

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE 192 OF 2003

REPUBLIC PROSECUTOR

VERSUS

SAMUEL KIMARI KARIUKI)

PETER KIMANI NYAMBURA) ACCUSED

RULING

The two Accused persons before the court are charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya). It is alleged that the 2 Accused persons on 17th January, 2002 at Kamirithu Village in Kiambu District murdered one Wambui Njathi.

To prove the charge the Prosecution called three witnesses out of whom PW.1 Margaret Mbaire is an independent witness. According to her, she heard distress call from the deceased on 7th January, 2002 at about 3.00 a.m. I note the date given by this witness which has not been questioned further by the Prosecution and compare the same with that given on the particulars of charge which is 17th January, 2002. I shall comment on this discrepancy later in my ruling which could be fatal to the Prosecution case. However, I intend to deal with the evidence led in whole.

This witness further stated that when she went out to check, the deceased showed a stone to her, which again is not before the court, and told her that she was hit with it on her chest. The distress call which she heard the deceased saying was “mama Wambui, come, Kimani is throwing stones at me.” This Kimani is not identified by her as none of the Accused persons is also identified by this witness. Then the deceased was taken inside her house where she (deceased) informed the witness that “she was with people who were beating and she had run away from people who had raped her She told me many raped her but she could only recognize two who were Kimani and Kimari”. Once again she did not identify these two named persons. Next morning before she took her (the deceased) to the hospital, she passed through Tigoni Police Station to report where she was given treatment note by the Police.

At this juncture it shall be appropriate to dwell on the evidence of cause of death of the deceased. PW.2 Joseph Waweru Njathi a brother to the deceased produced death certificate in respect of the deceased (Ex.1). It mentions the cause of death as Asphyxia, Manual Strangulation and Tuberculous bruises. As against that evidence, PW.1 has stated that injuries caused were by hitting of stone on her chest and rape by many people. None of these factors is mentioned in the Death Certificate produced by the prosecution. Even in the Death Certificate the date of death is specified as 7th January, 2002. With this evidence, I can now rely on the same as the correct date of death of the deceased. The charge mentions the date of commission of crime as 17th January, 2002 which clearly is the date after the death of the deceased as has been shown by the prosecution evidence itself. Even PW.3 has stated that he went to identify the body at City Mortuary on 17th January, 2002 and thus the same cannot be the date of the commission of crime.

The Prosecution is obliged to prove the charge as leveled against the Accused. The discrepancy in the date of commission of crime is very material in this case and goes to the root of the Prosecution case. Moreover there is no other evidence, apart from this serious default by the prosecution, to connect the two Accused with this crime which is alleged to have been committed by these two Accused persons.

In the premises, I can unhesitantly find that there is no evidence led against any of these two Accused persons connecting them to the offence of murder of Wambui Njathi.

After observing this I enter my finding of not guilty in favour of the two Accused persons and acquit them of the charge of murder as leveled against them.

I also direct that they be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi, this 12th day of October, 2005.

K.H. RAWAL

JUDGE

12.10.2005