



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 120 of 2004

REPUBLIC

VERSUS

STEPHEN NDUATI MAINA

JUDGMENT

The accused has been charged for the offence of murder, contrary to Section 203 as read with with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The facts of the prosecution as stated in the information are as follows:-

“On the 11th June, 2004 at Kariango Village in Kiambu District of the Central Province, murdered CATHERINE WANGARI WAMBUI”

In her evidence, PW1 – Veronica Wambui, aged 15 years, testified that she stays in Uthiru area and learns at Kabete Veterinary Lab Primary School in Standard 6. Besides the above, PW1 who is a sister to the deceased informed the court that they used to stay together with her sister at her grandmother’s house viz, Damaris Wanjiru. She recalled that on 11th June, 2004 at around 8.00p.m. while she was with the deceased, they met Nduati. On seeing him, the deceased held his hands and told him to go and greet their grandmother. After greeting both the grandparents of PW1, Nduati excused himself on the ground that he was in a hurry. From there, PW1 and the deceased went and bought vegetables before going back to the house. While they were in the house, Catherine went outside and her sister viz, Penina started crying. When Catherine (deceased) went back to the house and found that her mother was not in, she went out looking for her. According to PW1, though Nduati (the accused) had earlier promised to buy them – mandazi, chips, sausage and biscuits – they turned down his offer. She also recalled that while talking to them, the accused was caressing the body of the deceased. It was the evidence of PW1 that when Catherine went to look for her mother at around 8.30pm, she never went back home. On the other hand, PW2 – Ayub Nduung’u Gachonde, a grandfather to the deceased, recalled that on 11th June, 2004, his wife viz, Damaris sent the deceased, and her sisters (Veronica and Wangui to buy vegetables). They later went to their home at around 8.00p.m. and started shouting that Nduati was going to greet their grandmother. When there was power outage for about ten minutes, PW2 realized that the deceased and Nduati had left. Though two brothers of the deceased viz, Njoroge and Gitau started looking for their sister, the search was in vain. On the following day, PW2 went and reported the matter at Kabete Police Station. On the following Sunday, PW2 was informed that the body of the deceased had been recovered in the University farm and that the same had been taken to Kikuyu Police Station. Consequently, the body was transferred to the City Mortuary, where PW2 identified the same before a post mortem was carried out. In her evidence, PW3 – Judith Wambui Kanyi, a trader selling green grocers recalled that on 11th June, 2004 at around 7.30p.m. she sold green vegetables and tomatoes to the deceased, Wambui and Jane. She also explained that from her kiosk to the home of the young girls is about 30 metres apart. On her part, PW4 – Jane Wambui Nganga aged 11 years testified that on 11th June, 2004 at around 7.00 p.m. she was sent with the deceased to go and buy green vegetables. According to PW4 when they reached home, the deceased cheated her grandmother that she wanted to go for a short call. PW4 confirmed that there was power failure and when the electricity went back, they could **not** tell where the deceased was. She also recalled that when they had earlier gone to buy vegetables – they met Nduati who later accompanied them home to greet their grandparents. Apart from the above, PW4 also explained how Nduati had enticed them so that he could buy sweets, biscuits, samosas and saugages for them. Though PW4 and Veronica declined the offer, the deceased accepted the same. According to PW4, when there was a power outage, Nduati held the deceased by the hand despite the protestations by the former. When PW4 went back to the house, she never saw the deceased again. On the other hand, PW5 – PC John Kanyi testified that on 12th June, 2004 while he was attached to Kiambu Police Station, at around 4.00p.m., he was instructed to accompany Inspector Otikiri to the scene of the crime. On reaching there, they found the body of the deceased lying on the ground with her face directed upwards while wearing a

green top and that the trouser to the track suit had been removed. That apart, he also observed that one side of the under-pant had been used to hold both legs, and that the deceased was also bleeding from the nostrils and the leg. On 23rd June, 2004, PW5 attended the post-mortem of the deceased at the mortuary. During the same, the witness requested for vaginal swab of the deceased, blood sample and the clothes. Thereafter, PW5 took the vaginal swab and blood sample to the Government Chemist. In his evidence, PW6 – PC Nicholas Kakula testified that on 15th June, 2004 while in the company of PC Mugambi, PC Nganga, PC Mwendo and Simon Kaloki Muriuki, they arrested the accused who was on the way to the funeral of his grandmother.

In his defence, Stephen Nduati Maina (hereinafter referred to as the accused) introduced himself as a carpenter at Mwiki area. The accused explained that on 11th June, 2006 he was at home and later went to see his sister at Muthua at 7.00p.m. From there, the accused went to see his friend Kariuki who is a neighbour to the sister. According to the accused, he later saw some young girls carrying green vegetables. Subsequently, the accused went to greet Kariuki's grandmother and went back to the shop – where he stayed upto 8.30p.m. before going home. The accused reckoned that on the following day, he went to Kiambaa in connection with the funeral arrangements of the grandmother. After staying there for four days, the accused was arrested while on his way home. In conclusion, the accused stated that he did **not** know the deceased and also denied killing her.

After the conclusion of the trial, the three assessors unanimously returned a verdict of “**not guilty**” against the accused for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. According to the assessors, there was **no** evidence to show that the accused walked away with the deceased and that the post-mortem form was **not** presented to the court. They also stated that the evidence on record does **not** link the accused to the murder.

From the evidence on record, it is apparent that none of the prosecution witnesses actually saw the accused kill the deceased. It was crystal-clear that the accused was implicated in the killing due to the fact that he was the last person who was seen with the deceased when she was alive. Basically, the prosecution relied entirely on circumstantial evidence to prove their case. Unfortunately, the investigating officer never availed any weapon that was found on the accused that could link him to the offence. The court has in mind – a weapon like a knife, panga or firearm. That means that the evidence was just left hanging in the air. Besides the above, the evidence that was adduced show that PW5 had requested for vaginal swab of the deceased, blood sample and clothes. He also testified that he had taken the above to the Government Chemist for analysis. Unfortunately, the Government Chemist was not summoned to court to testify on his examination. The fact that the prosecution failed to avail the results of the examination can only be interpreted to mean that the same were not favourable to them or absolved the accused from the commission of the offence. Significantly, the prosecution also failed to call the doctor who performed the post-mortem to produce his report. The said report would have specifically shown the cause of death. As things stand now, the court is not aware of the cause of death. That means that the court has been left to guess what may have happened. In criminal trials, the duty to prove the case beyond any reasonable doubt lies with the prosecution. The accused has no obligation to fill the gaps in the prosecution case. Whereas the investigating officer had the right to suspect the accused, this court cannot use suspicion – however strong – as a basis to convict the accused.

It is unfortunate that the prosecution denied the court access to the above scientific reports. It must be emphasized that the prosecution has a duty to avail all relevant documents to the court that are relevant to help in reaching an informed decision. The Attorney General's duty is not to secure convictions in criminal cases. It is his duty to help the court reach the correct decision by availing all the relevant information within his custody. That will enable the court make an informed, just and impartial decision. It is on that note that the pivotal and crucial role of the Attorney General is clearly stated in Section 26 of the Constitution of Kenya. The same states inter alia,

- ***The Attorney General shall be the principal legal adviser to the Government of Kenya.***

- ***The Attorney General shall have power in any case in which considers it desirable so to do –***

(a) To institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person.

(b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

My interpretation is that the Attorney General has to discharge his duties diligently, efficiently, independently and fairly. However, the Constitution deliberately never set any pre-conditions that he must ensure that he secures convictions at any cost. That is because the same will fly against the face of the basic principles of the rule of law. It will also be

against the fundamental rights of the litigants being brought to court. That is because each accused is presumed to be innocent unless proved otherwise.

In the case of;

SAWE VERSUS REPUBLIC

CRIMINAL APPEAL NO. 2 OF 2002

(2003) KLR PAGE 364

The Court of Appeal stated inter alia;

In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of Republic versus Kipkering Arap Koske & Another 16 EACA 135 where it held, inter alia that:-

“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.”

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial Judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira versus Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned Judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

That being our view of the matter, we allow this appeal, quash the appellant’s conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.”

Applying the above principles to this case, it is apparent that the prosecution failed to prove any nexus altogether between the accused and the commission of the offence. The upshot is that I hereby wish to resolve the above doubts in favour of the accused. I hereby find that the prosecution has failed to prove their case beyond any reasonable doubt. Under the circumstances, the defence of the accused seems plausible and reasonable under the circumstances. While concurring with the unanimous verdict of the assessors, I do wish to “**acquit**” the accused of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The accused should be released forthwith unless held lawfully.

Those are the orders of the court

MUGA APONDI,

JUDGE.

Judgment read, signed and delivered in open court in the presence of the accused,

Ms Kiptoo.....Defence Counsel

Imbali.....State Counsel

MUGA APONDI,

JUDGE.

25TH SEPTEMBER, 2008