



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 52 of 2005

REPUBLICPROSECUTOR

-VERSUS-

(1) ELIZABETH NDUTA KARANJAACCUSED

(2) JOHN MUNENE MBUGUAACCUSED

RULING

The charge information dated 5th April, 2005 and filed by the Attorney-General was that the two accused had, on 11th August, 2004 and contrary to s.203 as read with s. 204 of the Penal Code (Cap. 63, Laws of Kenya), murdered one ***Daniel Karanja Kahia***, and that this offence took place at Githunguri in Kiambu District.

Hearing of the case began on 11th May, 2006 after I considered candidates for assessors and named as assessors (i) ***Rose Achieng Otieno***; (ii) ***Catherine Wanjiku Wang'ombe***; and (iii) ***Joseph Ndua Ngugi***.

P.W.1, ***Mary Wangari Kahia*** was sworn and gave her evidence in the Kikuyu language, being interpreted by the Court Clerk ***Mr. Ndung'u***. She testified that she lives at Kibathiri, Kagaa in Lari Division, Kiambu District. She plies the trade of a green-grocer, and also tends her mother's tea farm.

The deceased was PW1's brother. She testified that on 12th August, 2004 at about 8.00 p.m. while going home from her grocery business in the company of a niece of hers (who was not named), the niece intimated to her that the deceased had gone missing from his home. This news disturbed the witness, and she prayed her niece to be not the harbinger of bad tidings. She got home, rested, and later slept. On the following morning, on 13th August, 2004, before 7.00 a.m., PW1's step-mother came to her home. She had come to get members of PW1's family to go out on a search for the deceased who was still missing. PW1's step-mother reported that she and other family members had already searched in the neighbouring homesteads, but they did not find the deceased. PW1 and her step-mother thereupon awoke the children of the home, exhorting them to forgo their morning tea, and instead go out to rummage in the neighbouring forest, in search of the deceased. The search party – which PW1 was unable to join – went out, but their search was fruitless. They returned empty-handed at about 9.00 a.m.

At about 1.00 p.m. on the same day, 12th August, 2004 PW1 teamed up with one ***Simon Mbugua*** (her son) and one ***Margaret Njambi*** (her neighbour) on another search mission. They went up to a dam in the neighbourhood; and there they found only the remains of ***Daniel Karanja Kahia***, in the shallow waters of Ruiru Dam. His legs were lying in mud, while the rest of the body was submerged in dam water. P.W.1

was able to identify the deceased by the clothes he wore, which were familiar to her. The search party thereupon raised alarm, by screaming, and many people were attracted and came to the scene.

On cross-examination by learned Counsel **Mr. Kanyangi**, PW1 testified that she had recorded a statement at the Githunguri Police Station, in which she had averred that she did not know how the deceased had drowned. She now confirmed that, indeed, she did not know how the deceased met his death.

PW2, **Peter Njogu Karanja**, was sworn and gave his evidence in Kiswahili. He testified that he lives at Kibathiri in Lari, and the deceased was his uncle. He had learnt from the deceased's mother that the deceased had gone missing. He later (on 12th August, 2004 at about 10.00 a.m.) went to the home of the deceased, where the deceased's wife informed him that the deceased had left home at 5.30 a.m., but he had not returned. PW2 testified: “[The 1st accused] did not say how [the deceased] had left. She did not say where **Karanja** [the deceased] had gone – though we asked. I left and went home”. The witness confirmed, at 8.00 p.m. on the same day, that the deceased was still missing; and on the following day, 13th August, 2004 he was aware there were search parties endeavouring to find the deceased; he did not participate in the search, and only learned later that the body of the deceased had been sighted at Ruiru Dam; and he now went thither and bore witness to the recovery. He left a crowd gathered at the dam, and returned to his home.

PW2, on being cross-examined by learned Counsel **Mr. Kanyangi**, averred that he was shocked by **Daniel Karanja Kahia's** death, but he had no knowledge just how the deceased met his death.

On the next occasion of hearing, on 5th July, 2006 counsel with the conduct of the prosecution case, even as he informed the Court that he had five witnesses ready to give testimony, stated that there was a new development which would have a bearing on the course of trial; the prosecution's key witness, one **Grace Mumbi Maina**, had died – and apparently she had died more than half a year earlier. In these circumstances, learned Counsel **Mr. Njogu** announced, he would close the prosecution case at this premature stage and would not go on to call his five witnesses.

Learned Counsel **Mr. Kanyangi** thereupon made the submission that no evidence had been adduced to show that the accused persons jointly murdered the deceased. Counsel submitted that the prosecution's two witnesses had told the Court no more than that they did not know what happened to the deceased; “they had”, in the words of learned Counsel, “confessed they did not know how the deceased met his death.” **Mr. Kanyangi** submitted that “up to the close of the prosecution case, it was not known what caused the deceased's death”. He submitted that a *prima facie* case had not been established against both accused persons. He submitted that the accused had no case to answer and should be acquitted of the charge at this stage.

To those submissions, learned State Counsel **Mr. Njogu** preferred not to make any responses.

No doubt then, the prosecution was not able to conduct its case as it had originally intended. The prosecution found that it could not call its key witness, **Grace Mumbi Maina**; and the prosecution forwent the opportunity to call five other witnesses. Such a state of affairs, on the bare face of things, was destined to lessen the thrust of the prosecution case considerably.

However, I will confine my decision to the *strength of the evidence* which the prosecution was able to tender, subjecting this to the required tests of proof in a criminal case. I was able in the recent case of **Republic v. Cosmas Mwaniki Mwaura**, H.C.Cr. Case No. 11 of 2005 to state the relevant principle as follows:

“The basic principle applicable in criminal trial is that, any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the Court to determine, upon a careful assessment of the evidence, whether

to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment. The logical inference is that whereas the prosecution must be heard in a criminal case, the accused does not have to be heard. The accused can only be heard if the Court determines that the weight of the evidence laid on the table is so implicative of the accused, that considerations of justice demand he be accorded a chance to answer”.

As in that earlier case, I will ask in the instant one: *What is the nature of the evidence placed on the table?* The milestones in the prosecution testimony may be set out as follows.

PW1, **Mary Wangari Kahia**, was a consistent witness. In her statement recorded at the Githunguri Police Station, and also in her testimony in Court, she averred that she *did not know* how the deceased had met his death. And on that fateful issue the testimony of the only other witness (PW2) was as follows:

*“[The 1st accused] did not say how [the deceased] had left. She did not say where **Karanja** [the deceased] had gone – though we asked.”*

PW2’s evidence shows no more than a mental concern on his part, about the circumstances in which the deceased could have departed from home, and gone and met his death; it does not carry any factual account that implicates either of the accused, in the causation of the death of the deceased. Indeed, in cross-examination PW2 acknowledged that he *did not know* how the deceased had met his death.

I think those landmarks in the prosecution case – if such they be – have not *identified* the person or persons who may have caused the death of the deceased. The submissions made by the defence counsel, that no evidence had been adduced to show that the accused persons murdered the deceased, must in my exercise of the judicial mandate, be upheld. It is, in this regard, to be noted that what limited evidence the prosecution has adduced was aimed only at the *first accused* but not the *second accused*; and it follows that the prosecution case falls down even more significantly as regards the 2nd accused. I am in agreement with learned counsel **Mr. Kanyangi** that a *prima facie* case has not been made against either of the accused persons.

I must hold that a foundation has not, in law, been laid for either accused to be burdened with the obligation to defend. The legal foundation for calling for defence is missing because, only concrete evidence would given such a foundation, and there is no such evidence.

Therefore I will now proceed under s.306(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya) which provides:

“When the evidence of the witnesses for the prosecution has been concluded, the Court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

On that basis I hereby enter a finding of “*not guilty*” in favour of both accused persons, and direct that they be forthwith released, unless either of them is otherwise lawfully held.

I now discharge the three assessors, and record thanks to them for their service during the trial of this case.

Orders accordingly.

DATED and DELIVERED at Nairobi this 19th day of July, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk, Ndung'u

For the Prosecution: Mr. Njogu

For the 2nd Accused: Mr. Kanyangi