REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 118 OF 2010

REPUBLIC ……………………………………………………...…….. PROSECUTOR

VERSUS

FRANCIS NJUGUNA KAMAU …………………………...………… 1ST ACCUSED

FRANCIS NJUGUNA KAGIRI…...…….…….………………...……….. 2ND ACCUSED

RULING

The two accused persons **FRANCIS NJUGUNA KAMAU** (hereinafter referred to as the 1st accused) and **FRANCIS NJUGUNA KAGIRI** (hereinafter referred to the 2nd accused) were both arraigned in High Court at Nakuru on 22/11/2010 facing a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of charge were that

> ***"On the 17th day of November, 2010 at [particulars withheld] Village Mau Narok District within Rift Valley Province, jointly with others not before court, murdered MARTHA WANJIKU MBURU"***

Both accused entered a plea of **'Not Guilty'** to the charge. Their trial commenced before **Hon. Justice William Ouko** (as he then was) on 19/9/2012. The learned Judge heard four (4) witnesses. Thereafter **Hon. Lady Justice Helen Omondi** took over the case and heard a further four (4) prosecution witnesses. Following her transfer to Bungoma High Court I took over the trial and recorded the evidence of the final two witnesses. A total of ten (10) witnesses were called by the prosecution. **MR. KANYI** Advocate represented both accused persons.

Briefly the facts of the case were as follows. The deceased **M W M** was a minor aged about 12 years. **PW2 JOSEPH GACHIO MWANGI** who was the head teacher of the school which the deceased attended told the court hat on 17/11/2010 the deceased reported to him that she had a headache and wished to be released to go home. **PW2** offered to buy her medicine but the deceased declined and insisted on going home.

PW1 J W M was the mother of the deceased. She told the court that on the material day the deceased came home from school vomiting and said she was unwell. **PW1** received her and then left to do casual work in a neighbouring farm. She returned home at 6.00pm to find the deceased missing. They searched for the deceased that night but failed to find her. The next morning the family and neighbours continued the search for the missing girl. The body of the deceased was later found near [particulars withheld] river.

PW4 J W was a child who was aged 6 years at the time of giving her testimony in court on 20/9/2012 but at the time of the incident in 2010 she was only 3 years old. This witness told the court that on the material day after the deceased had returned from school claiming to be unwell the 1st accused came and called her to accompany him to river [particulars withheld] to fetch water. **PW4** stated that the deceased left together with the 1st accused. During the course of police investigations a blood stained skirt and a piece of wood with blood was recovered in a certain single-roomed house. Both items were taken to the Government Chemist for analysis. Upon conclusion of police investigations both accuseds were arrested and charged.

At the close of the prosecution case this court must consider and analyze the evidence with a view to determining whether a *prima facie* case has been established to warrant placing the two accused persons onto their defence. The definition of what constitutes a *prima facie* case was provided in the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A 332** where it was held thus

> ***"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"***

This court must now decide whether the evidence on record sufficiently links the two accused persons to the murder of the deceased. The offence of murder is defined in Section 203 of the Penal Code Cap 63 Laws of Kenya thus

> ***"Any person who of malice aforethought accuses death of another person by an unlawful act or omission is guilty of murder"***

The prosecution must tender proof of the following crucial ingredients of the offence of murder beyond a reasonable doubt

> ***1) The fact and cause of death of the deceased***
>
> ***2) Proof that the deceased met his/her death as the result of an unlawful act or omission on the part of the accused(s)***
>
> ***3) Proof that said unlawful act or omission was committed with malice aforethought***.

The fact and cause of death of the deceased are not in dispute. **PW1** the mother of the deceased told the court that the body of her child was recovered near river [particulars withheld] the day after she disappeared from home. The body had injuries on the head. **PW1** identified the deceased as '**M W M'**.

Evidence regarding the cause of death was tendered by **PW9 DR. TITUS NGULUNGU,** a Consultant Pathologist based at Nakuru Provincial General Hospital. He told the court that he performed an autopsy examination on the body of the deceased on 22/11/2010. He noted extensive fractures on the head (skull bone) with brain matter missing from the cranial cavity. He also noted evidence of forceful penetration into the vagina as well as tears to the vagina and rectum. **PW9** opined that the cause of death was **"severe head injury due to blunt force trauma to the head"**. Basically the child met her unfortunate and untimely death due to having her head totally smashed in after being brutally raped. This was expert medical evidence which was neither challenged nor controverted by the defence. I am satisfied that both the fact as well as the cause of the deceased's death have been proved beyond reasonable doubt.

The next crucial question would be whether sufficient evidence exists to link the two accused persons to this brutal murder of the deceased. **PW2** stated that the deceased left school for home on 17/11/2010 claiming to be ill. The deceased's two school mates **H W(1) PW6** and **H W(2) PW7** both confirm that on that day the deceased told them that she had a headache and requested that they accompany her to seek permission from the head teacher to go back home. Neither **PW6** nor **PW7** escorted the deceased back to her home. They confirm that once she was released the deceased left the school compound.

PW1 the mother of the deceased confirms that on that day the deceased did return home from school at about 11.00am. **PW1** left to go and work in a neighbouring farm leaving the deceased at home with other young children.

PW4 was one of the children who had been left at the home with the deceased. She told the court that the 1st accused came and called the deceased. The two left together headed to [particulars withheld] river to collect water. **PW4** has no idea what happened after they left. It must be remembered that at the time these events occurred **PW4** was only three (3) years old – merely a toddler. Her evidence must be taken with caution as it is uncorroborated. No other person has testified that they saw the deceased in the company of the 1st accused on that day. Being only 3 years old at the time I wonder whether **PW4** was able to clearly recall the events almost 2 years later when she testified in court.

Be that as it may it would appear that the 1st accused is being implicated in this murder because he was allegedly the last person seen in the company of the deceased. Leaving aside the courts hesitation to rely fully upon the testimony of **PW4**, the mere fact that the 1st accused was last seen in the company of the deceased does not prove (or even suggest) that he had a hand in her death. There is no evidence to show what occurred after they left the home.

Did they get to the river? What happened at the river? Could third parties have attacked the deceased? All these questions remain unanswered. The 1st accused has no obligation to fill in the gaps in the prosecution case. The prosecution must tender tangible evidence to implicate the accused in this offence. The mere fact that the 1st accused may have accompanied the deceased to the river to collect water is not proof of his involvement in her murder.

The prosecution also placed reliance on certain items which were recovered at the scene and which were deemed to link the two accused persons to the murder. **PW5 SERGEANT SAMWEL CHINAI** told the court that he visited the scene where the body of the deceased was found. **PW5** in his evidence in chief stated that he recovered from the house of the 2 accuseds a blood stained shirt **P. exb 1** and a piece of wood with blood-stains on it. **P. Exb 2**. This is what led the police to arrest the two accuseds. However **PW5** contradicts himself in his testimony. Whereas during his evidence in chief **PW5** claims that the house in which the exhibits were recovered belonged to the two accused persons. No evidence is tendered to prove that the house did actually belong to the two accuseds. **PW5** admitted under cross-examination at page 25 line 16

> ***"It was a small house and no one else lived there. It was a single room. I did not talk to the landlord….."*** (my emphasis)

Given that according to the testimony of **PW5** it was the OCS and **not** the accused persons who led him to that house, court wonders how did police conclude that the house belonged to the 2 accuseds.

The evidence of **PW5** is directly contradicted by that of **PW11** **INSPECTOR OMARI** who was the investigating officer. Under cross-examination by defence counsel **PW11** states as follows

> ***"I do not know if the room belonged to the [two] accuseds. The room was within a homestead. I found nothing in the room to link the 2 accused to that room….."***

PW11 made no attempt to interview the owner of the homestead to establish who occupied that room. He admits that there was nothing to show that the room belonged to the 2 accused persons. On what basis then did police conclude that the shirts recovered in that room belonged to the 2nd accused? Further analysis of the evidence on record shows that this conclusion by the police was entirely misplaced.

The recovered exhibits (including the shirt said to belong to the 2nd accused) were forwarded to the Government Chemist for analysis. This was essential to establish the source of the blood found on the items.

PW10 HENRY KIPTOO SANG was the Government Analyst who examined those exhibits. He made a comparison of the blood stains on the shirt and piece of wood with blood samples taken from each of the 2 accuseds persons. His findings contained in his report dated 29/10/2012 which was produced as an exhibit in court. **P. Exb 2** can be summarized as follows:

- The skirt and piece of wood were both moderately stained with human blood
- The DNA profiles taken from the blood stains on the two exhibits matched the blood sample taken from the deceased
- The DNA profile on the blood stains on the shirt was of **unknown male origin**
- In other words the blood stains on the shirt **did not match** the DNA profile of either the 1st or the 2nd accused persons.

The evidence of **PW10** totally destroys the prosecution case. Although the recovered shirt was said to belong to the 2nd accused (though no proof was offered of this fact) the blood stains found on that shirt **did not** match the DNA profile of the blood sample of the 2nd accused. The blood stains on the shirt were of **'unknown male origin'**.

There is therefore the very real possibility that this shirt **did not** belong to the 2nd accused. Therefore although the blood stains on the wood originated from the deceased herself **no** link is shown to exist between the exhibits recovered and the blood stains on them to the two accused person. In that case it is quite probable that it was a third unknown male person who attacked and killed the deceased.

The two accuseds were arrested and charged purely on the basis of suspicion. Suspicion no matter how strong cannot form the basis for a conviction. The 1st accused was implicated solely on the basis of the unsworn testimony of a 3 year old child. Whist the 2nd accused was implicated on the basis of the recovery of a blood-stained shirt which as has been shown did not even belong to him. It would be meaningless to place the 2 accused persons on their defence on the basis of the evidence on record. That would be tantamount to calling upon the 2 accuseds to fill the gaps left in the prosecution case. If the two accuseds elected to keep silent in defence the evidence on record could not possibly sustain a conviction. I find that no *prima facie* case has been established. I enter a verdict of **'Not Gulity'** and I acquit both accuseds under Section 306 (1) of the Criminal Procedure Code. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated in Nakuru this 25th day of July 2016.

Mr Biko holding brief for Mr. Kanyi

Mr Chirchir for State.

M. Odero

Judge

25/7/2016