. Because of this, the prosecution case against him was not proved beyond reasonable doubt. As a result, his conviction was unsound. In this regard, Mr Wetangula for the appellant submitted that prior to the burning of the deceased, save for her dying declarations, there was no other evidence as to where the fire came from. According to him, if the appellant set the deceased on fire, it was strange that he at the same time struggled to put it off and then took the trouble to take her to the hospital. In view of this, the deceased's dying declarations required corroboration. That corroboration was lacking. Without it, they were of no evidential value and could not therefore be acted upon. Mr Wetangula then concluded by contending that since there was no other evidence against the appellant, the latter's conviction for the murder of the deceased was insupportable.

Mr Musau for the respondent conceded the appeal.

There is no doubt that the appellant's conviction by the superior court was dependent on the deceased's

statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in *Pius Jasunga s/o Akumu v Regina* (1954) 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, 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 in *Migezo Mibinga v Uganda*, [1965] EA 71 the same Court pointed out that:-

> "It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanour, etc, the accused has acknowledged its truth. Subsequently, it is advisable that at trial judge should expressly state whether he is satisfied or not that there was such acknowledgement."

In this regard therefore, it is instructive to take note of Lord Atkinson's observation in *Rex v Christie*, (1914) AC 545 at page 554:-

"The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in part."

The core issue in this appeal is whether the deceased's question to the appellant – "Why did you decide to kill me?" and the latter's response – "Let us leave this matter you are sick." – amounted to his acceptance that he had killed her. The trial judge did not expressly state whether or not he was satisfied that the appellant's response was such acknowledgement. He only expressed astonishment to it considering that the query by the deceased was made in the presence of a policeman – PW 14. What followed this response was the deceased's statement to PW 14 as is set out near the beginning of this judgment. Notwithstanding the trial judge's finding that PW 1 was truthful, from what we have earlier said in this regard, we think that caught between his mother, the deceased, and his father, the appellant, he was less forthright in his evidence. This, as we have attempted to point out above, was a blow to the credibility of the deceased's statement to PW 14. Because of this, and in the circumstances of the case before the trial judge, we are uncertain that the appellant's answer to the deceased's question in the presence of PW 14 as is set out above amounted to his acceptance that he killed her. This is in spite of the deceased having earlier told PW 12 that the appellant had set her on fire after accusing her of coming home late and being drunk for as we observed in *Pius Jasunga s/o Akumu v Regina*, *supra*:-

"The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy."

As we have said earlier in this judgment, the prosecution case against the appellant did not only revolve around the deceased's statements referred to above but his conviction was dependent on them. However, with the disquietude that we have expressed regarding their credibility, the appellant's complaint that they lacked probative value and that therefore there was insufficient evidence as to the cause of the fire that burnt the deceased is not without merit. For this reason, we agree with the appellant that the prosecution case against him was not proved beyond reasonable doubt. Consequently, his conviction was improper. Accordingly, we allow this appeal, quash the appellant's conviction and set aside his sentence of death. He will be set at liberty forthwith unless he is otherwise lawfully held in custody.

It is so ordered.

Dated and Delivered Nairobi this 30th day August, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL