**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 24 OF 2008**

**BETWEEN**

**NELSON JULIUS KARANJA IRUNGU ……...……APPELLANT**

**AND**

**REPUBLIC ……..……RESPONDENT**

***(An appeal from a judgment of the High Court of Kenya at Nairobi (Muga Apondi, J.) dated 1st February, 2008***

**in**

**H.C.CR.C. NO. 46 OF 2005)**

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## JUDGMENT OF THE COURT

The appellant was convicted by the superior court (Apondi, J.) for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, and was sentenced to suffer death as by law provided. It had been alleged in the Information filed by the Attorney General on 14th April, 2005 that on the 15th day of February, 2005, at Kamiti Maximum Prison, Nairobi, he murdered ***Esther Wanjiku Karanja*** (the deceased). The deceased was the appellant's wife of 9 years and they had three children, the last being a two year-old son. After hearing evidence from ten prosecution witnesses and the appellant, the learned Judge summed up the case to two of the assessors left at the trial, the third one having been lawfully discharged, and the two assessors gave the unanimous opinion that the appellant was not guilty of the offence as charged. Unfortunately the learned Judge in his summing up said nothing to the assessors about considering lesser and cognate offences if they were not satisfied beyond doubt that the offence of murder had been committed. The only direction given to the assessors was to acquit or convict for the offence charged. We shall revert to this aspect of the matter later in this judgment.

What was the evidence tendered before the trial court?

The appellant was a prison warder and had worked for 16 years in different stations in Kenya. His last station was Kamiti Prison where he resided in the main quarters. The deceased was a housewife and was not residing with the appellant in Kamiti, but at their rural home in Murang'a. Their marriage was not

a happy one as they used to have unspecified domestic quarrels. This was confirmed by two of the deceased's brothers ***Samuel Mungai Ngugi*** (PW2) and ***Isaac Kinuthia*** (PW5). Indeed, the appellant had befriended a barmaid, one ***Wairimu***, who resided in Kiamumbi near Kamiti Prison and the deceased had known about their relationship for about two years before the fateful day.

There was no eyewitness account of what transpired on the fateful day, 15th February, 2005. Reliance was therefore made by the trial court on what the deceased was said to have told those who came into contact with her after the incident and on what the appellant stated in his evidence. The trial court treated the pronouncements of the deceased as *"dying declarations"* and examined other circumstantial evidence as corroborative of those declarations. Once again we shall examine the two issues of law presently.

The deceased's narration on what transpired on the fateful day was recorded by ***Pc. Joseph Kimanzi*** (PW10) of Kilimani Police Station. Pc. Kimanzi recorded a statement on 17th February, 2005 at Kenyatta National Hospital, Nairobi where the deceased had been admitted with severe burns two days earlier. The statement was not signed by the deceased because, as stated by Pc. Kimanzi, the deceased's hands were burned and she could not write. It was recorded in the presence of a lawyer from FIDA and one of the deceased's brothers who was not named. The deceased stated that she had arrived at Kamiti Prison on 14th February, 2005 and went to her husband's (the appellant's) house. It was locked but she managed to push the wooden window and place the luggage she had inside. She then went to ***Wairimu's*** house at Kiamumbi to look for the appellant who had earlier informed her that she had married the said Wairimu and were living together. She found Wairimu and asked for the keys to the Kamiti house but Wairimu closed the door on her leaving the deceased standing outside. Shortly thereafter the appellant arrived and found her there. He took the house keys from Wairimu and went with the deceased to the Kamiti house. They spent an uneasy night together as they did not talk to each other. The following morning, 15th February, 2005, the appellant asked the deceased who had informed her about Wairimu and who had showed her Wairimu's house. He left for work but returned at 1 p.m. when the deceased told him she wanted to leave for home and required money. The appellant said he had no money because he had not collected his salary having lost his identity card. He suggested that the deceased should go home and sell one of their goats. The appellant washed his socks that afternoon and in the evening he told the deceased that he was going to Wairimu's house. The deceased protested that it was not right for him to do so since she was there. The appellant became angry and hit her on the head with a torch he was carrying. He then took a stove and poured paraffin on her and set her on fire. The deceased ran out of the house screaming and one of the neighbours poured water on her putting off the fire. Shortly thereafter she was taken to Kenyatta National Hospital for treatment. The FIDA lawyer who was present with Pc. Kimanzi was not called to testify and it is not clear from the record whether the deceased's brother who was present was Samuel Mungai Ngugi who testified as PW2. Ngugi did not say in his evidence that he was present with Pc. Kimanzi on 17th February, 2005. He said he went to visit his sister at Kenyatta National Hospital on 16th February, 2005, the previous day, and the first words uttered by the deceased were *"Our Mungai, can you see what Karanja has done to me?"* He was also given some narration similar to what Pc. Kimanzi recorded on 17th February, 2005. He added, however, that the deceased complained that the appellant had not bothered to know what had taken her to Kamiti, was not going home and was not sending any assistance to pay debts which were accumulating at home. On hearing those complaints, the appellant wanted to leave the house but the deceased protested. The appellant threatened to assault her but the deceased left the house until 9p.m. when she returned. The appellant opened the house for her and told her:

*"Didn't I tell you that I will kill you?"*

That is when he hit her with a torch, poured paraffin on her and lit her up. She ran out screaming:

*"Ooohi, umenichoma kwa sababu ya Wairimu."*

The other witnesses who overheard the deceased talk about the incident were ***Warder David Ngui*** (PW3), ***Wardress Catherine Kanini Nicola*** (PW4), and ***Chief Officer Khamisi Athumani*** (PW1).

Warder Ngui was the appellant's next door neighbor at Kamiti Quarters. At about 10 p.m. on 15th February 2005, he was in bed with his wife and child when he heard the deceased and the appellant talking in low tones. One hour later (11 p.m.) he heard noises of someone getting out of bed and walking around the house. A child called out *"mum"* and subsequently he heard the lighting of a stove. He then saw unusual light coming from the appellant's house and Ngui and his family ran out of their house. Ngui then saw three fires heading towards one direction and later heard the deceased's voice shouting:

*"Umenichoma kwa sababu ya mwanamke….."*

The appellant came to the scene carrying a young child but rushed back saying his wife got burnt and had to be taken to hospital. Ngui did not ask the appellant how the deceased got burned. Wardress Kanini (PW4) was one of the neighbours who arrived at the scene after hearing the screams and found the deceased when the fire had already been extinguished. It was fortunate that as the deceased ran out aflame she found ***Robert Lonyang Mukeyon*** (PW6) who was drawing water from a nearby tap at the time. Robert poured water on her extinguishing the flames. According to Robert the deceased was merely shouting *"Ooi ooi ooi"* and a man followed behind her shouting *"Ni nini…. ni nini"* Wardress Kanini and other women tied a *lesso* round the deceased and the appellant came to the scene and both he and the deceased started quarreling. Wardress Kanini and other women removed the deceased to the main prison gate where instructions were issued by Chief Officer Athumani to take her to Kenyatta National Hospital. Athumani recalls the deceased as having told him that she had been lit with a burning stove by her husband. The appellant also arrived at the scene shaken and asked the deceased:

*"Umefanya nini.?"*

Whereupon the deceased responded:

*"Si ni wewe umefanya hivyo."*

They had an argument before Athumani. They nevertheless travelled together to the hospital where the appellant remained after admission of the deceased. Four days later on 19th February, 2005, ***Inspector Richard Tanui*** (PW8) of Scenes of Crime summoned the appellant to his office at Kasarani Police Station and interrogated him on the incident. He also visited the scene but found no signs of burns. He found the bottom of a stove in the bedroom while the top was in the sitting room. He never saw any kerosene. The appellant denied having burnt his wife but only saw her burning next to the water tank. IP. Tanui nevertheless arrested the appellant and charged him with the offence of attempted murder. Two days later on 21st February, 2005, the deceased died. The postmortem examination carried out on the body by ***Dr. Jane Wasike Simiyu*** (PW9) indicated that the body had 80% burns on both upper limbs, anterior abdominal wall, lower limbs and back. There was accumulation of fluid (oedema) on the respiratory system and brain. The pathologist did not give an opinion on the cause of death.

In his defence the appellant gave sworn testimony and was not challenged in cross-examination on what he stated. He refuted the story narrated by the deceased and stated that he had arrived home after work on 14th February, 2005 only to find his wife outside carrying their 2 year-old baby. She had not told him about the visit. After giving him information about their rural home, they slept. The following morning they stayed in the house and he went to work at 1 p.m. On returning home at 7 p.m., he found the deceased annoyed for some unknown reason. He removed his uniform intending to change his clothes but the deceased asked him where he wanted to go. The appellant said he was going to the shops to buy cigarettes. The deceased then dumped their child on a chair and told him she was going away and he would not know where. She went and returned at 9.30 p.m. and knocked on the window. The appellant opened the door for her and he went to their bed. She followed him and asked him about his relationship with Wairimu. He said he would discuss the issue the following day after duty. But the deceased would hear none of it. She went to the sitting room and lit the stove. She held it at him saying she will kill herself and their son. Suddenly she lit a matchstick, lit herself and ran outside. He was shocked and ran after her. The fire was extinguished by someone near the water tank and he went back to the house to collect her clothes and the child. He took her to hospital where she was admitted. He nursed her for four

days until he was summoned to Kasarani Police Station and was placed in cells. Two months later on 21st April, 2005, he was charged with murder. He testified that Wairimu was his girlfriend of two years and that his wife (the deceased) knew about it. He did not know why the deceased was annoyed or why she decided to burn herself and it was a shocking experience for him.

As stated earlier the assessors were not satisfied that the offence had been proved beyond reasonable doubt and advised the trial Judge to acquit him. The learned Judge however differed from them and convicted the appellant. In law the opinions of the assessors are not binding on the trial Judge although the Judge ought to explain the reasons for departing from such opinions. The learned Judge reviewed the evidence and formed the view that it rested on the *"dying declarations"* made by the deceased and on circumstantial evidence since there was no eyewitness account. He found that the various utterances made by the deceased before her death amounted to *"dying declarations"*. He further found that all the circumstantial evidence led to only one conclusion, stating:

**"In the case of**

**SAWE VERSUS REPUBLIC (2003) KLR Pg. 365 The Court of Appeal held inter alia:**

***1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.***

***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***

***3. The burden of proving acts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."***

**In this particular case, the evidence on record irresistibly leads to one conclusion. The same leads to the conclusion that the accused killed his wife following a domestic quarrel over his illicit love affair with another woman. In the same breadth, the court has carefully considered the defence case and rejects the same since it is just a fabrication. The story itself does <u>not</u> ring her** (sic- perhaps "true") **at all. I also hereby differ with the verdict of the assessors given the above overwhelming evidence."**

The appellant was aggrieved by those findings and is now before this Court on his first and final appeal. His learned counsel, Mr. Ogesa Onalo abandoned the original memorandum of appeal and urged four grounds in a supplementary memorandum of appeal filed by him. Essentially, Mr. Onalo submitted firstly that the essential ingredients for the offence of murder, and particularly *mens rea*, were absent and no cogent proof was provided by the prosecution. On the contrary the evidence established that there was a domestic quarrel between a husband and wife but there was no evidence of malice aforethought attendant to the commission of any offence. If any offence was committed, it was at the spur of the moment which would amount to unlawful killing or other personal injury but not murder. Secondly, he submitted, it was erroneous to rely on the utterances of the deceased as *"dying declarations"* as she was not at the point of death. Furthermore, the purported dying declarations had no probative value because the deceased is said to have given different and contradictory stories to the various witnesses who said they overheard her. Thirdly, the defence of the appellant was summarily dismissed without consideration although it was sworn testimony which was unchallenged. Finally, Mr. Onalo attacked the circumstantial evidence relied on to convict the appellant submitting that the mere fact that the appellant was with the deceased when she sustained burns was not proof that it was the appellant who set her on fire. In his view, the circumstances explained by the appellant displaced the prosecution's account of events and he was therefore entitled to acquittal.

For his part, Senior State Counsel Mr. Monda, contended that there was no basis for challenging the trial court's findings because the dying declarations were not challenged and the trial Judge believed the witnesses who heard those declarations. The defence of the appellant was rejected as it was fictitious in

the light of the evidence adduced by the prosecution. In his submission, malice aforethought was established by the evidence that the burns on the deceased were 80% and there could have been no other intention by the perpetrator of the crime but to cause death or grievous harm. The quarrel between the appellant and the deceased had no bearing on *mens rea*, he concluded.

We have carefully considered the evidence on record as it is our duty to do on a first appeal. There can be no doubt that the deceased died and that she died as a result of complications arising from extensive burns on her body which were sustained on the evening of 15th February, 2005. As correctly surmised by the trial court, there was no eyewitness account on how the deceased sustained the burns. It was nevertheless the prosecution's evidence that the deceased told various persons who met her, and others who overheard her, that it was the deceased who caused the burns and the reason was because of another woman known as Wairimu who was either the girlfriend or wife of the appellant. Those witnesses were Athumani (PW1), Ngugi (PW2), Ngui (PW3), Kanini (PW4) and Pc. Kimanzi (PW10). The credibility of those witnesses was assessed by the learned trial Judge as *"independent, truthful and cogent"*. As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses. Their evidence must nevertheless meet the test of consistency relevance and veracity. The words uttered by the deceased and heard by those witnesses were not uttered at the point of death since it was several days before the deceased died on 21st February, 2005. That however is not a bar to their admissibility in evidence.

In the first place, ***section 33*** of the Evidence Act Cap 80, provides in relevant part as follows: -

**"33. Statements, written or oral, of admissible facts made by a person who is dead, ……are themselves admissible in the following cases –**

**(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"**

**……..**

To use the words of this Court in an earlier decision – **Dhalay v R. [1995 – 1998] 1 EA 29 –** the words uttered by the deceased would form *"part of the res gestae*" on the relationship between the appellant and the deceased and are receivable evidence. The evidence fell for consideration whether it was labeled *"dying declaration"* or given a different label. It is clear, however, that the deceased had no hope of survival considering that she had suffered 80% degree burns over a large area of her body and indeed she did inform her brother, Ngugi, on 16th February, 2005 that she was dying. The learned trial Judge relied on English law in considering the evidence of *"dying declaration"*. He cited the "**Republic versus Reaney and Reddish (1857) 11 Dears & B 151**" which we have been unable to find. The reference to "Republic" would in any event be erroneous since "R" in English courts would refer to "Regina" when the Queen reigns or "Rex" if it was a King. Be that as it may, the passage relied on is in **R v Woodcock [1789] 1 Leach 500** at page 504 and was approved in **R v Perry [1909] 2 KB 687** at Pg. 701 stating:

**"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."**

Three essentials must therefore be present under English law; the declarant must be in:

· actual danger of death when the declaration was made,

· have had a full apprehension of his danger,

· Death must have ensued.

The situation in Kenya is, however, different as exemplified in ***section 33*** of the Evidence Act (supra). There is a wealth of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from **Choge v Republic [1985] KLR 1**, citing the predecessor of this Court in **Pius Jasanga s/o Akumu v R (1954) 21 EACA 331**:

**"In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.**

**In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (R v Muyovya bin Msuma (1939) 6 EACA 128. See also R v Premanda (1925) 52 Cal 987.)**

**The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:**

**The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and… the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed…The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (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 not guarantee for accuracy (ibid).**

**It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But 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 of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171)."**

See also **R v Eligu s/o Odel (1943) 10 EACA 90**, **Okethi Okalo v Republic [1965] EA 555**, **Aluta v Republic [1985] KLR 543**, and **Kihara v Republic [1986] KLR 473**.

The learned trial Judge may well have fallen into error in applying the English approach in considering the evidence of *"dying declaration"* but we cannot fault him in reaching out for further circumstantial evidence to satisfy himself that the evidence on dying declaration was but truthful. These circumstances were that the deceased and the appellant were in the same house on the fateful evening upto the moment the deceased found herself on fire. Their marriage was not a particularly happy one though they had been together for 9 years and had three children. Their stay together for the one day before the fateful moment was also an uneasy one. The prosecution witnesses believed by the trial court established that there was a quarrel. Upon evaluation of the evidence the trial court found that the quarrel was about another woman called Wairimu. On our own evaluation of the evidence we think that

conclusion is well borne out by the evidence. The contention by the appellant was not true therefore that the deceased was annoyed for unknown reasons. Wairimu was either his girlfriend as he conceded or was married to him, as the deceased believed. Although motive is not relevant in criminal responsibility, (***section 9(3)*** of the Penal Code) one was established in this case. We have examined and weighed the totality of the evidence on record, including the defence put forward by the appellant and we find no validity in the claim that the deceased set herself on fire. The defence of the appellant was properly rejected by the trial court.

Having said that we are concerned, as stated earlier, that proper directions were not given to the assessors in view of the peculiar circumstances of this case. The attack on the deceased would appear, on the evidence, to have been on the spur of the moment precipitated by a quarrel between the appellant and the deceased. The first attack was by a torch held by the appellant and there was room for escape at that moment since the door would appear not to have been bolted. There was a contention by the appellant that it was the deceased who intended to launch an attack using a lighted stove. There were therefore apparent issues of provocation and self defence which ought to have been put forward in summing up to the assessors but were not. They affect the ability of the appellant to form the necessary intention or *mens rea* in the offence charged. We do not know what the assessors, who were at that time lawful and necessary part of the trial, would have stated if these matters were placed before them. For those reasons we give the benefit of doubt to the appellant and find that the offence of murder was not proved beyond reasonable doubt. We have no doubt, nevertheless, that the appellant did cause the death of the deceased which was unlawful and therefore amounted to manslaughter.

In the result we allow the appeal, quash the conviction for murder and set aside the sentence of death imposed on the appellant. We substitute therefor a conviction for manslaughter and impose a sentence of 18 years imprisonment which the appellant shall serve with effect from the date of his conviction by the trial court on 1st February, 2008.

It is so ordered.

***Dated and delivered at Nairobi this 16th day of July, 2010***.

**E.O. O'KUBASU**

**…….**

**JUDGE OF APPEAL**

**P.N. WAKI**

**……..**

**JUDGE OF APPEAL**

**J.G. NYAMU**

**……..…….**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**