IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO.154 OF 2013

BETWEEN

ANTONY MUEMA MUTISYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Machakos

(Asike Makhandia, J.) dated 14th December, 2012

in

HC.CR.C.No.38 OF 2011)

****

JUDGMENT OF THE COURT

This appeal arises from the Judgment of the High Court ***(Makhandia, J,*** as he then was) sitting at Machakos. Before him the appellant herein ***Anthony Muema Mutisya*** was charged with two (2) offences of murder and attempted murder. In the first count it was alleged that on 20th May, 2011 at the Administration Police Camp, Mulala, Nzauni District in Makueni County, the appellant murdered ***Quedaline Nduku Muema*** contrary to ***Section 203*** as read with ***Section 204 of the Penal Code, Laws of Kenya***. And in the second charge it was alleged that on the same date and place he attempted to murder ***Mary Nyakio Mwangi,*** contrary to ***Section 220(a) of the Penal Code***, ***Laws of Kenya***. The particulars of the latter charge were that the appellant attempted to unlawfully cause the death of the said ***Mary Nyakio Mwangi***, an administration police officer, by setting on fire a house she was sleeping in.

On 18th October, 2011, the appellant pleaded not guilty to both the charges. Later the learned Judge made orders, including having the appellant's mental status assessed by a psychiatrist. After all the preliminaries, the trial got under way on 24th January, 2012. ***Mr. Mwenda*** was the prosecuting counsel, while ***Mr. Makundi*** came in for the defence. Hon. ***Makhandia, J.*** heard eight (8) prosecution witnesses and also the appellant in defence. He penned the judgment which ***Dulu, J.*** delivered on 14th December, 2012. ***Hon. L. Mutende, J.*** pronounced sentences on the two counts, both of which the appellant had been convicted. She ordered that the appellant do suffer death for the offence of murdering ***Quedaline Nduku Muema***, hereinafter the deceased, as charged in count 1. He could then serve ten (10) years imprisonment

for attempting to murder ***Mary Nyakio Mwangi*** as alleged in count 2 – the latter sentence being held in abeyance in the light of the death sentence.

Being dissatisfied with the conviction and sentences, the appellant preferred this appeal which ***Mr. O. Mogikoyo*** learned counsel argued before us on two grounds. ***Mr. E. O. Orinda,*** Assistant Director of Public Prosecution appeared for the State. The two grounds of appeal read as follows:

> ***"(i) That the learned trial judge erred in fact and in law in convicting the appellant while replying (sic) on the evidence of a single identifying witness when the circumstances were not favourable for a positive identification.***
>
> ***ii. That the learned trial judge erred in fact and law by failing to find that the prosecution had failed to prove their case to the required standard in law."***

In his judgment, the learned trial Judge set out the evidence of all the witnesses and the unsworn statement by the appellant in his defence. He set out four issues for determination, namely, whether the deceased was murdered and if so, whether by the appellant. The third issue was whether there was an attempt to murder ***Mary Nyakio Mwangi*** and fourth, whether the appellant master-minded that act.

The learned Judge set down the ingredients of the offence of murder and what the prosecution should prove to secure a conviction, namely proving death of a person; the death being a result of an unlawful act or omission of another person being the accused before court and the death being accompanied by malice afore-thought as defined under ***Section 206 of the Penal Code,*** which was reproduced. The Judge then addressed the charge of the attempted murder of ***Mary Nyakio***.

From all the evidence presented, the learned Judge concluded that the appellant appeared at the house at Mulala where ***Mary Nyakio*** and his daughter, the deceased were asleep. He roused ***Mary Nyakio*** through the window. She recognized him. They talked briefly before the appellant poured some liquid through the window, ignited it and the house was engulfed in a big blaze. He ran away. ***Mary Nyakio*** attempted to flee from the burning house with the deceased, who was said to be about 2 years old but was not able to do so due to the fire. She dropped her down and the child perished in the inferno. As the fire raged, a gas cylinder in the house exploded and the flames intensified. The learned Judge was satisfied that the appellant was at the scene, he caused the fire in question and so was responsible. The Judge found that the prosecution evidence had displaced the *alibi* by the appellant that during this time, he was at his duty station far away at Ukwala in the then Nyanza Province. And so accordingly the appellant was convicted both on the murder charge and that of attempted murder. A death sentence was pronounced on account of the former charge while the latter attracted ten years in prison hence this appeal.

The position taken by ***Mr. Mogikoyo,*** arguing this appeal was that the appellant was never at the scene at Mulala AP Compound on the material night. That other than ***Mary Nyakio Mwangi*** (PW1) who claimed that the appellant came to her house, no other witnesses, of all the eight, saw him that night. And that ***P.C Michael Kilongosi*** (PW8) had emphatically testified that the appellant was not seen in the area. Turning to PW1's claim that she saw the appellant and in fact he set the house on fire, counsel told us that the incident took place at night. PW1 had testified that the appellant appeared by her window and knocked. She woke up and only drew the curtains apart. She did not open the window, yet she claimed that she saw the appellant.

That was not possible in the moon-lit night without any other source of light. She did not say whether the window panes were clear or tinted or whether the attacker stood in the shade of the house. Further, that it was not clear how the attacker got into the table/sitting room and poured some liquid there. So all in all, the appellant was never at the scene of the crime and he did not light the fire in question, counsel submitted.

Mr. Mogikoyo added that since it was only PW1 who claimed to have seen the appellant, that was evidence of a single identifying witness who could have been mistaken, the conditions prevailing not being conducive to positive identification.

Moving to the proof of the case beyond reasonable doubt, counsel urged us to consider the other evidence including the point where the remains of the deceased were found in the house. That while ***James Mutinda*** (PW5) told the trial court that the remains were in the bedroom, PW8 (above) said that they were at the rear of the bed. We heard that if PW1 (***Mary Nyakio***) said that there were petrol fumes in the house the prosecution did not bring evidence as to the kind of liquid claimed to have been poured in the house and was ignited to cause the fire. Then regarding the explosion of the gas cylinder, we were told that, in the circumstances, that was the cause of the fire that burned down the house in question and not the appellant. ***Mr. Mogikoyo*** even wondered why PW1 did not make to escape from the house through the bedroom window but instead jumped through the fire in the sitting room.

And on his part ***Mr. Orinda*** opposed the appeal urging us to look at all the prosecution evidence together and not isolating what each witness said. He told us that the appellant and PW1 (***Mary Nyakio***) were lovers since 2007 when they were both training with the National Youth Service. They had the child, ***Quedaline,*** the deceased. The relationship got strained and attempts to reconcile them by the parents of PW1 (***Joseph Mwangi***, PW3, and ***Agnes Wangechi,*** PW6) failed. So out of jealousy, and assuming or suspecting that PW1 had taken on another lover, the appellant attacked her on the night in question, expecting to find that other man in the house. When he knocked at her window, PW1 pulled curtains aside and recognized him in the bright moonlight. The two talked as the appellant insisted on getting into the house to check for himself, even after PW1 lit a torch and shone it around revealing no man inside the bedroom. That the appellant accessed the house, poured liquid about and set the place ablaze. Apparently he fled and as PW1 tried to run through the flames to go out, she picked up their child but dropped her in the house where she burnt to death. Counsel was firm in his position that the appellant was responsible for all this because PW1 told the neighbours and others who came by – ***Bibiana Musyoka*** (PW4), ***James Muhinda*** (PE5), ***AP Philip Mutua*** PW7 and ***PC Kilongosi*** (PW8) that the fire was lit by the appellant. She told them all this at the scene or immediately after the incident. We were told that none of these witnesses were shaken in cross-examination regarding the events they narrated.

Mr. Orinda then moved to the issue of the *alibi*. His position was that while PW1 testified that she saw and recognized the appellant at the scene, and ***Mukere Charles*** (PW2) said that the following day, 21st May, 2011 at 7.30 p.m. the appellant came to her house and tried to get in by force, while ***PC Michael Kilongosi*** (PW8) stated that at the material time the appellant was off-duty from his Ukwala Station, all this evidence clearly displaced the *alibi* that the appellant was not at Mulala until 29th May, 2011 and only got to be told of the incident by his parents.

Regarding the gas cylinder explosion, counsel told us that evidence by witnesses who came to the scene was that it exploded because of the fire that was burning down the house and so the cylinder was not the cause of the fire. That all relevant evidence was adduced which established malice aforethought on the part of the appellant who also harboured a motive. We were thus urged not to allow the appeal.

There was a brief response from ***Mr. Mogikoyo,*** mainly that motive was not a central factor in a murder trial and none featured in the present case. That the appellant was not identified/recognized at the scene. It was also not proved that he committed the offences and so the appeal should be allowed.

In determining this appeal, we are conscious of the fact that we are sitting as the first appellate court whose duty is enunciated in the case of ***Okeno v Republic [1972] EA 32***. It was held, in that case, *inter alia*, that:

> ***"The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well of course deal with any questions of law raised on appeal." (PP.36 1)***

And the evidence to be reconsidered and evaluated is that on the trial court record as we reappraise it below.

APC Mary Nyakio Mwangi (PW1) was an Administration Police Constable stationed at Mulala Administration Police Camp. At 4.00 a.m on 20th June, 2011. while asleep in her quarters with her

daughter, ***Quedaline Nduku Mwema***, someone came to her bedroom window and tried to open it. She woke up to see who it was. The "visitor" told her that if she wanted to know whom it was she should open the window curtains. PW1 drew the window curtains apart and saw the accused – the appellant herein. She asked him why he was coming to her house and yet they had separated and both sides of their parents knew as much. She said:

> ***"He told me that he had come to kill me."***

PW1 asked him why and the appellant answered that he had been told that she had another man in the house. He demanded that she put on lights to see if indeed there was no other man in the house and she switched on the torch and directed it to her bed. There was no other man, but the appellant insisted that he had come to finish PW1 and the child. Ordering the witness not to make any movement or call for assistance, the appellant moved from the bedroom window to the table room window. PW1 screamed calling out to a neighbor ***CPL Mutua***. The appellant opened the table room (sitting) window and poured some liquid through it. PW1 grabbed the child (deceased), and as she ran into the sitting room, she saw a huge fire. She tried to run through the fire but got suffocated in what she called petrol fumes. She was made to crawl to the door but realized that she was no longer having the child. She managed to open the door and run to the door of ***CPL Mutua***. ***CPL. Mutua*** did not open. PW1 continued to scream and ***Mutinda***, ***Karembo*** and ***Mukere*** arrived. They asked for the whereabouts of the child. PW1 answered that she was in the house. ***CPL Mutua*** finally came out of his house and as all of them raised an alarm, the gas cooker exploded. The child was in the house. PW1 went to Mulala dispensary for treatment, then to Makindu District Hospital and later Kenyatta National Hospital. PW1 told the learned trial Judge that before the incident, the appellant had been sending death threats short messages using his line 0722786414 to her No.0711371434. The appellant was PW1's boyfriend and they had the deceased child together. In their "come-we-stay" relationship, the appellant used to abuse the parents of PW1, because their relationship was strained. PW1 reported that to their office, the appellant being a fellow AP Officer then stationed in Ugenya District. She said that although the incident took place at night there was very bright moonlight and she saw the appellant clearly. They talked for about 5 minutes at the window. She knew him well, the two having stayed together before. PW1 did not mistake the appellant for someone else. She was seriously injured in the incident, sustaining burns on the face, neck, both hands, chest and back. She obtained a P3 form which was later produced in evidence. PW1 was admitted at Kenyatta National Hospital for 1½ months. The child died in the house. The witness knew the appellant in 2007 when the two were training together at Yatta National Youth Service Camp. The house got completely razed down with her personal property inside. In PW1's view it was out of jealousy that the appellant did what he did.

In cross-examination, PW1 told the trial Judge that the two became friends in 2008 after her AP Course. The appellant got posted to East Pokot District. The witness was posted to Mulala in 2009. When she became pregnant their relationship soured and in 2010 she decided to go her way. The appellant had been ill-treating her; she reported this to the District Commissioner and also the Children's Officer. On the description of the material night PW1 said:

> ***"Although it was dark outside, there was sufficient moonlight that enabled me to see him sufficiently to recognize him."***

When she saw him through the window, she had not put on the light and since he stood close to the window, PW1 did not see what he was carrying. At the time of the incident only PW1 and ***CPL. Mutua*** were in the camp. He was more interested in saving his property than quickly coming to her aid. PW1 was categorical that the appellant started the fire by pouring petrol inside the house, then he fled. She had no reason to falsely accuse him.

Mukere Charles (PW2), a farmer from Mulala was at home when her son, Mutinda, called her at 5.00 a.m. on 20th May, 2011 informing her that there was a fire at the local DO's office. PW2 ran there screaming and found PW1 (***Mary Nyakio***) standing by a tree. Their efforts to rescue the deceased failed. Many people came. Then the gas cylinder exploded with the deceased still in the house. PW2 did not know how the fire was started. She however, added:

"On 21st May, 2011 at about 7.30 p.m. the accused came to my house and tried to force himself in; fearing for (my) safety I ran away with my daughter through the window."

In cross-examination, PW2 said that she had not seen the appellant, whom he knew, before the incident; she did not know his relationship with PW1 either. Efforts to try to trace the appellant were not successful.

Next to testify was ***Joseph Mwangi Gachoki*** (PW3), from Kirinyaga Central, the father of PW1 and grandfather of the deceased. He identified the latter's body to the doctor who performed the post mortem.

PW3 knew the appellant who had visited his home with his parents to introduce themselves. PW1 was not married (to him) but later she began to complain that he was violent to her. PW3 said that the appellant used to send insulting sms (short phone messages) to him. He described him as a violent person. He did not stay together with PW1 and the officer in charge of Mulala AP Camp had barred the appellant from entering the Camp.

Bibiana Wanza Musyoka (PW4), another farmer from Mulala, while asleep in her house, heard the voice of PW1 at 4.00 a.m. on 20th May, 2011. She looked out and saw PW1's house on fire. PW4 ran to the scene, found CPL. Mutua going round the burning house; PW1 pleaded that they assist her retrieve her child. But the fire was so intense that nobody could go into the house. While taking PW1 to Mulala Dispensary:

"On the way she told us that it was the accused who had set her house on fire."

Back to the scene the search for the deceased's remains yielded nothing. In cross-examination PW4 told the learned trial Judge that she had last seen the appellant a while ago but did not see him on the material day. PW1 gave PW4 and others the details of the appellant and told them that the two had since parted ways. She also narrated to them how the appellant had poured some watery substance into the house.

James Mulinda (or ***Malinda,*** PW5) of Mulala was asleep at 4.00 a.m. on 20th May, 2011 when he heard screams. He opened the door and saw a fire in the AP Camp, 100 metres away. He ran there with his mother. They found ***CPL Mutua*** there and asked PW1 where her child was. She answered that she was inside the burning house. Then:

"I asked her how the fire had started and she told me that it was the accused who had started it."

When PW5 tried to put the fire off an explosion was heard from inside the house. The fire was put off and when PW5 went inside he saw the deceased's remains in the bedroom. Police took them away. The witness knew the appellant but he had not seen him that day. The witness who knew the appellant well repeated in cross-examination that PW1 mentioned that the appellant started the fire through the window.

Agnes Wangechi (PW6), a farmer from Kirinyaga testified next. On 24th June, 2011 along with her husband (PW3) they identified the deceased's body at Makindu District Hospital for post mortem operation. She said that when the appellant visited their home, PW1 introduced him as a boyfriend. The two however, were not married. Their relationship deteriorated. PW3 protested about this in a letter that made the appellant react violently to PW1.

APC Philip Mutua (PW7) of Mulala DO's Camp, was asleep in his house. At 4.00 a.m. he heard PW1 ***APC Nyakio***, a neighbour, screaming that her house was on fire. He went there and inquiring about the whereabouts of the child, PW1 answered that she was in the burning house. Then:

"She told me that it was the accused who set the house ablaze. After setting the house on fire, the accused ran away."

In cross-examination, PW7 told the trial Judge that PW1 told her that it was ***Muema***, the appellant whom

the witness knew before, who set the house ablaze. The witness did not see him during the incident; he was aware that the relationship between PW1 and the appellant had deteriorated. PW7 tried unsuccessfully to arbitrate in that regard.

P.C. Michael Kilongosi (PW8) of Sultan Hamud Police Station received information at 5.30 a.m. on 20th May, 2011 that a fire had occurred at Mulala AP Lines. On the way, he with other officers, met Mulala Dispensary ambulance carrying a woman who had suffered extensive burns. The woman, PW1, told the police team including the OCS:

> ***"…that it was her former boyfriend who had set the house on fire. Her daughter aged 2 years had died in the inferno."***

The team moved to the scene, removed the remains of the deceased and started to look for the appellant. The appellant was arrested when he surrendered to the police at a place called Mbumbuni. During the investigations that PW8 participated in, it transpired that the appellant:

> ***"…was attached to Ukwala AP Post. It was confirmed that the accused was then off (sick) duty."***

P.C. Kilongosi was recalled, reminded of his oath and gave further evidence. He produced the 2 forms filled by ***Dr. Mibei*** and ***Dr. Aluvano*** of Makindu District Hospital under Section 33 of the Criminal Procedure Code in respect of the death of the child and injuries sustained by PW1 (Exh 10 P1, P2). The prosecution closed its case. After due submissions, a case to answer had been made out against the appellant who gave an unsworn statement in defence.

He told the trial Judge that he was an AP based at Ugenya District Headquarters. Between 29th and 30th May, 2011 he received a telephone call from his parents, of an incident which took place at Mulala AP Camp between his wife and another AP Officer. That seemed to close the defence case and final submissions followed with the subject judgment being delivered. It gave rise to this appeal which we now set off to determine.

Beginning with Count 1, the death of Baby ***Quedaline***, PW1 (***Mary Nyakio***, the mother, told the trial court that as she made to escape from her burning house with her child in the suffocating fumes, she dropped her and she perished in the inferno. She told the witnesses who gathered just as much. PW8 ***PC Kilongosi's*** team collected the remains of the burnt child and took it to Makindu District Hospital. There the grandparents (PW3, PW5) identified the remains to the doctor who performed a post mortem. A report dated 24th June, 2011 certified that death was due to "desiccation" from flame burns (Exh.P2). Accordingly the death of ***Quedaline*** was proved.

As charged, was that death caused by the act of the appellant who had malice aforethought? We think so. The act that set the house of PW1, on fire must be shown to have been perpetrated by the appellant, for us to conclude that he was responsible. To that effect we have the evidence of PW1 PW4, PW5, PW6, PW7 and PW8 whose names and identities appear above.

PW1 told the trial court that the appellant came to her bedroom window and demanded to check whether PW1 had another man in the house, their relationship of girl and boy friend having soured. He announced that he had come to kill them, PW1 and her child. Even after being shown by torch light that there was no man in the house, the appellant stated that he could finish them. He moved to the sitting room window, poured liquid inside and, no doubt, set the house ablaze and fled. PW1 managed to get out of the flaming house, screaming. Neighbours came. She told them there and then that the child was in the burning house and that the appellant started the fire. Those witnesses knew the appellant and although they did not see him at the scene, they heard with their own ears PW1 claiming that the appellant had been there and he set their house on fire. We believe that evidence as the trial court did that indeed it was the appellant who set the house on fire and the deceased perished therein, due to desiccation from flame burns as the post mortem report stated.

We appreciate that the act took place at night. Could PW1 have been mistaken about the identity of the

appellant who did not set foot in the house? We do not think so. PW1 and the appellant knew each other for long – since their days at the National Youth Service in 2007. They had even visited PW1's parents, quite probably to introduce the appellant as a future husband.

On this night, there was bright moon light. PW1 testified that she saw the appellant outside her window clearly. Although that could be considered a difficult circumstance to easily identify somebody, in our view this was a question of recognition. The two knew each other before. They talked for some 5 minutes before the fire. That was the voice PW1 knew. So this was not the case of a single identifying witness but that of recognition by sight and voice. The two were not strangers. And while put under rigorous cross-examination, PW1 insisted:

> ***"Though it was dark outside, there was sufficient moonlight that enable (sic) me to see him sufficiently to recognize him."***

And this follows the assertion during examination-in-chief which featured:

> ***"I spoke to him through the window for about 5 minutes … I could not have mistaken him for anybody else."***

In the case of ***Anjononi vs Republic [1980] KLR 59*** where the issue of identification of robbers who allegedly committed their act at night stood to be determined, this Court touched on the aspect of recognition:

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions of identification of the robbers in this case were not favourable. This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or another."*** (Underlining supplied.)

We are of the mind, after due reconsideration and evaluation of the evidence on record that PW1 indeed recognized the appellant as the attacker on the material night. She saw him outside her window in the bright moonlight but more reassuringly recognized him when the two talked before the incident. For people who knew each other for about 4 years, there was no mistake on the part of PW1 that the appellant was the one who visited her on that fateful night. In this regard we are in agreement that the two were familiar and PW1 knew the appellant's physical features and voice. As the learned trial Judge found, we too conclude that PW1 was not mistaken about the appellant's identify. He moved from the bedroom window, to the sitting room window which he opened. He poured liquid inside the house, set it aflame and fled. Thus the act of burning the house in which the deceased perished was the deed of the appellant. To be guilty of murder by an act or omission, the perpetrator must have malice aforethought i.e. the intention to cause the death of another. Part of Section 206 of the Penal Code which the learned Judge set out in his judgment, says:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -***
>
> ***a. An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***b. Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person …***
>
> ***c. ……***
>
> ***d. ……."***

Did the prosecution prove that the appellant had malice aforethought in this case? This, we answer in the affirmative. On reconsidering the evidence, PW1 told the trial court that the appellant announced to her at the window that he had come to kill her and their child. By torch light PW1 showed the appellant the bedroom. It did not have another man as he claimed. But still he maintained that he would finish them. Then he poured liquid in the house and set it ablaze. To us, this was a manifestation of an intention preceded by deliberate plan to kill PW1 and their daughter. He announced it and executed it. In sum, the appellant caused the fire to raze down PW1's house with malice aforethought which caused grievous injuries to PW1 and the death of ***Quedaline***, the deceased. Again, we find as the trial Judge did on this point of malice aforethought, that the appellant acted with same. It was proved as against the appellant.

Mr. Mogikoyo urged us to find that the house burnt down because the gas cylinder exploded. We do not agree. All evidence we have set out above is clear that the explosion was heard when the house was burning.

What about the *alibi*? The appellant seemed to be saying that he was out in Ukwala when all this took place and his parents only told him of it between 29th and 30th May, 2011.

The evidence of PW1 was that she saw and recognized him at the scene on the fateful night. We have found so. Then ***Mukere Charles*** (PW2) testified that on the following day, 21st May, 2011, the appellant came to her house at 7.30 p.m. and attempted to force himself in. PW2 was fearful and fled with her daughter. Then in the investigations by ***PC Kilongosi*** (PW8), it was confirmed that during the incident the appellant was off duty. To us, putting all this together, rightly and properly displaced the appellant's *alibi*. The learned trial Judge found so and so do we. All that evidence leaves the appellant in the vicinity of Mulala and at the scene of the crime. The prosecution had a duty to displace the claim of *alibi* and it did so by evidence of witnesses referred to above.

How about evidence not being adduced that the fire was caused by petrol being lit in the house? ***Mr. Mogikoyo*** pushed this point but we did not see which way it was leading. It was not denied that petrol was used in the blaze or claimed that some other substance was used. We did not find much merit in this ground and we dismiss it. There was no need to call evidence to prove this issue. Therefore we conclude that the offence of murder was proved against the appellant as set out in count 1.

Regarding motive, it is trite law that this is not central in prosecution of a murder charge although it can be considered only as being relevant. In this case, we do not take in regard the claim that motive was central to the charge of murder. The trial court did not consider it so and neither do we but we observe that the soured relationship between PW1 and the appellant was not far off from prompting the latter out of jealousy to take the course he did. But as we have said earlier, motive was not central to prove the charge. The charge was proved by evidence and a conviction properly followed.

Lastly, in count 2, the appellant was charged with attempted murder of ***Mary Nyakio***

PW1, under Section 220(a) of the Penal Code. It reads:

> ***"220. Any person who –***
>
> ***a. attempts unlawfully to cause the death of another; or***
>
> ***b. ---***
>
> ***is guilty of a felony and is liable to imprisonment for life."***

The evidence by ***Mary Nyako*** (PW1) herself and the witnesses as stated above points to the appellant having set PW1's house on fire in order to kill or finish her with their daughter. We have found that the daughter perished in the blaze and that constituted murder. As for PW1 she suffered extensive burns on the chest, face, both arms, hands and back as set out by ***Dr. Mibei*** in the P3 form (Exh.P1). These were caused by the fire that the appellant started. Accordingly, we conclude that he attempted to unlawfully

cause the death of PW1. She escaped to safety. Accordingly, the charge was proved and the appellant was properly convicted.

We also find that the appellant deserved the death sentence imposed on him regarding the murder charge. For attempted murder, the maximum term is life imprisonment. The trial court imposed ten years imprisonment. It was lawful, even as it was not contested, and we leave it at that.

In sum, we dismiss this appeal in its entirety.

Dated and Delivered at Nairobi this 18th day of December, 2014

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR