



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 6 of 2005

REPUBLIC..... PROSECUTOR

VERSUS

EVANS WANJAMA MBUTHIA ACCUSED

J U D G M E N T

Evans Wanjama Mbuthia (hereinafter referred to as the Accused) is arraigned before this court charged with two counts of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. In the first count it is alleged that between 4th and 6th day of January 2005 at Githiga village in Murang'a District within Central Province he murdered Teresia Waruiru Chege (hereinafter referred to as the 1st deceased). In the second count it is alleged that on the same date and place as in count I, the Accused murdered John Mwangi Chege (hereinafter referred to as the 2nd deceased person). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence.

A total of 14 witnesses testified on behalf of the prosecution. Briefly their evidence was as follows:

Esther Wanjiru Chege (P.W.3) and David Chege Wanjohi (P.W.4) are the parents of the two deceased children. The 1st deceased was aged 6 years old, while the 2nd deceased was aged 8 years old. Both deceased together with 7 year old Patrick Irungu Mbuthia (P.W.5) were students at a school known as Githiga.

On the 4th January 2005, the 1st and 2nd deceased and P.W.5 were coming back home from school when they met the Accused person. The Accused was known to the deceased children as Accused had previously been married to their mother's sister one Jane Ngonyo and the 1st and 2nd deceased used to visit them. The Accused talked to the children and told them to go home and remove their school uniforms then go to his place so that he could give them money for buying a cake. The 1st and 2nd deceased proceeded home where they removed their uniforms. Their mother P.W.3 who had just come back home from the shamba served the children with lunch after which the children went out to play.

Sometime after 4.00 p.m. Gladys Wanjiru Muwa (P.W.7) who is a sister in law to the Accused was seated outside her home when she saw the 1st deceased child pass by, a few minutes later she saw the 2nd deceased child also pass by. She knew the two children as they used to previously come to visit their aunt Jane who was living with the Accused. The deceased children followed a road which was leading towards the home of the Accused as well as two other homes.

At around 6.00 p.m. P.W.3 became alarmed when her children did not come back home and she could not find them. Together with her husband P.W.3 looked for the children but did not trace them. The next morning they again looked for the children and contacted relatives but again they failed to trace the children.

At around 1.00 p.m. Simon Mbutia Wanjohi (P.W.6) went to the Accused and asked him whether he had seen the children however, the Accused denied having seen the children. P.W.3 & P.W.6 therefore made a report at Kevote Police Post.

Thereafter P.W.4, his mother and one Wallace Njoroge went to Samuel Karuma Kamau (P.W.8) who is the area Chief and reported the disappearance of the children. While they were still at the home of the chief, the Accused also arrived at the home of the chief and complained that some people had been to his house alleging that the missing children were at his house. The Chief told the Accused that he would need to make a statement to the police and the Accused left.

Later, on the instructions of the police, the Chief asked the Accused to accompany him to the police station. The Accused was interrogated by Cpl. John Kamau (P.W.9) but he denied having seen the missing children. The Accused was locked in as investigations continued.

On the 6th January 2005 P.W.4 was on his way back home when he passed by a bush near his home. Instinctively, he became apprehensive and on checking the bush found the body of the 1st deceased. P.W.4 screamed and lost consciousness. When he came to, he went and reported the matter to the police.

In response to the report P.C. Joseph Wachira (P.W.10) and Cpl. Gitau proceeded to the scene where they saw and recovered the body of the 1st deceased which was lying within some napier grass. They observed that the body had some bruises around the neck. The officers also recovered the body of the 2nd deceased which was in a sack within a thicket about 20 to 25 feet away. The body of the 2nd deceased also had bruises around the neck. Both bodies were escorted to Murang'a District Hospital.

On 7th January 2005 Cpl. Stevenson Thairu (P.W.11), Cpl. Dan Kagambo (P.W.12) and other officers from Murang'a CID took over the investigation of the case. They escorted the Accused to his house. Upon searching the house they recovered a white and blue striped shirt which had some stains which they suspected to be blood. They also recovered a blue T – shirt which was also similarly stained.

On 13th January 2005, P.W.4 and Wallace Njoroge Waiguru identified the bodies of the 1st and 2nd deceased to Dr. Kanyi Gitau (P.W.1) who performed postmortem examinations on the two bodies. The findings of Dr. Kanyi Gitau in each case included blueness on the eyes, mouth and nails, facial oedema, and fracture of the cervical vertebrae. Dr. Kanyi Gitau formed the opinion that in each case the cause of death was asphyxia due to strangulation. In respect of the 1st deceased Dr. Kanyi Gitau noted bruises on the *labia majora* and fluid in the vaginal cavity, while in the case of the 2nd deceased he noted that the anal opening was enlarged and lacerated. The Doctor took a vaginal swab from the 1st deceased and an anal swab from the 2nd deceased together with blood samples from both deceased. The Accused was also escorted to Murang'a District Hospital where a blood sample was taken.

P.W.12 labeled all the specimens together with the shirts recovered from the house of the Accused and prepared an Exhibit Memo and escorted them to the Government analyst for examination.

Stephen Matinde Joel Waebe (P.W.13) a government analyst received the samples and exhibits and carried out the examination. He found that the vaginal swab and the anal swab did not contain any semen or spermatozoa. The Blood sample of the 1st deceased and that of the Accused were both of group 'A' while that of the 2nd deceased was group 'B'. The shirts recovered from the house of the Accused were found both to be lightly stained with human blood of group 'B'. P.W.13 formed the opinion that the bloodstains on the two shirts could have come from the 2nd deceased.

A P3 form showing that the accused was examined by one Dr. Ngugi and found to be mentally normal was also produced in evidence by Dr. Janai Marita Ondieki (P.W.14).

When put to his defence the Accused gave an unsworn statement and called no witness. The Accused simply stated that the children who are said to have died never went to his home, and that he never saw them at his home.

In his submission, the defence Counsel maintained that although the prosecution case is dependant on circumstantial evidence, the prosecution had failed to prove that the inculpatory facts were incompatible with the Accused's innocence and incapable of explanation upon any other hypothesis other than with the guilt of the Accused.

It is evident that there was no eye-witness to the commission of these offences. The evidence implicating the Accused person is purely circumstantial. It is therefore necessary to identify the circumstances from which the conclusion of guilt may be drawn and consider whether the same has been established and if so whether the facts established are consistent only with the guilt of the Accused or whether there are any co-existing factors which may weaken the inference of guilt.

There was clear evidence from Dr. Kanyi Gitau (P.W.1) who performed the post mortem examination on both the deceased, that the cause of death in respect of each deceased was asphyxia due to strangulation. Both the deceased appear to have been subjected to some sexual assault as the 1st deceased had bruises on the *labia majora* whilst the annal opening of the 2nd deceased was enlarged and lacerated.

There was also evidence of P.W.4 and P.W.11 that the bodies of the deceased were recovered from a bush near the home of the deceased. The evidence implicating the Accused was initially that of 7 year old Patrick Irungu Mbutia, who testified that the Accused had invited the deceased persons to go and get money for buying a cake. This witness gave unsworn evidence as He did not impress the court that He understood the nature of an oath. The evidence of this witness therefore requires corroboration. There was no direct corroboration of the witness's evidence. His evidence was however consistent with that of P.W.7 who testified that she saw the deceased's children going towards the direction of the home of the Accused just about 4.00 p.m. on the same day that the two deceased children disappeared. Although P.W.7 could not testify for certain that the two children actually went to the house of the Accused, she did confirm that the two deceased children previously used to pass by when they were going to visit their aunt who was then living with the Accused. It is noteworthy that although P.W.7 had initially given this information to the mother of the deceased children, she denied having given this information when interrogated by Cpl. John Kamau and had to be locked in the cells. It is evident that P.W.7 being a sister in law to the Accused was initially reluctant to give information to the police that could put Accused in trouble. I find that the truth was actually what P.W.7 stated under oath before the court that she actually saw the two deceased children going towards the direction of the house of the Accused.

Apart from the evidence of P.W.5 and P.W.7, the Accused raised suspicion when He reported to the area chief Samuel Karuma Kamau that He was fearing for his life because some people had gone to his house alleging that the missing children were at his house. The more damning evidence was however that of Stephen Matinde Joel Waibe (P.W.13) the government analyst who examined and found traces of human blood of group "B" on a white grey stripped long sleeved shirt and a 'T' shirt recovered from the house of the Accused which blood was of the same blood group as that of the 2nd deceased child (i.e. John Mwangi Chege) thereby leading to the conclusion that the bloodstains must have come from the 2nd deceased child. Although no Rhesus factor or D.N.A. test was done, The fact that the Accused's clothes were stained with blood of the same group as the 2nd deceased is consistent with the evidence of P.W.5 and P.W.7, that the Accused had come into contact with the deceased children.

It is apparent that the Accused person did not speak the truth when He denied having seen the children as there is sufficient evidence that the Accused had earlier met the children and invited them to his house and that the children were seen going towards the direction of the house of the Accused. This coupled with the forensic evidence relating to the presence of blood matching the blood group of one of the

children on clothings recovered from the house of the Accused leads to the conclusion that the Accused person caused the death of the two children.

There was evidence that the Accused was formerly married to an aunt to the deceased children but that they had parted ways. There was no evidence as to what caused the break up in the marriage. However the fact that the mother of the deceased children had warned the children not to go to the house of the Accused again is an indication that the relationship had soured.

The manner in which the offence was committed, the assault on the children and the disposal of the body were all evidence of malice aforethought. Although only traces of blood from the Blood group of the 2nd deceased were found on the clothing of the Accused. It is clear that the two deceased children were together and that the assault on the children and their death were done in the same manner and the bodies disposed off in the same place. I have no doubt therefore that the death of the two deceased children was caused by the same person. I concur with the unanimous opinion of the Assessors and find that the person who caused the death of the two deceased children was the Accused.

I reject the defence of the Accused and find him guilty of the two offences of murder contrary to **section 203** as read with **section 204** of the Penal Code. I convict the Accused of both offences under **section 322 (2)** of the Criminal Procedure Code.

Dated, signed and delivered this 25th day of September 2006.

H. M. OKWENGU

JUDGE