



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Case 71 of 2003**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JANE WANJIRU KINYUA ..... ACCUSED**

**J U D G M E N T**

Jane Wanjiru Kinyua hereinafter referred to as the Accused is arraigned before this court charged with three 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 on the 4th day of July 2003 at Gatunganga village in Nyeri District within Central Province she murdered Nicholas Nderitu Wanjiru. In the second count she is alleged to have murdered Anthony Kinyua Wanjiru on the same day and place as count 1, while in the third count she is alleged to have murdered Kennedy Mureithi Wanjiru on the 5th day of July 2003 at Gatunganga village.

7 witnesses have testified for the prosecution. Briefly their evidence was that the Accused was the mother of the three deceased children. She was not married. Sometime around 2nd July 2003, the Accused and her mother with whom she used to stay were thrown out of where they used to stay. Margaret Gathiga Maina (P.W.3) who was a friend to the Accused's mother gave them a temporary place to keep their things. On 2nd July 2003, two of the deceased children, Kennedy Mureithi aged about 5½ years and Antony Kinyua aged about 4 years went to the house of Lucy Wanjiru Kiberenge (P.W.4). They remained at the house of P.W.4 until 4th July 2003 when the Accused's mother went to P.W.4 and informed her that she had found a house at Gitunduti and that the Accused would come to collect her children. On 5th July 2003 the Accused's mother wanted to go with the children but she could not do so as she was feeling unwell. Later the two deceased children were collected by the Accused who left with them at about 7.00 p.m.

That night the Accused arrived at the house of P.W.3. at about 9.00 p.m. having only one child who was the deceased Anthony Kinyua Wanjiru. She spent the night at the house of P.W.3 and left with the child the next morning saying she was going to Mombasa.

On the same day P.C. Rose Nyatero (P.W.5) who was then attached to Gatunganga Patrol Base received information acting on which she went to a well within the shamba of one Kararu Mahehu where she recovered the body of a 5½ year old male child, the body was identified by the mother of Accused as that of her grandchild. The body was taken to Nyeri Provincial General Hospital.

On 13th July 2003, the Accused was collected by IP Purity Wamuyu (P.W.7) from Karatina Police Station where she was being held together with her boy-friend one Gikonyo and taken to Kiganjo police station.

On 19th July 2003, the Accused took P.W.7 to a pit latrine in a deserted home within Kiriko village. The pit latrine was demolished and the body of a 1½ year old child who was identified by the Accused as Nicholas Ndiritu was recovered. The Accused thereafter took P.W.7 to Kihoni forest but efforts to recover the third body were not successful.

On 14th August 2003 Dr. Ezekiel Machira (P.W.2) of Nyeri P.G.H. performed postmortem examinations on the two bodies which were identified to him by the Accused as Ken Mureithi Wanjiru and Nicholas Nderitu Wanjiru. He formed the opinion that the cause of death of Ken Mureithi Wanjiru was strangulation then body disposed off in water, while the cause of death of Nicholas Nderitu Wanjiru was strangulation with a leso which was still around his neck. The Accused was also examined by Dr. Abraham Gatangi (P.W.1) on 30th August 2003. Dr. Gatangi confirmed that the Accused's mental status was normal.

The Accused in a sworn defence denied having caused the death of her 3 children. She testified that she was working at Gitunduti as a tea picker and that she was housed by her employer. She maintained that she did not make any statement after her arrest nor did she show P.W.7 anything. She claimed she only took P.W.7 to Guara in Naru Moru to her mother's sister where they went to look for Accused's mother but did not find her. She swore that she had left her children with her mother and only later saw them at the mortuary and therefore did not know what happened to the children. In short the Accused raised the defence of an alibi and the burden lies upon the prosecution to disprove this alibi.

The first issue therefore that needs to be resolved is whether at the material time the Accused was working and staying at Gitunduti and had left the three deceased children with her mother at Gatunganga as she claimed in her alibi or whether the Accused and her mother were both staying with the deceased children at Gatunganga where they were forced out and were in the process of looking for alternative accommodation as claimed by the prosecution witnesses. In her defence the Accused claimed that she was working at Gitunduti as a coffee picker for one Githungo and that she was also living at Gitunduti whilst her children lived at Gatunganga with her mother. There is however no evidence that the Accused raised this alibi at any time before she was put on her defence. This means that the prosecution was at a disadvantage as it could not have anticipated the defence of the Accused so as to call evidence from the coffee farm where she was allegedly working. Be that as it may both P.W.3 and P.W.4 were categorical that the Accused her mother and her children were thrown out of where they were staying and P.W.3 gave them a place to temporarily keep their things.

The evidence of P.W.4 is also clear and consistent with that of P.W.3 that just a day before the body of the deceased Kennedy Mureithi was recovered from a well, the Accused collected two of the deceased children i.e. Kennedy Mureithi and Anthony Kinyua from the house of P.W.4 where the two children sought temporary refuge as their mother and grandmother continued to look for alternative accommodation. P.W.3 maintained that Accused arrived at her house with only one of the deceased children Anthony Kinyua and that she spent the night at the house of P.W.3 and left the next morning which was the same day the body of Kennedy Mureithi was recovered. I have taken note of the fact that P.W.3 was not particularly certain of the dates the events took place and in fact contradicted herself in this regard. Nevertheless the evidence of P.W.3 is clear that the Accused spent a night at her house with one of the deceased children Anthony Kinyua also referred to as Tony, and that the following day the body of one of the deceased children Kennedy Mureithi was recovered from a well.

The evidence of P.W.3 taken together with that of P.W.4 and that of P.W.5 who recovered the body from the well on 6th July 2003 clarifies the confusion in dates and confirm that the Accused was in the Gatunganga area with the deceased children between 2nd July 2003 and 6th July 2003. I therefore reject the alibi of the Accused as false. There was sufficient evidence from P.W.5 and P.W.7, that the bodies of the deceased children Ken Mureithi Wanjiru and Nicholas Nderitu Wanjiru were recovered in a well at Gatunganga and pit latrine at Kiriko village respectively. I am satisfied that the body identified to P.W.2 by Accused as that of Ken Mureithi Wanjiru was that of the Accused's son also referred to as Kennedy Mureithi Wanjiru. Dr. Ezekiel Machira (P.W.2) who examined the two bodies concluded that the cause of death in each case was strangulation. The question is how did these innocent children meet their death? Was it as a result of any act or omission on the part of the Accused? Did the Accused have any malice

forethought to cause the death of the deceased children? How about Anthony Kinyua Wanjiru whose body has not been recovered to date, has his death been established? There was no eye witness to these grisly murders.

The court has also not had the benefit of the evidence of the Accused's mother who was alleged from the Bar to be deceased; nor does the court have the benefit of the evidence of John Kararu Mahehu who reported to the police the presence of the body in his well but who was not called as a witness. With this in mind I have considered the evidence and do find that as concerns the deceased children Kennedy Mureithi and Nicholas Ndiritu, the Accused was the last person seen with Kennedy Mureithi on the night of 5th July 2003 when she left the house of P.W.4 with the deceased child. It is evident that the Accused arrived at the house of P.W.3 a few hours later without the deceased child. The body of the deceased child was recovered in a well which was near the house of P.W.3 where Accused had spent the night. The child did not accidentally fall into the well as it was clear from the post mortem examination done by P.W.2 that he was strangled before being thrown into the well. As a mother the Accused did not raise any alarm or exhibit any concern over the disappearance of the child. It is evident that she did not raise any alarm because she knew what had happened to the child. I find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any explanation other than the hypothesis that the death of Kennedy Mureithi Wanjiru was the result of a deliberate act or omission on the part of the Accused.

As concerns Nicholas Ndiritu, this was the Accused's 1½ year old son. A toddler whose whereabouts the Accused should have known. P.W.3 testified that the Accused did not have the child when she went to her house and that when asked about the child Accused claimed to have left the child with the person who had promised to give her a job in Mombasa. In fact the Accused claimed she was traveling to Mombasa the next morning. The Accused obviously did not tell P.W.3 the truth as the Accused was arrested about 10 days later within Karatina area and the body of Nicholas Ndiritu recovered from a pit latrine in Kiriti village a few days later. Once again the child had been strangled before being dumped into a pit latrine. I have considered the evidence of P.W.7 that the Accused is the one who led her to Kiriko village to the pit latrine where the body was recovered as against the evidence of the Accused denying this fact. I am satisfied that the Accused must have led P.W.7 to the pit latrine where the body of Nicholas Ndiritu was recovered. The Accused misled P.W.3 as to where the child was, once again she had not raised any alarm or expressed any concern that the child had disappeared. I find that the Accused is the one who actually strangled the child and dumped her into the pit latrine. The circumstances point irresistibly to the guilt of the Accused. I note that no clear motive was established for the Accused's actions. However the circumstances are such that malice aforethought must be inferred. The strangulation of the children was clear evidence of an intention to cause their death.

I am satisfied that with regard to the death of Kennedy Mureithi Wanjiru and Nicholas Ndiritu Wanjiru the prosecution has proved the case against the Accused beyond reasonable doubt. I concur with the unanimous opinion of the Assessors in respect of count 1 and 3 and find the Accused guilty of the two offences. With regard to count 2 which concerns the death of Anthony Kinyua Wanjiru. The body was not recovered. Mr. Orinda relying on an unreported case of *Ambani Gandani Konde v/s Republic* CA 103 of 1999, submitted that the fact that the body had not been retrieved was not fatal to the charge where death is obvious. Mr. Orinda promised to avail this authority to the court but failed to do so. My efforts to obtain the authority were also not successful. In the circumstances of this case however, the death of Anthony Kinyua cannot be said to have been obvious. Contrary to the particulars of the charge which claim that he was murdered on 4th July 2003, P.W.4 did testify that the child left her house with the Accused on the 5th July 2003, P.W.3 also confirmed that the Accused spent that particular night at her house with the child and left the house the next morning with the child Anthony Kinyua. This evidence confirms that Anthony Kinyua Wanjiru was alive on 4th July 2003 when he is alleged to have been murdered. I note that there was apprehension and suspicion that the Accused may also have killed Anthony Kinyua since no one seems to have seen the child since the time he left the house of P.W.3 with the Accused, however, in the absence of any other evidence the evidence in respect count 2 remains no more than mere suspicion.

However suspicion no matter how strong cannot take the place of hard evidence. Moreover the possibility that the child may have been abandoned somewhere cannot be ruled out. I do therefore differ

with the Assessors in respect of count 2 and find the charge not proved. I accordingly find the Accused not guilty of that charge. The upshot of the above is that I find Accused not guilty of count 2 and acquit her of the same. I find Accused guilty of count 1 & 3 and convict her of the same under section 322 (3) of the Criminal Procedure Code.

Dated signed and delivered this 14th day of July 2005.

H. M. OKWENGU

JUDGE