REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 33 of 2006

REPUBLIC ……..…….PROSECUTOR

VERSUS

FLORENCE WAMBUI NGONE ……..……..ACCUSED

JUDGMENT

The accused person, Florence Wambui Ngone is charged with Murder contrary to section 203 as read with section 2004 of the Penal Code. The particulars of the offence are that on the 8th of February, 2006 at Garilee Village, Thika District within Central Province, murdered Paul Ngone Gitau.

This case was heard by Hon. Ojwang J. before he was transferred out of the station. My learned brother heard the entire prosecution case and went even further to make a ruling under section 306 of the Criminal Procedure Code. In his ruling, the learned Judge found that the accused should answer the charge. I took over the case at that point and having explained to the accused her rights under section 200 of the Criminal Procedure Code, she opted to have the case continued from where the previous Judge left off. I therefore took the defence case and the submissions of the counsels. I must also state that I noted a procedural defect in the proceedings of this case in that having started the trial with assessors, the learned Judge discharged all the three assessors from the proceedings. The learned Judge in his ruling cited the Statute Law (Misc Amendment) Act No. 7 of 2007 as the reason for that decision. I say no more. I hereunder set out the case.

The brief facts of the case are that the accused is the wife of the deceased. At the time the incident occurred, the accused and the deceased were not living together following a disagreement which led the deceased to require the accused to leave the matrimonial home on the 5th February, 2006. There are two (2) witnesses who testified that they saw the accused in the compound where her matrimonial home is situated on the day of the incident. These were PW6, wife of PW4's son George, and PW1 Leonard, PW4's son. It is within this compound that the deceased was found dead on the morning of 8th February 2006.

In order to give a clear picture, it is important to describe the compound according to the evidence of the Assistance Chief of the area who was PW 3, one Peter Njuguna Wanyoro. PW 3 stated that the compound where the deceased lived had a set of two houses on one side and three houses on the other, each separated by a hedge. The two houses on one side were for the deceased and the accused, and the second belonged to their son Uno Mwaura. The other three houses across theirs belonged to the brother of the deceased, Gabriel Ndungu Gitau, PW 4, and his two sons Leonard Nduti, PW1 and George Gitau Ndungu.

In regard to the events of 8th February 2006, we have the evidence of three eye witnesses who claim that they saw a fight between the deceased and his son Uno Mwaura. These were PW1 and 2 Leonard and Jacinta Nduti who were husband and wife, and PW6 Esther Gitau,wife of George Gitau. As already stated they all lived in the houses within the compound where the deceased lived. From the testimony of these three witnesses it appears to me that PW6 Esther witnessed the entire episode from the beginning. From her testimony, Esther states that she saw the accused person within the shared compound of their homes at 10 p.m. in the night in question. Esther claims that she saw her going round and round within the shared compound just before the incident. Esther continued to say that the accused walked away from the compound only to return later accompanied by her son Uno to his house. Esther stated that she saw the son Uno enter his father's house (the deceased). The next thing she said she saw was Uno Mwaura holding his father by the shoulders and dragging him without shoes towards PW4's house. PW 4 did not live within the compound and therefore the house was unoccupied at the time. Esther testified that the deceased was making noise and screaming at the same time. She also testified that Uno Mwaura was beating and kicking his father as he dragged him towards PW4's house. According to Esther, Leonard and Jacinta came out of their house at the point when Uno Mwaura was beating and kicking his father outside PW 4's house. That evidence that Leonard and Jacinta were attracted by the screams from the deceased person, and that the deceased was beaten and kicked by his son outside PW4's house, was confirmed by the two witnesses, PW1 and 2. Both Jacinta and Esther testified that they told off and dissuaded Uno Mwaura from beating and kicking his father and that he eventually heeded and left him.

All three witnesses that is, Leonard, Jacinta and Esther collaborated their evidence that Uno Mwaura claimed that he was disciplining his father for being abusive and for breaking into PW4's house. All three witnesses testified that they all withdraw back into their houses after Uno Mwaura stopped kicking his father. All three also corroborated their evidence that they left the deceased lying outside PW4's house. According to their evidence, the deceased was found lying dead at the same spot the following morning.

There are two incidents which took place before the one in question. The first one was on 5th February and was testified to by PW6 Esther. Esther testified that she saw the accused and deceased outside their house, which was across from her house. She saw the deceased removing clothes and crockery from his house and dumping them outside. The clothes belonged to the accused. Esther testified that both were saying nothing and further that the deceased appeared

drunk since he was staggering as he walked.

The second incident is testified to by Leonard PW1 and Esther PW6. This one happened on 8th February at 5pm. Leonard testified that he saw the deceased break into the house of PW4 (Leonard's father's house) and remove clothes and crockery belonging to the accused. Esther testified that the clothes the deceased removed from PW4's house were the same ones she had seen the deceased dump outside his house. The deceased looked set to burn the clothes because he armed himself with a matchbox. Both Esther and Leonard testified that Leonard persuaded the deceased not to burn the clothes and that he agreed not to do it. The two also testified that Leonard went for Elizabeth, PW9, and daughter to the deceased, who successfully persuaded the deceased to leave the clothes and to go to sleep. It was by then 6p.m.

After these two incidents, is when the fateful one where the deceased son, Uno Mwaura, was seen kicking, hitting and dragging his father by the shoulders occured. That was the last time that the deceased was seen alive.

The accused defence was that the deceased, who was her husband, beat her and chased her away from their matrimonial home on 3rd February, 2006. She testified that he told her that he never wanted to ever see her again. The accused in her unsworn statement stated that her husband asked her to remove all her belongings from their house, which she did. The accused testified that after removing her belongings from their home, she left them in her brother-in-law's house (PW4) and left. She claimed that she left the home and did not go back there until the 13th February, 2006 when she was arrested while at her parents' home. She denied causing the husband's (deceased) death.

I have carefully considered the evidence adduced by both the prosecution and the defence. I also considered the submissions by both Mrs. Kinyori for the accused and Miss Mwaniki for the State.

The defence was of the view that the prosecution was relying on circumstantial evidence, going by Mrs. Kinyori's submissions. The State on the other hand was of a different view. It was Miss Mwaniki's submissions that the State was relying on the doctrines of common intention and principle offender. It is my view that both counsels are right. The state is relying on all three proposed principles in support of a conviction for this offence.

The evidential burden is upon the prosecution to prove its case beyond any reasonable doubt. The Court of Appeal for Eastern Africa, in the celebrated case of **OKALE VS. REP 1965 EA 555** held:

> **"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches; (repeating the principles set out in NDEGE MARAGWA VS. REP (10)), the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole."**

I will now consider what the circumstances of the case are and what in it the State regards to be in its favour. The Court of Appeal in **KARIUKI KARANJA VS REP[1986] KLR 190** stated as follows regarding circumstantial

evidence.

> **"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution."**

That statement is in line with the holding on the same point in the celebrated case of **REX VS KIPKERER ARAP KOSKE [1949] 16 EACA 135.**

The issue is whether there is any circumstantial evidence against the accused person. Ms Mwaniki submitted that the state was emphasizing the particulars of the charge, that the accused was charged jointly with another not in court. For this reason, it is the prosecution's case that so long as it can be shown that the accused was not acting alone, the case against her was proved.

Mrs Kinyori in response to that contention submitted that the prosecution had failed to discharge its burden and to prove its case on the required standard for the reason that the evidence adduced did not disclose that the accused caused the death of the deceased or that the accused committed the unlawful act, and further that the circumstantial in the case did not meet the required standard. Counsel submitted that none of the key witnesses testified that they saw the accused at the scene of the incident just before or during its occurrence, nor did they testify that the accused had participated in the beating and kicking of the deceased. Counsel relied on the case of **REP VS. NYAMBURA AND 4 OTHERS [2001] KRL 355** ,where Etyang J held.

> **"In a case where the accused are charged with committing murder "jointly with others not before the Court, it is necessary that the prosecution places the accused persons in the crowd of people which killed the deceased."**

Mrs Kinyori submitted that since the accused had been charged **"jointly with another not in court",** the prosecution had failed to place the accused at the scene of the incident.

I have already reviewed the evidence adduced by the State. It is clear from the evidence that two people saw the accused within the compound of five houses as explained earlier, at 10pm, on the material day. That was just before Uno Mwaura was seen dragging his father by the shoulders towards his uncle's house (PW4's), and hitting and kicking him. The two witnesses are Leonard and Esther.

I noted the comments made by my learned brother, Hon. Ojwang J., regarding the testimony of Esther PW6. The learned Judge commented that this witness was,

> **"The witness now in the witness box has become fidgety as she gives her evidence. She testified in a manner that does not shed any light on the happenings of the material date. It is apparent to me, at this stage, that there is no forthright testimony coming out. I wish to administer this warning to the witness. She has taken an oath to speak the truth, and she is bound on that oath. Testimony will continue to be taken – and she is to respond frankly. I form the clear impression that she is misleading the Court, that will be perjury – which is an offence for which she stands to be prosecuted and, if found guilty, committed to jail. This, therefore, is a warning to PW6, that she ran's grave risk of being subjected to the criminal process if she will not give truthful testimony before this Court. I now order that the examination in chief is to continue."**

As I stated earlier, I did not take the evidence of any of the prosecution witnesses and so I had no opportunity of examining their demeanor. That notwithstanding, much as the Judge was concerned that Esther had faulted and had ceased to be of assistance to the court at some point during her testimony, I did find material corroboration of Esther's evidence in the prosecution evidence. Esther's evidence that the accused was within the home where the incident occurred on the night in question received corroboration from the evidence of Leonard. In fact Leonard went even further in his evidence because according to him, the accused woke him up at 9.30pm on 8th and inquired to know from him who had broken into PW4's house and whether her clothes had been burnt. Leonard testified that when he told the accused that the deceased had broken into PW4's house but that her clothes were safe, she left the position where she was at his window.

On Esther's part, she said she saw the accused at around 10pm going up and down the compound before leaving. Esther's testimony was that no sooner had the accused left than Uno Mwaura came into the compound straight for his father. Esther's evidence was therefore corroborated by the testimony of Leonard. I find good reason to find that Esther was telling the truth and that her testimony was worthy of belief.

The accused put forward alibi as a defence against the charge facing her. In the case of **KARANJA VS. REP 1983 KLR 501** it was held as follows:

> **The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.**
> **In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see it the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.**

The question is at what stage was this defence put forward and whether the defence is available to the accused.

I have looked at the record of the proceedings. The accused person did not put forward *alibi* as a defence at any stage of the proceedings until the time of her defence. The accused was represented by counsel throughout the case. In

line with the Court of Appeal decision of **KARANJA VS. REP**, supra, the defence was put in late and must be regarded as an afterthought. That aside, I must mention here that *alibi* is not strictly speaking a defence as is the defence of insanity. The Court of Appeal in the case of **LEONARD ASENATH VS REP (1957) EA 206**adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3 ALL E.R. 969** which held as follows:

> **"Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case."**

Even if the court has to consider the *alibi* put forward the evidence of the accused is very clear that the accused had been seen at the scene of the incident shortly before the incident occurred. I believed the evidence of PW1 and 6 that the accused was at the scene of incident at the time it occurred. The defence is in the circumstances unavailable to the accused person.

Going back to the principles of common intention and principle offender it has been established that the accused was around the scene of incident just before the deceased and his son fought. Was there any common intention?

Ms Mwaniki for the State submitted that the prosecution was relying on the evidence PW1 and 6, Leonard and Esther to the effect that after the accused found her things thrown out of her home, she called her son Uno Mwaura who started beating his father. Learned counsel for the State submitted that the prosecution evidence established that Uno Mwaura had beaten his father until he succumbed to his injuries. That bit that Uno beat the deceased until he succumbed to the injuries is not supported by the evidence. The evidence was the deceased was alive when his son stopped beating him and was even seen by PW1 trying to stand up.

I have already set out in this judgement what Ms Kinyori, learned counsel for the accused submitted regarding the rote of the accused in this case, basically stating that accused was not shown to have been at the scene at the material time. **Section 21** of the Penal Code defines what common purpose is in the following words.

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197,** considered the meeting of common intention and stated as follows at page 204.

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.**
>
> **The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (Cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault Rep vs Tabulayenka s/o Kirya (1943) 10 EACA 51."**

Having considered this evidence I believe the testimony of both Leonard and Esther that the accused had come to the compound between 9.30pm and 10.00p.m. The next issue to consider is whether that evidence meets the standard to qualify as circumstantial evidence against the accused. I have already quoted the case of **KARANJA VS REP (1986)**, supra. The burden is upon the prosecution to prove facts which could justify the drawing of such inference. The position in this case is that the prosecution has adduced direct evidence which shows clearly that the deceased was battered by his son the night before he died. The doctor's findings of the cause of death are consistent with the injuries inflicted by the deceased son as witnessed by PW1, 2 and 6. As for the role of the accused in all these, I will get back to this at a later stage. I am not satisfied that the prosecution discharged its burden of proving facts that could justify the drawing of an inference that the accused was a principle offender or that she was acting in common intention with her son Uno Mwaura. None of the witnesses actually heard any discussion between the accused and her son at all or to the effect of conspiring to injury or cause the death of the deceased. The prosecution relies on mere suspicion that just because the accused was seen at the scene on the material night she must have been a party to the incident. That suspicion is however not sufficient to justify the drawing of an inference that the accused guilt was a principle offender or that she had a common intention to commit the offence with others. Further, that suspicion cannot sustain a conviction for the offence against her.

Having come to the conclusion I have of this case, I find that the inculpatory facts are as consistent with the accused innocence as they are of her guilt, that these facts are cabable of explanation upon other hypothesis other than of the guilt of the accused. For these reasons the evidence addused by the prosecution is insufficient to sustain a conviction for this very serious offence of Murder.

In conclusion, I find the accused person not guilty and acquit her for the offence for which she is charged accordingly.

Those are the orders of the court.

Dated at Nairobi this 9th day of December, 2009.

LESIIT
JUDGE

Read, signed and delivered in the presence of

Court clerk

Present

For the State

For the Accused

LESIIT
JUDGE