REPUBLIC …… PROSECUTOR

VERSUS

MARTIN MWANGI CHEGE ……..……. ACCUSED

JUDGMENT

The accused, Martin Mwangi Chege is charged with murder contrary to section 203 as read with section 204 of the Penal Code. According to the information laid against him by the Attorney General, it is alleged that on the 21st day of June 2004 at Kaaga area near K.E.M.U. in Meru Central District the accused murdered Elizabeth Nyambura (the deceased).

The prosecution called evidence to the effect that the deceased was a girlfriend to the accused person. That on the night in question at about 7 pm the two arrived at the home of PW7, Charles Kariuki, (Mr. Kariuki) an uncle to the deceased and a practicing advocate of this court. The deceased was also employed in the law firm of Mr. Kariuki in Meru town.

Upon arriving at Mr. Kariuki's residence they were served dinner by PW1, Stephen Gikundi (Gikundi). Gikundi and PW2, Jacob Munene (Munene) were employees of Mr. Kariuki at his residence. Mr. Kariuki on this particular day was away in Nairobi.

On that fateful night Gikundi and Munene left the deceased and accused in the main house to go to their respective quarters for the night. It was Gikundi's evidence that from his quarters he was able to see the main house and noticed that the deceased and accused had disagreed because the accused appeared to have been thrown out of the house by the deceased as they were only talking through the window. Eventually, the deceased allowed the accused back into the house. Gikundi and Munene testified that they saw the accused the following morning. He informed them that the deceased had gone to work.

PW3, Henry Gituma Mbogori (Gituma), a neighbour and a client to Mr. Kariuki found the accused, Gikundi and Munene together that morning and once again the accused informed him that the deceased had gone to work. Later that morning when Gikundi went to the deceased person's room to get soap he found it locked. In the meantime the accused borrowed some money from Munene and left for Nairobi.

While Gikundi was washing the veranda to the main house he saw through the window that the deceased was infact lying on her bed. He looked for Munene but was unable to trace him immediately. Munene returned home at about 4pm and was informed about this. Both Gikundi and Munene went to the deceased's bedroom window and confirmed that she was dead. They contacted Mr. Kariuki who had shortly returned to Meru from Nairobi. A report was made to the police and according to PW4 Cpl Julius Kurgat the body of the deceased was moved to Nkubu mortuary where post mortem examination was conducted by PW5 Dr. Henry Njiru (the doctor.) The doctor on his part told the court that he noted three bruises on the left side of the deceased's neck and one large one on the right side.

He also observed that the trachea cartilage was crushed and lungs congested. In his opinion the cause of death was asphyxia due to strangulation. On 14th August 2005, after nearly one year the accused was arrested by I.P. Stephen Kabe in Nairobi. He was subsequently transferred to Meru where the present charges were preferred.

In his sworn evidence in defence the accused confirmed that he had been having a relationship with the deceased some three months before her death. He further confirmed that indeed he was with the deceased on the night preceding her death. That before they went to Mr. Kariuki's residence that evening they had met at a pub where the deceased took beer and the accused took soda. According to the accused the deceased appeared drunk.

At Mr. Kariuki's residence they joined Gikundi and Munene briefly before the duo left. The accused went to the bathroom to take a bath. On returning to where he had left the deceased she was not there. Her phone was ringing. The accused received it and confirmed it was Mr. Kariuki calling. He went outside the house to look for the deceased. And there she was in the arms of Gikundi, embracing and kissing. When Gikundi noticed him he released the deceased. The accused got hold of Gikundi's shirt but before he could do anything to him Gikunda broke loose and ran away threatening to unleash the dogs on him.

The accused fearing the dogs ran to the main house only to find he had been locked out. He ran outside the home and sought accommodation for the night at a friend's house some 4km away. The following morning he returned to Mr. Kariuki's residence to collect his personal belongings. On arrival he found Gikundi, Munene and Gituma standing outside the compound. On seeing the accused Gikundi walked away and stood aside. The accused found his belongings thrown outside the main door which was locked. After collecting them he left for Nairobi having obtained an advance from Munene. However, before leaving for Nairobi he made a final attempt to see the deceased by going to her place of work – Mr. Kariuki's chambers. He was informed that she had not reported on duty that morning. On the way to Nairobi he kept on calling the deceased's phone without success. He concluded that their relationship had ended.

After that he did not bother again with the deceased. That constitutes the evidence in this trial. The issues are largely uncontroverted. For instance, there is no dispute that the deceased and the accused person were friends; that they were together on that fateful night; that the following morning the accused was at Mr. Kariuki's residence. The presence of Gikundi and Munene that evening and the following day at Mr. Kariuki's residence is also not in dispute.

From the doctor's evidence I find as a fact that the deceased died of strangulation. The accused is facing a charge of murder. In other words it is the prosecution case that the deceased was murdered by the accused. However, from the totality of the evidence adduced by both the prosecution witnesses and the accused there is no direct evidence of any witness who saw the accused commit the murder.

The prosecution evidence is purely circumstantial. It is based on the evidence that the accused was the only person with the deceased before she was found dead; that the accused and the deceased disagreed and the former briefly thrown out of the house on the night in question; that the following morning the accused told Gikundi, Munene and Gituma that the deceased had gone to work when she was in fact dead; that he left the body locked in the room and disappeared for nearly one year.

It is settled that to rely on circumstantial evidence to found a conviction that evidence must irresistibly point to the guilt of the accused person to the exclusion of anybody else. See **Rexrkipkering arap Koske** 16 EACA 135. In **Musoke V. R.** (1958) EA 715 citing with approval **Teper V. R.** (1952) A.C. 480 an additional principle was introduced, namely;

"***It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference."***

Does the evidence adduced irresistibly point to the guilt of the accused and no one else; are there co-existing factors that weaken or destroy the inference?

I am persuaded that the accused spent the night with the deceased. While he claims that he disagreed with Gikundi over the deceased, he did not advance any reason why Munene who even advanced him bus fare and Mbogori would testify that he told them that the deceased was taking a bath and later that she

had gone to work.

It would appear that there was some misunderstanding between the accused and the deceased which led to the former being temporarily evicted. It is probable that that misunderstanding arose from the compromising position in which the accused found the deceased and Gikundi in. It is strange that even after returning to his quarters Gikundi was still keen to see what was happening in the main house.

While I am alive to the fact that the accused assumes no burden to prove his *alibi,* his version that he ran out of the compound for fear of the dogs cannot be true. First there was evidence that there are no dogs in Mr. Kariuki's residence. Secondly there is also evidence that the gate to the residence was locked at 10pm. I reiterate that the accused spent the night in Mr. Kariuki's house. Munene, who in my view was an independent and credible witness told the court how he reported on duty at Mr. Kariuki's house from his house some 120m from Mr. Kariuki's house at 7.30am on the morning of 22nd June 2004. He found Gikundi talking to Gituma about the misunderstanding of the previous night between the deceased and the accused.

As they were discussing, the accused who had gone to buy cigarettes appeared. Munene who is the supervisor of Mr. Kariuki's workers sought to know from the accused if the deceased had gone to work to which the accused replied that she was taking a bath. At that stage the accused went into the main house. About two (2) hours later at 10am the accused approached Munene at his quarters for a soft loan – for bus fare after which he collected his bag and was escorted to the bus stage by Munene. That evidence places the accused squarely at the scene thereby displacing his *alibi* defence. The fact that the deceased was last seen well and alive was found the following day dead and the fact that the only person who was last seen with her was the accused called for an explanation as from the accused person if no adverse conclusion would be drawn. That is the import of section 111 of the Evidence Act.

Having dismissed his *alibi* and the accused having failed to offer an explanation as to how the deceased met her death while they were together, then in terms of section 119 of the Evidence Act the presumption is that he knew how the deceased met her death.

The other fact or is that after the accused left for Nairobi on 22nd June 2004 he was not seen until 14th August 2005 when he was arrested, although there is evidence that he was a very frequent visitor to Mr. Kariuki's residence. Indeed according to Munene the accused had been to the residence on 19th June 2004 – only some three days before the incident and according to Gikundi the accused would visit the deceased after a week or a month. While it was Mr. Kariuki's evidence that the accused used to visit his houses in Nairobi, Embu and Meru and further that the accused attended Mr. Kariuki's brother's and father's funerals on separate occasions. Being that close to the deceased and by extension to Mr. Kariuki's family one would have expected the accused to show some interest and concern about the deceased.

He stayed away for nearly one year until he was arrested. In the recent Court of Appeal decision in **Ronald Mwachia Ezekiel V. R.**, citing with approval the High Court case of **Gathagu V. R.** (1984) KLR 652 it was held that it amounts to circumstantial evidence where the suspect disappears immediately after the commission of the offence. The Court of Appeal stated that:-

"***We respectfully agree with the decision of the High Court in Gathagu V. R. (1984) KLR 652 that if an accused person goes into hiding immediately after the incident giving rise to the charge, that conduct amounts to circumstantial evidence that should be taken into account."***

I have said enough on that aspect of this case. The accused in his defence stated that he found the deceased and Gikundi in a compromising position. That he grabbed Gikundi by his shirt and that Gikundi broke lose and ran away before he (the accused) could do anything. The question is – was the accused provoked when he found his girlfriend embracing and kissing Gikundi?

If at all that was the case, was it sufficient to lead an ordinary or a reasonable person to do what the accused person did? The burden of establishing that the accused was not provoked is on the prosecution.

Although the deceased was only a girlfriend of the deceased the definition of provocation in section 208 of the Penal Code is wide enough to include such a relationship. See **Mangi V. R.**

The most important thing to consider is whether the act or insult in question was of such a nature as to be likely to deprive the accused of the power of self-control and to induce him to commit the offence charged? Put differently, did the accused attack the deceased in the heat of passion due to sudden and grave provocation? That is a question of fact whose determination will depend on the peculiar circumstances of each case.

But the measure is whether an ordinary or a reasonable person in the accused person's position would have responded to the provocation in the manner he did. See **RC V. R** Criminal Appeal No. 199 of 2004. According to the post mortem report there were three bruise marks on the left side of the neck and one large one on the right side. The trachea cartilage was also crushed. This was the cause of asphyxia secondary to strangulation. It is my considered opinion that if the accused person was reacting to having found the deceased person kissing Gikunda, he overreacted as no reasonable person with the kind of exposure and education (gave his evidence in flawless English language) if the accused person would have responded by applying the pressure and force on a helpless girl's neck. The plea of provocation is not available to him in the circumstances of this case. He, no doubt, intended the consequences of his actions.

The final point which I must now turn to before I conclude is with regard to the alleged violation of the accused person's rights. On behalf of the accused person it was submitted that he was detained by the police after his arrest for a period in excess of fourteen (14) days contrary to section 72(3) of the Constitution. The offence was committed on the night of 21st June 2004, the accused arrested on 14th August 2005 and brought to court on 19th October 2005. That period is clearly in excess of the fourteen (14) days allowed under the Constitution.

It is now settled that the rights enshrined in section 72(3) are not absolute in the sense that where sufficient explanation for the delay is offered the detention beyond fourteen days will not constitute a violation of the rights under section 72 of the Constitution. See **Paul Mwangi V. R.** Cr. Appeal No. 35 of 2006. The issue having been raised during the trial the prosecution offered the explanation through PW9 Sgt. Harriet Kinya and partly through PW6, I.P. Stephen Kabe. The latter arrested the accused person on 14th August 2005, kept him at Savanna Patrol Base in Nairobi for a few hours before he was transferred to Buru Buru Police Station. The evidence of the former was not helpful in so far as the detention of the accused person from the date of his arrest to the date he was brought to court is concerned.

She was simply handed over the file for investigations by the officer in-charge crime on 6th September 2005 to proceed with investigations. By the time the file was handed over to her the fourteen (14) days had expired. Yet there is no explanation as to when the accused person was brought to Meru and what was happening before the file was handed over to Sgt. Kinya. The investigating officer before Sgt. Kinya who would have been better placed to link up these loose ends was not called.

Again the explanation for the period between 6th September 2005 when Sgt Kinya took over the matter and 19th October 2005 – a whole month – is not satisfactory. Sgt. Kinya explained that she used that period to record statements from witnesses, forward the investigation file to DCIO who later forwarded it to the office of the Attorney General. There are no details of the witnesses from whom the witness recorded statements.

There are internal processes in the investigative branch of the police where the file moves back and forth between the office of the Attorney – General and the investigating officers. Those processes no doubt, are useful. However, they must be conducted within the law; within the fourteen days set by the supreme law. In **Gerald Macharia Githuku V. R**, Cr. App. No. 119 of 2005 where the appellant had been detained for seventeen (17) days from the date of his arrest to the date he was arraigned in court, the court upheld the appellant's appeal and observed that:-

"…….***although the delay of 17 days in bringing the appellant to court after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the Constitution should be disregarded……..”***

In the famous case of **Albanus Mwasia Mutua V. R.** Criminal Appeal No. 120 of 2004 it was held, inter alia, that:-

"***The jurisprudence which emerges from the cases we have cited in this judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”***

There being no explanation for detaining the accused person for over sixty (60) days contrary to the provisions of section 72(3) of the constitution, I am bound, the unanimous opinion of the assessors and my finding that the accused committed the offence notwithstanding, to find that his constitutional rights were violated. Accordingly, I order that the accused person shall be set at liberty forthwith unless he is held for some other lawful cause.

Dated and delivered at Meru this 28th day of January 2009.

W. OUKO

JUDGE