REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 16 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP CHEGE MAINA.....ACCUSED

RULING

1. The accused is charged with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.

2. The particulars are that on 28th March 2017 at Kamacharia Location within Murang'a County he murdered *Milka Muthoni Wanjiru*.

3. He pleaded not guilty. The Republic only managed to call *two* witnesses. The prosecution's case is built entirely on *circumstantial* evidence. The question now is whether the evidence raises a *prima facie* case.

4. PW1 was Elizabeth Wanjiku Wanjiru, an elder sister of the deceased. She knew the accused well as they were all day scholars at St. Philip Gikindu Secondary School. On 28th March 2017, she arrived home from school at about 7:00 p.m. She found her brother, Eliud Kimani (PW2) at home. The deceased was not there. After a few minutes their grandmother, Elizabeth Wanjiku, came to inquire about the whereabouts of the deceased. PW1 told her that she had left school ahead of her and she did not know where she was. She had last seen her at school at about 11:00 a.m. with a fellow student called Rose Njeri.

5. Their grandmother advised them to look for her. They began the search at the home of Rose Njeri who told them that they parted ways with the deceased when they reached Njeri's home. She said that the deceased proceeded towards her home.

6. PW1 used her grandmother's phone to call a number of their schoolmates including Samuel who in turn said he would call the accused. Samuel called back a short while later to say that the accused told him that he had not seen the deceased after they parted ways earlier on.

7. The deceased's brother (PW2) went out for a further search and returned after two hours. It did not bear fruit. At about 9:00 p.m., Rose Njeri, her mother and the accused came to the deceased's home. They said they had come to assist in looking for the deceased. They went out to their *shamba* to conduct a search while PW2 went to a neighbouring farm. The searches yielded nothing.

8. Njeri's mother then suggested that the search be extended to a nearby stream. The five of them (PW1, Mama Njeri, Rose Njeri, the accused and PW2) went to the stream armed with *pangas* and torches. PW2 then proceeded alone into a place which looked disturbed. He came back and said nothing. They all moved to another spot. Just then, Mama Njeri and Rose Njeri rushed back towards them. Mama Njeri was screaming. PW2 was also screaming.

9. PW1 realized that they had located the body of the deceased in the thicket. She did not go near the body. The village elder and other members of the public came to the scene. Police officers later arrived and took the body to the Kiriaini mortuary.

10. Like I stated, PW2 was Eliud Kimani, a brother of the deceased. His evidence was largely in tandem with that of PW1. He added that the body was discovered at about 10:00 p.m. in a bushy area on the accused's *shamba*. The body was naked but the deceased still had her shoes. Her clothes were neatly folded on her side. She had injuries on the mouth and the head was swollen. Her tie was on the neck. He formed the impression that she was raped. He testified that the body was taken by the police to Kiria-ini Mission Hospital Mortuary. He attended the post mortem examination but could not remember the date.

11. That marked the close of the prosecution's case. Learned counsel for the accused, *Ms. Kimani*, filed submissions on 15th February 2021. The Republic did *not* to file any submissions.

12. I am now called to determine whether the evidence discloses a *prima facie* case sufficient to place the accused on his defence. I have said that only two witnesses took to the stand. And the blame lies at the feet of the prosecution. On 30th October 2017 when PW1 testified, there were two other witnesses in court but *Ms. Keya*, Learned Prosecution Counsel, sought an adjournment and told the court-

> The other witness present will be a witness in a trial within the trial over the admissibility of the accused's confession. In the circumstances I seek adjournment. The investigation officer is present but I wish to call him at the end. he told me that the other witnesses whom he had bonded were not able to attend court today. He did not give me any reasons. They are relatives of the deceased. Other witnesses were not bonded.

13. Although the application was not opposed by the defence, the Court, (*Waweru J*), warned the prosecution as follows-

> Indeed the prosecution must remember that the accused is a minor and his trial is time - bound by law. See section 194 and 5th Schedule of the Children Act. This case is now fixed for further hearing on 28/11/2017.

14. The matter did not proceed on 28th November 2017 but was placed before *Waweru J* the following day when it was put off to a further mention. After a series of mentions, it was fixed for hearing on 9th October 2018 when I took over the proceedings and explained to the accused his rights under section 200 of the **Criminal Procedure Code**.

15. The Prosecution was again not ready for want of witnesses. The application for adjournment was opposed. *Ms. Otieno*, learned Prosecution Counsel, pleaded for a *last* adjournment. I ordered that *"purely in the interests of justice and noting the accused is a minor"* the hearing would be adjourned to 13th December 2018. I also issued witness summons to the following *eight* remaining witnesses:

i. Eliud Kimani

ii. Rose Njeri

iii. Teresa Nyambura

iv. Joseph Mwangi

v. C.I. Stanley Mwaura

vi. P.C. Charles Muna

vii. C.I. Hassan Ado

viii. Dr. Sachini (Kiriaini Mission Hospital)

16. Save for Eliud Kimani (PW2) none of the other witnesses were called. On 9th October 2019, exactly one year later, learned Prosecution Counsel, *Mr. Mutinda*, sought another adjournment on grounds that the investigating officer was unwell and had not followed up on the earlier summons. The application was opposed. For reasons in a considered ruling I granted the prosecution the last adjournment and I renewed the witness summons to the remaining witnesses.

17. When the trial resumed on 11th February 2020, learned Prosecution Counsel, *Mr. Mutinda*, sought yet another adjournment on the grounds that he had a new investigating officer; that the Chief Inspector of Police who recorded the accused's confession had retired from the force; and, that the area chief was unwell.

18. I found little merit and ruled as follows-

> On 9/10/2019 and for reasons in a considered ruling the Republic was granted a LAST adjournment. The court also issued summons to the last 3 witnesses but they have not been availed. As indicated earlier the 1st witness testified way back on 30/10/2017 and the last one on 13/12/2018. No sufficient grounds have been advanced for the fresh application for adjournment noting also that the accused has been in custody since the year 2017. Application is refused. Matter shall proceed at 11.00 a.m.

19. At 11:20 a.m., the prosecution had not procured any more witnesses and closed their case.

20. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

21. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

22. There is absolutely *no* doubt about the *death* of the deceased. Although the pathologist did not testify and no postmortem report was

produced, the body was clearly identified in the thicket by PW2 and who attended the postmortem examination.

23. From the injuries that PW2 highlighted, I also entertain *no* doubt that the cause of death was *unlawful*.

24. However, there was no *eye witness* to the murder. Like I stated, the entire case for the prosecution is built upon *circumstantial evidence*. In ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949) the court held-

> In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

25. There are some incriminating pieces of evidence: Firstly, the accused was seen with the accused on their way from school. PW1 said that a boy called Samuel told her that the accused and deceased parted ways outside the homestead of the accused and that the deceased proceeded on her journey home. That latter statement is classic hearsay. Although the accused participated in the "search" he seemed to be leading the party to the body.

26. Sadly, Chief Inspector Stanley Mwaura, who recorded a "confession" by the accused never testified. I stated earlier that this critical witness was in court on 30th October 2017 but *Ms. Keya*, Learned Prosecution Counsel, chose not to put him on the stand that day. I issued summons to all remaining witnesses on at least two other occasions, to be specific on 9th October 2018 and a year later on 9th October 2019. They were not acted upon.

27. In a criminal trial, the *standard of proof* is beyond any reasonable doubt. In the absence of the *"confession"* and as things now stand, there is no reliable evidence *proving* that the accused killed the deceased. Paraphrased, there is no evidence to *convict* if the accused opts *to keep silent.*

28. The law on that subject was succinctly captured in ***Bhatt v Republic*** [1957] E.A. 332 at 334-

> Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one-
>
> > 'which on full consideration might possibly be thought sufficient to sustain a conviction.'

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is-

> 'some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.'

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

29. From my analysis of the evidence produced at the trial and the legal authorities, I am not persuaded that the Republic has proved a *prima facie* case against the accused *sufficient* to place him on his defence.

30. Accordingly, under the provisions of section 306 (1) of the **Criminal Procedure Code**, I enter a finding of *not guilty*.

31. The accused is hereby acquitted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL 2021

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Mr. Mbue holding brief for Ms. Kimani for the accused.

Mr. Mutinda for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.