



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

CRIMINAL CASE NO. 150 OF 2003

REPUBLIC
PROSECUTOR

VERSUS

ROBERT OWINO
ACCUSED

JUDGEMENT

The accused, **Robert Owino**, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that on the 11th day of November, 2002, at Kibubuti village in Kiambu District within Central Province murdered **Mary Wanjiru Wairimu**.

PW1, Moses Mathu Kibe, Kibe, was at Kibubui Estate on 11th November, 2002 and boarded a vehicle in which a young girl, Wanjiku, who was on her way to hospital was also an occupant. The girl had injuries on the abdomen and head. She told Kibe that Robo, beat her. According to Kibe, Robo was Robert Owino. The vehicle the accused was traveling in had other occupants other than Kibe. They too testified in these proceedings.

PW2, Dominic Wambua Kimeto, Kimeto, recalled that on 11th November, 2002 within Kibubuti estate in the morning he saw on the grass some signs of struggle. As he drew near, he saw a young girl with injuries on the head near the eye. She was unconscious. Kimeto informed the supervisor. In company of Kariuki and a driver they took the child to a Dispensary within the estate where she was referred to Kiambu District Hospital.

The substance of Kimeto's testimony is that en-route to hospital the little girl gained consciousness and on enquiry told him that it is "**Robo**" who beat her. Kimeto did not know who was referred to as Robo.

PW3, Margaret Nyambura, Nyambura's testimony is that on 11th November, 2002 Mama Jud told her to go and see Wanjiku at the hospital. At the stage she remembered Robo having told her on the same day to go and look for Wanjiku in the coffee plantation. Later on she got to know that Wanjiku had been injured but she did not know by whom.

PW4, Elizabeth Wairimu, Wairimu, is the mother of the deceased. Wairimu was called from duty with shocking news that her daughter was at the dispensary. When she reached there she was told her daughter had been taken to Kiambu District Hospital. About 5.00 p.m. she was told the child had passed on. Later she saw the body which had a cut on the abdomen and an injury to the left eye.

PW5, Simon Ndisi Nyakianda, Nyakianda, recalled 11th November, 2002 when he got information that an injured girl was lying at the coffee estate. When he arrived at the scene the girl had already been taken to Kiambu General Hospital. He got to know that the suspect was one **Robert Owino**. He failed to trace the suspect on that day.

On 13th November, 2002 he laid an ambush and arrested Owino in their house under a chair at 1.20 a.m. on 14th November, 2003. He was accompanied by **Musiti** and **Mukuti**. He took the suspect to **Karuri Police Station**. In cross examination he testified that he wrote in his police statement that his team arrested Owino in the house and not under the chair.

PW6, James Muigai Wairimu, Wairimu, is a nephew to Wanjiku. She identified the body of Wanjiku for purposes of post-mortem. The post – mortem was carried out by Dr. Jane Wasike Simiyu, PW8.

PW7, No.5676 PC Simon Mwathe, Mwathe, took post-mortem forms for registration. He facilitated the giving of a number. Later he learnt post mortem was done on 15th November in his absence.

PW8, Dr. Jane Wasike Simiyu, Simiyu, performed post mortem on the body of Mary Wanjiku. In her opinion the cause of death was abdominal injury which could have been occasioned by sharp and blunt object.

PW9, No.230649, Inspector Zipporah Mboroki, Mboroki, received a report of the incident and proceeded to the scene. By this time the girl had passed on. By consent she produced the post-mortem report of the deceased as exhibit 2 in these proceedings.

At the close of the prosecution's case, **Mr. Nyachoti** for the defence submitted that there was no case to answer. That the prosecution had not tendered any iota of evidence implicating the accused as required under section 213 of the Penal Code. That the accused was, on the evidence, charged on the basis of rumours and that the whole investigation was shoddy. **Miss Nyalyuka** for the prosecution informed the court that she was relying on the evidence on record.

The deceased, Wanjiku, was injured by somebody on the 11th day of November, 2002. The issue before the court is who did it? There was no direct evidence on this point. The prosecution relied on circumstantial evidence and evidence of Mathu (PW1) and Kimetoo (PW2) to the effect that the girl told them in her semi-conscious condition that it was Robo who injured her. According to the two star witnesses they assumed Robo was Robert Owino. The prosecution equally relied on the evidence of Nyambura (PW3) that earlier in the day Robert Owino had told her to look for Wanjiku in the coffee plantation. The prosecution also relied on the evidence of Nyakianda (PW5) to the effect that Robert Owino went missing until 14th November, 2002 when he was arrested in their house within the estate. Substantially those were the chain of circumstances relied on by the prosecution to prove its case.

The accused in his unsworn evidence testified that on the material day, he was involved in house work entrusted to him by her mother and never left the house. On the night of 13th/14th November, 2003 some watchmen of Kibubuti Coffee Estate arrested him on allegation of murder he had no hand in. He denied having committed the offence.

The evidence against the accused is entirely circumstantial. In order to justify, a 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 guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused. See **JOAN CHEBICHII SAWE - vs – REPUBLIC CRIMINAL APPEAL NO.2 OF 2002 (C.A)**.

In my Judgement the circumstances aforesaid, which constituted a chain cannot hold. There are several

co-existing circumstances which weakened the chain. The first one is that whatever discussion between Mathu (PW1) and Kimetto (PW2) as to how the girl obtained her injuries could amount to **dying declaration under section 33 of the Evidence Act** which provides:

“(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

However the statement of the deceased was neither taken by a person in authority nor reduced in writing. Moreover if questions were put the questions and answers must both be given which was not done in this case. In any event a statement which has been reduced in writing must, to be admissible as a dying declaration, be in the actual words of the deceased. **PIUS JASUNGA S/o AKUMU – vs_ REG (1954) 21 EACA 331.**

In my view the only piece of evidence that could hold on the chain of circumstances was the tete-a-tete between Mathu (PW1) and Kimetto (PW2) as to the cause of her injuries. That aspect of evidence which does not amount to dying declaration in law renders the prosecution case miserably weak. It cannot sustain a conviction in law.

I therefore agree with the verdict of the assessors that the case has not been proved beyond reasonable doubt.

Accordingly, I acquit the accused of the charge of murder. The accused is set free unless lawfully held for some other lawful cause.

DATED and DELIVERED at NAIROBI this day of 17th January, 2005.

N. R. O. OMBIJA,

JUDGE.