REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 303 OF 2007

BETWEEN

JOSIAH MWAI MUYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ombija, J) dated 31st August, 2006

In

H.C. Cr. C. No. 163 of 2003)

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JUDGMENT OF THE COURT

Josiah Mwai Muya, "*the appellant*" hereinafter, was tried before Ombija, J, sitting with the aid of assessors, on Information which charged him with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the Information were that on the night of 23rd and 24th October, 2002 at Githunguri Village in Kiambu District within Central Province, the appellant murdered Rose Wanjiku Mwai, hereinafter "*the deceased*."

As is obvious from her name the deceased was the appellant's wife. From the evidence on record, she was not the appellant's first wife; she was the second wife to be married by the appellant, the first wife with whom the he had several children such as Regina Nyambura Mwai (PW4 – Regina) and Sarah Wairimu Mwai (PW7 - Sarah), having died. The appellant's children with the deceased were Josiah Muya Mwai (PW1 – Josiah), Samuel Mbugua Mwai (PW2 – Samuel), Paul Njoroge Mwai (PW5 – Paul) and Naomi Muthoni Mwai (PW10 – Naomi). These witnesses testified that the appellant and the deceased were not in a cordial relationship because the appellant was alleged to be keeping a mistress at a nearby trading centre and the deceased was aware of that fact. In his unsworn evidence, the appellant did not say anything upon that issue, though the prosecution was relying on that factor as being the reason why the appellant and the deceased were not on talking terms and provided the motive for the killing.

From the recorded evidence, there was no doubt that early in the morning of 24th October, 2002, the children in the appellant's home were woken up at about 5.30 a.m. to find a building used as the family kitchen on fire. The appellant who was a shop-keeper at Githunguri shopping centre was apparently not at home. The sons and daughters, after putting out the fire, left to go and report the matter at the local Police

Station but they first went to the shop and found the appellant there. The appellant accompanied the children to the Police Station and when the party returned to the appellant's homestead, the deceased was found burnt in the kitchen. Her body was lying on what was called a "*bench*" with her head in a pan containing some liquid and her legs on a stool. According to retired Chief Inspector of Police, Samuel Mukiri Gathu (PW13) the room in which the body was found was smelling petrol. John Kibuthi (PW14), a Government Analyst subsequently found that the various types of liquid collected from the room contained diesel, an inflammable petroleum product. In these circumstances, one would have naturally assumed that the cause of death was the 95% burns Dr. Maundu found on the body of the deceased during the post-mortem. Dr. Maundu was apparently not available to testify and his report was produced in the trial by Dr. Njue Moses (PW8) who had worked with Dr. Maundu and was familiar with his signature. According to Dr. Maundu, the cause of death was due to head injury resulting in a fracture of the skull and brain haemorrhage extradurally. According to Dr. Maundu the 95% burns occurred after death. From the evidence of the doctor and the position in which the body was found lying, i.e. on the back with the head inside a pan and the legs on a stool, the logical inference to draw and which the learned Judge did draw, was that someone killed the deceased by hitting her on the head and then set the building on fire to cover-up the killing.

As was correctly appreciated by the trial Judge and the assessors the evidence regarding who had killed the deceased was entirely circumstantial. No-one ever saw the appellant kill his wife and the three assessors were unanimous that the Republic had not proved beyond reasonable doubt that it was the appellant who did kill his wife. The learned Judge , however, was of a different view, found the charge proved as required by law, convicted the appellant and duly sentenced him to death. The appellant now appeals to the Court.

The law regarding the use of circumstantial evidence as a basis for a conviction is now well settled – see **DHALAY VS. REPUBLIC, [1995 -1998] 1 EA 29**.

It must be such evidence which irresistibly points at the person accused as the exclusive perpetrator of the crime charged and with no other co-existing circumstances which would weaken such a conclusion.

In this case, there can be no doubt from the recorded evidence that the appellant slept in his home during the material night. His two sons Josiah Mwai (PW1) and Samuel Mbugua (PW2) saw him and spoke to him at about 10.00 p.m. and 10.30 p.m. that night. In his unsworn evidence, the appellant agreed he spoke to his son Josiah at 10.00 p.m. and then he himself went to sleep at about 11.00 p.m. His two daughters Regina and Sarah were occupying one of the bed-rooms in the house where the appellant and the deceased lived. When cross-examined Regina specifically said:-

"I finished Form 4 in 2001 at Kagaa Girls High School. My own mother died long time ago. I used to live with my step-mother, my father used to sleep in the same house everyday. The kitchen is near the main house where I was sleeping. The kitchen is shut but not locked. ----------."

The important thing to note here is that the appellant and the deceased were living in the same house. In his statutory statement the appellant said nothing about where his wife slept that night and it is reasonable to assume, as the learned trial Judge did, that, the deceased and the appellant had slept in the same bed-room. According to him, he woke up at about 4.00 a.m. and went to the shop. He was silent as to whether the wife was in the room or had left for the kitchen. Joseph Ng'ang'a Mwangi (PW3) was the brother of the deceased and was informed at around 6.30 a.m. about the incident at the appellant's home. He went to the appellant's home and after seeing the body of his sister naturally sought an explanation from the appellant. Listen to him narrate what he said the appellant told him:-

"I asked the accused what the problem was. Accused told me to go to the kitchen and see for myself. I identified the body of Rose Wanjiku Mwai. I then went back to the house and got full briefing from accused. Accused told me that when he came home the previous night (sic) he went to the sitting room and relaxed on the chair. Then when he felt sleepy then (sic) he went to sleep until morning. He woke up in the morning and went to open the shop. That while at the shop her children came to inform him of the burning body at the kitchen in her home. He told me that when he

reached home he did not find her in the house. That he only heard a bang at the kitchen door while relaxing in the sitting room. That he thought it was his wife. He said that his wife usually woke up in the morning to warm up water for milking the cows. He claimed that may be the deceased was burnt in the process of lighting the fire. I asked him if they had quarreled the previous day and he answered in the negative. I asked for the mobile telephone of the deceased to trace what calls may have been made before her death. May be there was somebody who told her bad things that made her to commit suicide. Accused said if the phone was useful it should be traced. Mbugua Mwai tried to get the phone in the house without success. Accused advised Mbugua to look even under the bed but it was not found. Accused said may be the deceased took the phone for charging at caster place shop where we went looking for a vehicle to take the body to the mortuary.

We went back home at about 3.40 p.m. in the evening and we got information that the mobile telephone of the deceased was found in the pick-up of the accused. That other things were also found in the vehicle."

The record before us shows that this witness was never cross-examined on his evidence. The witness specifically asked the appellant for the mobile telephone of the deceased. Samuel (PW2) was told to look for it even under the bed; the telephone was not found and the appellant then suggested the telephone could have been taken to some place for charging.

One thing is certain and that is that the two sons of the appellant, Josiah (PW1) and Samuel (PW2) suspected their father to have been involved in the death of their mother. Again, listen to the testimony of Samuel:-

"Once the body left for the mortuary, I thought the vehicle should be opened since I saw a knife at the dash-board. I used a wire to open the cabin. I suspected the knife had been used in killing my mother. My mother and father were not in good terms. My suspicion increased when the mobile telephone of my mother was found in the Peugeot belonging to my father."

Samuel then returned to the police station and gave the information to Chief Inspector Gathu (PW13). The Chief Inspector testified:-

"***I got information that there were goods inside that pick-up. One of my askaris opened the door of the vehicle. Inside were a black polythene bag. On opening the same I found a shirt, 2 blouses, a landline telephone head, a Motorola cell phone and a kitchen knife. On enquiry, I was made to understand that the same belonged to the deceased. On interrogating the sons and daughters I learnt that the accused and the deceased were not living harmoniously. Considering that relationship I wondered how the deceased property could have found their way into the car belonging to the accused. -------"***

We have already set out the evidence of Joseph Nganga (PW3), the brother of the deceased who specifically asked the appellant about the cell-phone belonging to the deceased and the appellant's reaction thereto. It is true that Samuel the young man, opened the vehicle in the absence of the appellant but no one seriously suggested to him that it was him who had put the various items belonging to the deceased in the appellant's vehicle in order to falsely accuse his own father of killing the mother. Samuel was the younger brother of Josiah (PW1) who was only twenty-one years old at the time he (Josiah) testified. It would be too much to think that a boy aged around twenty or so years would want to invent a situation which would fix a murder charge on his own father. Once again, the appellant himself said nothing at all about the presence of his wife's mobile telephone in his own vehicle and we once again stress the fact that Joseph (PW3) had asked him about the same telephone and he did not tell anyone that the phone was in his vehicle.

The learned trial Judge rejected the suggestion that the deceased might have committed suicide; we also reject that theory as it is wholly inconsistent with the fact that the deceased died from a head injury and that the burns on her body were inflicted after she had died. Mrs. Rashid, learned counsel for the appellant, also suggested before us that a former house-maid of the deceased who had been imprisoned on the complaint of the deceased could have committed the murder as an act of revenge. There was

absolutely no iota of evidence that the maid was ever seen in the vicinity either on that day or prior to the day of the killing or on any other day at all. We reject that theory as it is not supported by any evidence at all. If the maid had committed the offence there would have been no reason for the appellant to hide the presence of the deceased's telephone in his vehicle.

We repeat that no-one ever saw the appellant kill the deceased and the evidence against him was wholly circumstantial. But on our own consideration of the recorded word, we are fully satisfied that the circumstantial evidence pointed exclusively at the appellant as the killer of his wife and that there are [were] no co-existing circumstances which would remotely weaken the circumstantial evidence adduced by the Republic in support of the charge of murder brought against him. The learned trial Judge was fully justified in rejecting the unanimous advice of the assessors that the appellant was not guilty as charged. His guilt was proved beyond any reasonable doubt and we accordingly reject his appeal against the conviction.

The appellant was sentenced to death but we believe that sentence was one of the many which were commuted to life imprisonment by the President. We dismiss the appeal against sentence as well. Those shall be the orders of the Court in the appeal.

Dated and delivered at Nairobi this 8th day of April, 2011.

R.S.C. OMOLO
.....
JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR