



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE 3 OF 2005**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AGNES WARAU KIMOTHO.....ACCUSED**

**JUDGMENT**

The accused person, Agnes Warau Kimotho was charged with the offence of **murder** contrary to **section 203 as read with section 204 of the Penal Code**. The particulars of the offence stated that, between the 5<sup>th</sup> and 6<sup>th</sup> day of December 2004 at Silanga Village in Nyandarua District, within Central Province, she murdered Fredrick Njoroge Warau. The prosecution relied on the evidence of six witnesses in their bid to prove the charge against the accused person. The accused person opted not to give or to call any evidence in defence.

The accused person is the mother of the deceased a young child of about five years. The accused person was at the time, living with the deceased whom she was looking after. Family members who testified during the trial said that the accused person was extremely protective and fond of the deceased. They could not explain why the accused person decided to throw the deceased in a well. The accused person is a single mother; she was staying at the family land with other members of the family.

On 5<sup>th</sup> December 2004 Francis Ndungu Wangari PW1 enquired from the accused person where the deceased was. The accused person told him that the deceased was asleep. The accused person went to church. After sometimes, Herbert Kimotho PW2 also a son of the accused person came home, PW1 informed him that the accused person had told him that she left the deceased sleeping in the house. PW1 was surprised because the deceased was an active child and used to walk around the compound. PW2 went into the house to check on the child, but did not see the deceased. They decided to look for him in the neighbourhood.

When their search yielded no results, they decided to report the matter to the Assistant Chief. They continued looking for the child even the following day. They also interrogated the accused person when she arrived home from church at 5.30 p.m. without the deceased. The accused person just entered her house and kept quiet but upon being probed by the neighbours, she left saying she had gone to look for the child. She returned at about 8pm without the child and locked herself in the house and refused to talk to anybody. The next day when they woke up they found the accused person had disappeared. They started looking for her but she returned home and when they asked her where the deceased was she said he was inside the water well.

That is when the neighbours arrested the accused person and took her to the police station. They found IP Tom Kario at OlKalou police station who interviewed the villagers and the accused person. The accused person led them to the water borehole where she said the deceased was. They emptied the water borehole and found the body of the deceased which was taken to Ol Kalau District Hospital Mortuary. A post-mortem examination was carried by **Dr. Sammy Masiku**. He formed the opinion that the cause of the deceased's death was cardio pulmonary arrest due to brain hypoxia due to either strangulation or drowning.

The accused person was also taken for mental examination and **Haron Auta PW5** a psychiatrist trainee at Gilgil General Hospital examined her. He formed the opinion that the accused person's mental state was very poor. She was disoriented and experiencing acute confusion. She had very poor memory could not recall anything and lacking insight. She could not tell whether she was sick or where she was. In his opinion, the accused person is a psychotic case and was suffering from severe depression.

Evidence from PW1, PW2 and also the accused person's sister Annah Wangari PW3 all testified that the accused person used to behave strangely. She never used to talk to people, she was suffering from depression. This was corroborated by the evidence of PW5. Counsel for the accused person submitted that the evidence on record failed to establish a prima facie case to enable this court convict the accused person of the offence of murder. Firstly no one saw the accused person kill the deceased either through strangulation or drowning. The deceased was a child aged about 5 years and no one could tell how the body of the deceased ended up in the well. Secondly there is possibility that the child dropped himself in the well. There was no evidence on motive because evidence was clear that the accused loved the deceased so much and was very protective of him. Counsel urged the court to consider the mental status of the accused as well. Lastly he submitted that the accused person was arrested on 6<sup>th</sup> December 2004 and he was not arraigned in court until the 7<sup>th</sup> January 2005 therefore the accused persons Constitutional rights as regards a fair trial were infringed upon, when the prosecution detained her in custody longer than the period provided by law.

On the part of the State Mr. Njogu submitted that the prosecution discharged the burden of prove. It is the accused person who led the police officers to where the body of the deceased was removed from a water-well. Moreover it is the accused person who used to stay with the deceased and kept on misleading the witnesses that the child was asleep, finally she revealed the child was in the well.

Based on the evidence on record it is clear the prosecution relied on circumstantial evidence that the accused person was lastly seen with the deceased. The accused person misled PW1 that the deceased was asleep when PW1 and PW2 established that the deceased was not asleep, the accused person was interrogated by neighbours, she was taken to the police station, and she is the one who led the police to the well where the body of the deceased was found.

For the prosecution to succeed in a case based on circumstantial evidence the facts of the case must be incompatible with the accused person's innocence and incapable of any other explanation or other hypothesis than that it is the accused person and no other person was responsible for the death of the deceased. See the case **Simon Musoke v. R [1958] EA 715** where the Court of Appeal held:

***“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”***

**Republic Vs Kipkering Arap Koskei & another 16 E.A.C.A 135**

***“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”***

The deceased was only five years old. He used to be looked after by the accused person. PW1 did not see the deceased and enquired from the accused person she misled him that he was asleep. After they

mounted a search and could not find the deceased the accused person led the police to the water well where his body was retrieved. From this evidence, I am satisfied that it is the accused person and no other person was responsible for the death of the deceased. However there is evidence that the accused person was suffering from depression. The report by the psychiatrist confirms that the accused person was found to be disoriented and suffering from acute depression. This medical finding was also confirmed by family members. I therefore make a finding that the accused person is guilty of the offence but insane.

Counsel also made reference to the provisions of **section 72(3) of the Constitution** and submitted that the accused person was not arraigned in court as provide in the law. It is provided that an accused person charged with a capital offence should be arraigned in court within a reasonable time or within fourteen (14) days. In this case the accused person was arrested on the 6<sup>th</sup> day of December 2004 and was arraigned in court on 7<sup>th</sup> January 2005. This was after a period of 30 days. The investigating officer who arrested the accused person testified in this matter. Counsel for the accused person did not seek an explanation why they did not arraign the accused person immediately after arrest. Counsel made this submission during the closing submissions. If the question was put to the investigating officer, he probably could have given an explanation. Upon consideration of this matter and also taking note that the month of December and January have public holidays, I am not satisfied that the Police inordinately detained the accused person and thus infringed upon her fundamental rights to a fair trial. Accordingly I will disregard the submission in this respect.

The accused person is found guilty but insane; it is ordered she be detained at the President's pleasure.

**Judgment read and signed on 23<sup>rd</sup> October, 2008**

**M. KOOME**

**JUDGE**