



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**CRIMINAL APPEAL 98 OF 88**

**Ngatia.....appellant**

**v**

**Republic.....respondent**

**JUDGMENT.**

In convicting the appellant for the offence of murder contrary to section 204 of the Penal Code, Masime J, as he then was, said:

Each of the assessors returned to me a verdict that the accused is guilty of the offence charged. I have for my part carefully considered the evidence led by both sides. I have noted that the accused admitted the offence charged in his extra-judicial charge and caution statement which was not retracted and was put into evidence. However, in his unsworn statement, the accused has put himself with a jerry can of paraffin in the deceased's house; he says, however, that all he did was to wipe his face with a handkerchief and that as he did so flames burst out and burnt them all. As against this evidence, there is the evidence of PW 3, the accused's own charge and caution statement and the rest of the circumstantial evidence. On consideration of all this evidence, I am satisfied beyond reasonable doubt, as the assessors were, that the prosecution have proved, as they were duty bound to do, that the accused with malice aforethought caused the death of the deceased. I agree with the assessors and find the accused, Joseph Kariuki Ngatia, guilty, of the offence of murder and I accordingly convict him of that offence.

It would appear from the foregoing that the appellant's conviction was based on the evidence of Sarah Wambui (PW 3) and the appellant's charge and cautionary statement which was tendered in evidence at the trial without objection by the appellant. PW 3 was the only eye-witness to the incident in her parents' house that led to the death of the deceased. Her evidence was as follows:

I am a daughter of Moses Mburu. Mary Wanjiru was my mother. Susan Mbaire was my sister. On 5.2.85 Joseph Kariuki came to our house at about 7.30 pm. He is the accused. I knew him before. He was married to Susan. Inside the house there were six persons including me. Susan Mbaire, Mary Wanjiru, Ben Kimani, Joyce Mugure and myself. We were seated next to a 'jiko' which was burning. We were cooking. Joseph Kariuki came into the house and opened the door without knocking. I was next to the corner and stood behind my mother and shouted 'God' and mother said 'give him a seat'. I noticed he held a 'panga' and I wanted to walk away but he ordered me to stay back. Her used the panga to cut the jerry can he had. I then saw a flame. When he cut the jerry can he was near the 'jiki'. I regained consciousness in Mwangi's house. I noticed my hands were burned. I could not see properly. The house was built of 'mabati'. Before Kariuki came into that house nobody had been burned.

On being cross-examined by counsel for the appellant, PW 3 said that she shouted 'God' because she noticed that the appellant had a panga. She also said that apart from telling her to shut up, the appellant did not say anything else and except her deceased mother who told her to give him a seat, nobody else spoke.

The relationship between the appellant and his wife was strained. Indeed, in March, 1984 his wife and their two children left him and went to her parents' home after he charged her with infidelity. In January, 1985 she returned to him. According to his charge and cautionary statements, three days thereafter, he started passing urine mixed with blood. He subsequently went for treatment at Nyahururu District Hospital. When he returned home for money to purchase the prescribed medicines, he found that she had broken into his box and taken the Kshs.450 which was therein she had gone away with the money. In this statement, the appellant then said:

When I saw what she had done to me, I got much annoyed and I left home to follow her up to her home. She had come at Dundori during the month of January, 1985 and she had ran away in the month of February, 1985. I left home on the 5th day of February, 1985 heading to Ng'arua where I had thought she would go as her father was living there. I had left Dundori with an empty plastic jerry can. On arrival at Nyahururu upper stage, I bought seven litres of petrol but I cannot recall the price of petrol at this time. I boarded a vehicle up to Supili Trading Centre. I went with the petrol up to their home. On arrival at home, I found mother to my wife, Mary Wanjiru, my wife Susan Mbaire, my son Kimani Kariuki, my daughter Wanjiru Kariuki, Wambui Mburu and Mugure. On entering into the house, I told them 'You cannot keep on disturbing me'. At that time I opened the jerry can that was with petrol and started spreading it into the house. Inside the house there was a 'jiko' that was burning. Before pouring the whole petrol, the house got fire and we all got burnt. From there I do not know what went on until I found myself at Nyahururu District Hospital where I was admitted with all my body burnt.

With the kind of evidence set out above, several questions remained unanswered. For instance, did the appellant find his money taken away by his wife on the same day he followed her up to her parents' home? How soon after this finding did he follow her? How far was her parents' home from his home and therefore how long did or could it take him to get there? One thing was, however, certain and that was that the appellant was very annoyed with what his wife had done to him. He said so as is set out above. Indeed, his shouting, his shouting at PW 3 and telling her to shut up was indicative of this. With the unanswered question questions posed above, we cannot rule out the possibility that the app was deprived of his self control when he did what he admitted to have done. In fact it is difficult to say whether his retaliatory act was out of desperation or wholly in his annoyance. Malice aforethought was therefore not proved. Consequently, the appellant's conviction of the murder of Mary Wanjiru Mburu cannot stand. Accordingly, we quash the said conviction, set aside the appellant's death sentence and substitute therefore a conviction of manslaughter contrary to section 205 of the Penal Code and sentence the appellant to 7 years imprisonment from the date of his conviction by the superior court, that is to say, from 3rd June, 1987. To this extent, the appellant's appeal succeeds.