



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 117 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

ESTHER WANJIRU.....1ST ACCUSED

SAMUEL KIMEMIA WAMITI.....2ND ACCUSED

RULING

Esther Wanjiru Kimani and Samuel Kimemia Wamiti are jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They are alleged to have murdered Samuel Kimani Mwangi on the night of 12th and 13th September 2007, jointly with others who are not before the court. They denied the offence. The accused persons were initially represented by M/S Owenga but later Mrs Ndeda took over. The prosecution was led by Mr. Njogu and later Mr. Omwenga of the State Law Office.

The prosecution called a total of 8 witnesses and closed its case. Beth Waithera Kimani, (PW1) a daughter of the deceased, recalled that on 13/9/07 her father left their house when it was dark and raining and said he was going to sleep in his second wife's house, that is, the 1st accused's house. The next day, somebody came looking for her father and she went to look for him but found the father's body lying on the road and he was dead. She said the 2nd wife's house was about an acre away from their house. She had no idea how the deceased met his death.

Peter Mwangi, (PW2) a farmer and elder in Geta Village, was at his home on 13/9/07 when he was informed by the deceased's child that the deceased had been found dead about 200 ft from his home. He called the Assistant Chief who in turn called the police. He saw no visible injuries on the deceased except

blood oozing from the mouth. He did not know how the deceased met his death.

Dr. Jackson Macharia (PW3) produced the post mortem report in respect of the deceased on behalf of Dr. Mbirirwa who has since left the Government service. The doctor had done the post mortem on 21/9/07 on a male adult, the body was riga-mortis with dry blood on the lips, mouth and nostrils. Internally, he found haemorrhage and haematoma on the anterior chest and abdomen, blood between the chest and abdomen and a string tightly tied at the base of his penis, and cut wound on the right arm. He formed the opinion that the cause of death was internal bleeding, secondary to blunt trauma. He also produced reports by Dr. Mbirirwa in respect of 2nd accused person and Dr. Muriuki in respect of the 1st accused person as Ex.2 and 3. Both accused were certified fit to stand trial. This witness was not in a position to tell who inflicted the fatal injuries on the deceased.

David Muriuki Karinge (PW4), the Assistant Chief of Kiambogo, recalled having been called by David Muchiri and informed about the deceased's body having been seen and he went to the scene. He noticed blood on the deceased's nostrils, and his trousers were lowered. His body lay between his two houses. He did not know how the deceased met his death.

Jack Kamau Njuguna, (PW5) is a farmer at Geta Location, and a brother-in-law to the deceased. He was informed of the deceased's death on 13/9/07 about 8.00 a.m. and went to the scene where he found the body outside the deceased's compound. He noted that the body was not wet though it had rained the previous night, which meant that the deceased was killed elsewhere and the body brought there. He noted that the deceased's inner wear and trouser were pulled down, and blood oozed from the mouth. Later, he took the 1st accused person to police station for interrogation and he also went to Murang'a to get the 2nd accused person and one Eunice Wambui (PW6) who had some land dispute with the deceased over sale of his land in Muranga.

Eunice Wambui (PW6) did accept that she was once arrested for the murder of the deceased but was released. She recalled that she and 2nd accused person had entered into an agreement with the deceased for the sell his land in Muranga in 2005, having been introduced to the deceased by the 2nd accused person. Each was buying ½ acre for which the 2nd accused paid Kshs.40,000/- and she was supposed to pay Kshs.80,000/- but instead she paid Kshs.105,000/-. She testified that she knew that there was a family dispute over the land as the family did not want the deceased to sell it before it was transferred to his name. She further said that she had attended the Land Control Board with the deceased the consent was given and the land was transferred to her as a gift. She was not able to tell why the deceased wanted it indicated as a gift.

PW7 Chief Inspector of police, David Mwangi, was then the OCS of Kipipiri Police Station. He was informed of the deceased's death by the area Assistant Chief. He went to the scene on the said date about 11.00 a.m. and found the body about 50 metres from the deceased's house. On observation, he saw blood oozing from the mouth and a piece of cloth tied to his private parts. He recorded statements of witnesses including the 1st accused person. He later had 1st accused person escorted to the magistrate's court for taking of a confession but it was not recorded and she was charged.

Having reviewed the evidence of all these witnesses, I find that there is no witness to the murder. Apart from PW1 saying that the deceased left their house going to his 2nd wife's house which is 1st accused's house, there is no evidence that he went there. If the 1st accused person were called upon to explain, the court would be expecting to fill the gaps in the prosecution case. There is not even circumstantial evidence against her and she remains a mere suspect.

Though it has been alleged that the deceased and the 2nd accused person were involved in some land transaction, which land was also sold to PW6, the 2nd accused person has not been linked to the deceased's murder in any way. He remains a mere suspect too. PW6 was a suspect and was even arrested but was later released. I find that there is totally no evidence linking the two accused persons to the murder of the deceased save that they remain suspects. The prosecution has therefore not met the threshold of a criminal charge. If the accused persons were asked to make their defences, the court would be shifting the burden on them to prove their innocence.

In the result, I find no evidence connecting the accused persons with the death of the deceased and they are hereby acquitted under **Section 306(1)** of the **Criminal Procedure Code**.

DATED and DELIVERED this 21st day of January, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Otieno holding brief for Mrs Ndeda for the accused persons.

Mr. Nyakundi for the state.

Kennedy – Court Clerk.