

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 22 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS GATONYE RICHU.....RESPONDENT

R U L I N G

This case arises from the unfortunate death of GWW, a young girl of about 12 years of age who died on the 15th April 2005. From the evidence of Dr. John Weru a medical officer stationed at Nyahururu District Hospital who carried out a post-mortem examination on the body of the deceased on the 19th April 2005, the deceased's vaginal wall, cervix and uterus were all bruised and there was pus in the peritoneum cavity leading to the conclusion that the cause of death was peritonitis secondary to severe pelvic infection caused by injuries to the internal genitalia secondary to defilement. Dr. Weru conceded that the injuries to the genitalia were curable if attended in good time.

Under Section 213 of the Penal Code: -

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases:-

(a)

(b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c)”

Francis Gatonye Richu (hereinafter referred to as the subject) is the one who is alleged to be responsible for the murder of the deceased. The prosecution has closed its case after calling a total of 8 witnesses. It is now incumbent upon this court to determine whether the prosecution has adduced sufficient evidence establishing a prima facie case against the subject.

From the evidence of Dr. Weru it is evident that the deceased's death was a result of the injuries arising from a sexual assault that the deceased had suffered. The question is whether there is prima facie evidence that the subject is the one who sexually assaulted the deceased and caused her the injuries that led to the deceased's death.

In this regard the prosecution relied on the evidence of the deceased's mother BWM (P.W.1). This witness did not however know that the deceased was sexually assaulted as the deceased never revealed this fact to her but only complained about her legs being swollen. P.W.1 only came to learn of the alleged assault from Serah Wangui Njogu (P.W.2) Beatrice Kerubo Siriba (P.W.3) and one Mary Wangui who claimed to have interviewed the deceased and to whom the deceased revealed that the subject had defiled her. Both P.W.2 & P.W.3 confirmed that the deceased made that statement to them. Given that the deceased died a few days after making that allegation. The same can be said to be a dying declaration. Such a statement may form the basis of a case against an Accused however, the evidence must be treated very cautiously.

In the case of **Choge v/s Republic** [1985] K L R 1, the court of appeal held as follows:-

“Though there need not be corroboration in order for a dying declaration to support a conviction, the exercise of caution is necessary in the reception into evidence of such a declaration and it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

Similar sentiments were expressed by the court of appeal in the case of **Kihara v Republic [1986] K L R 473.**

In this case the dying declaration was not consistent with what the deceased informed her mother nor was it consistent with what the deceased told the Clinical Officer Nicasios Wachira Kanyungo. She complained to each of them of having a fever and a swollen leg. Moreover apart from the dying declaration, there is only the unsworn evidence of the minor Keziah Njambi Maina who testified that she saw the subject kick the deceased. The subject then told the witness to go away and not turn back. The witness left and therefore was not of much assistance as to what happened thereafter. In particular she did not witness the alleged sexual assault.

It is evident that the deceased did not receive proper medical examination following the assault. This was partly because of her failure to initially reveal what had happened to her, her mother's negligence in failing to insist on knowing what was wrong and also the poor investigations following the report of the alleged defilement. As a result the deceased was taken to hospital several days after the alleged assault. Further neither the deceased nor the subject was examined to determine the presence of seminal fluid in the deceased's vaginal area, or cervix or the presence of any other infection and whether the same could be connected to the subject.

The evidence that has been adduced by the prosecution raises suspicions against the subject. The dying declaration points an accusing finger at the subject. It is not however sufficient to prove the case against the subject should he elect to keep quiet at this stage. Given the evidence available putting the subject on his defence would be to call upon him to explain the gaps in the prosecution case which is not his responsibility as the burden of proof lies entirely on the prosecution. I find that there is no prima facie case established against the subject as laid down in the case of **Ramanlal T. Bhatt v Republic** [1957] E. A. 332. I accordingly find the subject not guilty of the charge and acquit him under Section 306 (1) of the Criminal Procedure Code.

The subject shall be released forthwith unless otherwise lawfully held.

Dated, signed and delivered this 8th day of February 2006.

H. M. OKWENGU

JUDGE