

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 17 of 2004

REPUBLIC.....PROSECUTOR
VERSUS
SAMMY MWANGI KARANJA.....ACCUSED
JUDGMENT

The accused, Sammy Mwangi Karanja was charged with **murder** contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the 2nd of November 2000 at Mirie estate, Dundori, Bahati in Nakuru district, the accused murdered Lydia Wangare Karanja. When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called six witnesses in a bid to establish its case against the accused. After the close of the prosecution case the accused was put on his defence. He gave an unsworn statement in his defence.

The facts of this case as can be gleaned from the evidence adduced by the prosecution witnesses are as follows; On the 2nd of November 2000, PW1 Holidia Wanjiru Karanja, (*the mother of the accused*) and PW2 Isaac Mwaura Karanja, (*the brother of the accused*) left their home at Mirie village to go to harvest potatoes in a plot which was in the forest. PW1 testified that the said farm was about one and a half hour walk from their home. They testified that they left the accused with their youngest daughter called Lydia Wangare Karanja (*hereinafter referred to as the deceased*). The deceased was aged about eleven years at the time. PW1 and PW2 testified that they left the accused while he was asleep in the house. When they came back at about 2.00 p.m., they found the accused had locked himself in the house. When they asked him why he had locked himself in the house, the accused replied that he was taking a bath. At the time it was drizzling.

PW1 and PW2 waited until the accused came out of the house carrying a basin with water. The two asked him where the deceased was. The accused replied that the deceased was playing by the roadside. Both PW1 and PW2 recalled that the accused was laughing sarcastically when he spoke with them. They testified that they looked for the deceased by the roadside and at the houses of the neighbours but they were unable trace her. PW1 came back to the house and again asked the accused where the deceased was. The accused replied that they should not bother him. According to PW1 and PW2, the accused became hostile and unco-operative. It was then that PW1 and PW2 remembered that the accused had threatened to do something that would hurt his mother.

The two witnesses testified that the relationship between the accused and PW1 was not good because the accused had become an irresponsible person and had even started smoking bhang. There were constant quarrels between the accused and his mother (*PW1*) to the extent that sometimes PW1 used to run away from home because she feared for her safety. PW1 and PW2 became suspicious and were apprehensive that the accused could have hurt the deceased. PW2 then recalled that a few days before the disappearance of the deceased, the accused had dug a pit in a plot which he had been given by his mother (*PW1*) to cultivate. PW2 went to the plot and discovered that the said pit had been covered by fresh soil. PW2 went home and called PW1. Both of them went to where the pit had been dug by the accused. They uncovered the freshly laid soil. After digging the soil with their bare hands for about one foot, PW1 testified that she saw the sweater which the deceased had worn in the morning when they left her at home. It is then that PW1 instructed PW2 to go and report the

incident to the police. PW2 went to Dundori police patrol post and made the report to the police.

PW4 Sgt. Francis Karani and PW5 PC James Mwisu accompanied PW2 to the scene. They dug up the pit and recovered the body of the deceased that had been buried in the said pit. According to PW4, the deceased had injuries on her head and further appeared to have been sexually assaulted because her vagina was oozing blood. PW4 recalled that blood was oozing from the mouth and the nostrils of the deceased. He testified that he was informed by

PW1 and PW2 that they had suspected that the accused had killed the deceased. PW4 and PW5 went to the house where the accused was sitting on a bed and arrested him. They both testified that when they arrested the accused he appeared to be under the influence of drugs. They found inside the house where the accused was sitting, the clothes of the accused which appeared to have been washed. They however saw that the said clothes had bloodstains. The accused had attempted to wash away the blood. The said clothes were taken by PW4 as exhibits. The said clothes were however not produced in evidence as exhibits. PW4 recalled that he informed the Scenes of Crime Officers who came to the scene and photographed the place where the body of the deceased was found. Thereafter, PW4 took the body of the deceased to Nakuru Municipal Mortuary for the purposes of post-mortem being conducted. The accused was arrested and taken to Bahati police station.

PW1 and PW2 testified that it was the accused who had killed the deceased because prior of the date of the incident, he had threatened that he was going to do something that would make his mother have regrets. PW1 testified that she had made several reports to the police concerning the conduct of the accused. She recalled that the accused was well behaved until two years prior to the incident when he started smoking bhang. It is from that point that he started disobeying his mother and being rude to her.

PW6 Dr. Paul Gachunga, a medical officer of health performed the post-mortem on the body of the deceased on the 3rd of November 2000. The body of the deceased was identified to PW6 by PW3 Peter Kiiru Kimani, a relative of the deceased. He observed that the body of the deceased was covered with soil. The pants of the deceased had been torn. Her tongue had turned blue. Blood was oozing from her mouth and nose. On examination of the deceased's vagina, he found there was blood. Her labia majora had been lacerated. Her hymen had been broken. She had a vaginal tear on the inferior wall of the vagina.

In his opinion the deceased had undergone a traumatic vaginal penetration. The cervical vertebrae (*the 1st and 2nd*) had been dislocated. The spinal cord at that level was transected. In his opinion, the cause of death of the deceased was cardio-pulmonary arrest secondary to cervical cord transection secondary to severe neck injury. He performed a high vaginal swab but did not find any spermatozoa. The post-mortem report was produced as *prosecution's exhibit No. 1*. On the 6th of November 2000, PW6 examined the accused with a view of ascertaining his mental status. He formed the opinion that the accused had a history of substance abuse. He confirmed that the accused took bhang. He was of the view that the accused was mentally fit to stand trial if he would not be under the influence of bhang. The P3 form was produced as *prosecution's exhibit No. 2*.

When the accused was put on his defence, he denied that he had killed the deceased. He testified that on the material day, he had gone to visit his mother at her home. He testified that at the material time he did not reside in the same compound with his mother. He recalled that when he reached his mother's house, he did not find her. He decided to repair the fence which was in state of disrepair. At about midday, his mother came back and asked him if he had seen the deceased. He told his mother that he had not seen the deceased. He testified that soon thereafter the police came and arrested him on suspicion that he had been involved in the death of the deceased. He denied that he had anything to do with the death of the deceased. He denied that he was aware of the whereabouts of the deceased when her body was

recovered.

In all criminal cases it is the duty of the prosecution to prove the charge against an accused person to the required standard of proof beyond reasonable doubt. The burden of proof does not shift to the accused person. The burden of proof must always be discharged by the prosecution. In the present case the issue for determination by this court is whether the prosecution had established to the required standard of proof that it is the accused person who killed the deceased with malice aforethought. The prosecution did not adduce any direct evidence. No one saw the accused kill the deceased. The prosecution however adduced circumstantial evidence in its bid to establish the accused's guilt. For the prosecution to succeed in securing the conviction of the accused by adducing circumstantial evidence, it must establish that it was the accused and no one else who could have killed the deceased.

As was held by the Court of Appeal in the case of **Joseck Nyaribo Nyagicha –vs- Republic CA Criminal Appeal No. 90 of 2005 (Kisumu) (unreported)** at page 5 of its judgment;

“It is perhaps pertinent to highlight the value for circumstantial evidence by citing what was stated in Blackstone’s Criminal Practice, 1995 Edition F110 at p. 177 where it was stated:

‘Circumstantial evidence is evidence of facts from which the existence or non-existence of facts in issue may be inferred. It ‘works’ by cumulatively in geometrical progression, eliminating all other possibilities. It is however necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there is no other co-existing circumstances which would weaken or destroy the inference.’

*The above was judicially considered in this court’s decision in **Munyao –vs- Republic [2002]2 KLR 504 at p. 509.”***

In another case, the Court of Appeal held that;

*“The principle as stated in **Sawe –vs- Republic [2003]KLR 364** is that, in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and remains there”*
– **John Kivuva Mbuvi –vs- Republic CA Criminal Appeal No. 189 of 2002 (Nairobi) (unreported).**

In the present case, the prosecution adduced evidence of PW1 and PW2, the accused’s mother and brother respectively. The two witnesses testified that they had left the accused with the deceased in the house in the morning. The two witnesses went to harvest potatoes from their farm which was about one and a half hour walk from their house. When they left their house in the morning, the deceased was alive and okay. When they came back home at about 2.00 p.m., they found that the deceased had disappeared from the homestead. They also found the accused had locked himself in the house. When they asked him why he had locked himself in the house, he told them that he was taking a bath. At that time it was drizzling. PW2 wondered why the accused would be taking bath at the time.

After a while, the accused opened the door to the house and came outside with a basin of water. When the two asked the accused where the deceased was, the accused answered that the deceased was playing outside by the roadside. PW1 and PW2 recalled that the accused sarcastically laughed at them when he gave them the answer. The two looked for the

deceased by the roadside and also in the houses within the neighbourhood but were unable to trace the deceased. They came back and asked the accused again where the deceased was. This time the accused answered them rudely and told them not to disturb him. It is then that PW2 recalled previously seeing the accused digging a pit in a plot which he had been given to cultivate by his mother. PW2 went to the plot and discovered that the said pit had been covered by fresh soil. He called PW1. Both of them then uncovered the soil from the pit and saw the body of the deceased.

PW1 instructed PW2 to inform the police. The police arrived at the scene and removed the body of the deceased from the shallow grave. According to PW4 and PW5, the accused was arrested at the scene in the house of his mother. The police found wet clothes in the room where the deceased was found. It appeared as if the accused had attempted to wash the said clothes. On close inspection of the clothes (*which were identified to belong to the accused*), PW4 and PW5 saw that the said clothes had bloodstains. The said clothes were taken by the police as exhibits but were not produced in evidence. PW4 and PW5 testified that the accused appeared to be under the influence of drugs, to be specific, bhang when they arrested him.

PW1 and PW2 confirmed that the accused's behaviour had changed about two years prior to the incident when he started smoking bhang. They further testified that the accused had developed a bad relationship with his mother. The accused had severally caused trouble at home to the extent that his mother (PW1) had reported him to the police. PW1 and PW2 further testified that two days prior to the death of the deceased and the recovery of her body, the accused had threatened PW1 with dire consequences. They testified that the accused had told them that he was going to do something which would make them realise who he was. When the deceased was examined by PW6, he established that the deceased had been sexually assaulted before her neck was fractured thereby causing her death. PW6 also observed that the pants of the deceased had been torn. There was evidence of traumatic sexual penetration in the vagina of the deceased.

Upon evaluation of the evidence adduced it is clear that the accused had the motive to harm the deceased. His relationship with the mother of the deceased, who also happens to be his mother, was not good. He had threatened to do harm to his mother or to do something that would punish his mother. The accused was left alone with the deceased at the house when PW1 and PW2 went to harvest potatoes from their plot which was at the forest some distance from their home. The deceased was in good health when she was left at home. When PW1 and PW2 returned home they found the deceased missing. Inquiries made of the whereabouts of the deceased from the accused did not elicit a positive response. In fact the accused was outrightly hostile to PW1 and PW2 when they insisted on interrogating him on the whereabouts of the deceased. It is at that point that PW2 recalled that the accused had dug a pit at a plot which he had been given by his mother to cultivate. He went to the plot and discovered that the pit had been covered by fresh soil. His suspicious was aroused and when he dug up the pit with PW1 he discovered the body of the deceased.

The sequence of events as narrated by the prosecution witnesses places the accused person with the deceased in the morning of the fateful day. The accused had a bone to pick with his mother. He was under the influence of bhang when he was arrested by the police later that day. The deceased was defiled before her neck was fractured thus causing her death. There was blood oozing from the vagina of the deceased. The accused was found with clothes which had bloodstains. The said clothes were identified to belong to the accused. No one else knew of the existence of the pit other than the accused and his brother PW2. It is clear from the evidence adduced by the prosecution witnesses that no one else other than the accused could have sexually assaulted the deceased and thereby caused her death. The accused denied that he killed the deceased. He even denied that he was at home in the morning when PW1 and PW2 went to the farm to harvest potatoes. It is clear from the evidence adduced by the prosecution witnesses that the inculpatory evidence adduced was inconsistent with the innocence of the accused.

Having evaluated the totality of the evidence adduced by the prosecution witnesses and the defence of the accused, I do hold that the prosecution proved its case beyond reasonable doubt that it is the accused and no one else who could have killed the deceased. There was a grudge that existed between the accused and his mother. The accused had severally been reported to the police by his mother. His mother feared the accused to the extent that some days she would sleep away from her home when the accused was in a foul mood. The accused smoked bhang. He was left alone with the deceased on the fateful day. There is no evidence to suggest that someone else went to the homestead on that day.

The circumstantial evidence adduced by the prosecution clearly points to the fact that it is the accused and no one else who sexually assaulted the deceased and killed her. He was found with clothes which had bloodstains. Although the said clothes were not produced in evidence by the prosecution, there is no doubt that the witnesses who testified before this court confirmed that the clothes which were bloodstained belonged to the accused. The accused had made an effort to wash away the bloodstains. When PW1 and PW2 arrived at the homestead, the accused told them that he was taking a bath. PW2 was surprised because it was unusual for someone to take a bath inside a house when it was drizzling. The reason why the accused locked himself in the house is because he wanted to wash away the evidence of the bloodstains. Further, the body of the deceased was found in a pit which had been dug by the accused. From the evidence adduced it is clear that no one else other than the accused and PW2 knew the whereabouts of the pit. PW2 was with PW1 at the material time. The other person who knew about the pit was the accused.

The circumstantial evidence adduced established to the required standard of proof that it is the accused who buried the body of the deceased at the said pit after sexually assaulting and killing the deceased. The circumstances of this case clearly indicate that the accused was under the influence of drugs when he committed the offence. However the fact that the accused was under the influence of drugs does not diminish his culpability. He had the motive to injure the deceased. I therefore hold that the prosecution proved its case on a charge of murder against the accused. Two of the assessors who assisted this court during the hearing of this murder case reached a verdict that the accused was not guilty whereas one assessor reached a verdict that the accused was guilty of the lesser offence of manslaughter. For the reasons stated above, I disagree with the verdicts of the assessors. In my considered opinion, the said assessors failed to appreciate the circumstantial evidence that was adduced by the prosecution despite of being given appropriate directions by this court.

The accused is therefore found guilty and is convicted of the offence of murder.

DATED at NAKURU this 4th day of July 2006.

L.

KIMARU

JUDGE