



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE 34 OF 2004

NAOMI WAMBOI KARANJA.....SUBJECT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

The subject, Naomi Wamboi 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 22nd of February 2004, at Makutano in Koibatek District, the appellant murdered Miriam Wambui Wachira. The subject pleaded not guilty to the charge. The prosecution called three witnesses in support of the charge against the subject. Margaret Wangare Karanja (PW1) testified that she was the mother of the subject. It was her testimony that the subject had become mentally unstable since March 2003 when she was raped as she was going to a local shop to purchase maize flour. She testified that the subject, who was about fourteen years of age at the time, conceived and became pregnant. The subject gave birth to a child after prolonged labour which caused her to suffer blood loss. After the subject had delivered the child she developed post partum depression. She became mentally unstable. She was taken to Eldama Ravine Hospital where she was treated.

The said hospital recommended that the subject be referred to the Nakuru Provincial General Hospital for further treatment. PW1 was however unable to take the subject to Nakuru as advised due to the fact that she did not have the financial capability to do so. She recalled that in the morning of the 22nd of February 2004 she had left the subject at home with her young son called Evan Metho and her granddaughter called Miriam Wambui Wachira. Miriam was then aged three years and one month. She was the daughter of Ruth Mwihaki – the daughter of PW1. PW1 left the subject at home because she was attending church accompanied by her other child called Margaret Wangare. When she came back home at about noon she saw that the said Miriam Wambui was nowhere to be seen.

She asked Evan Metho, her young son where the said Miriam Wambui (hereinafter referred to as the deceased) was. He informed PW1 that the deceased had fallen inside the well. PW1 went to the well and saw the trap door of the well had been left open. She screamed and lost consciousness. When she regained consciousness, she saw that the neighbours had arrived and had removed the body of the deceased from the well. The body of the deceased was taken to Eldama Ravine Hospital Mortuary. The police later went to the scene and arrested the subject because it was alleged that the subject was at home when the child fell into the well. PW1 did not know who caused the death of the deceased. PW2 Isa Mbaye Mariko, a neighbour of PW1, testified that on the 22nd of February 2004 while at Makutano Trading Centre, he heard people screaming from the direction of the house of PW1. PW2 went to the homestead of PW1. He was told by the people who had gathered there that a child had fallen into the well. PW2 testified that, he, assisted by others, immediately started rescue efforts in a bid to remove the child from the well. They drained the well. They found the deceased inside the well.

The deceased, a girl, was already dead. PW2 did not know how the child fell into the well. After the deceased had been removed from the well, PW2 reported the matter to Makutano Police Post. PW2 recalled that the deceased's chest had been tied with a "lesso". PW3 Dr George Osiemo Bogonko testified that he was a medical doctor working at Eldama Ravine District Hospital. On the 24th of February 2004, upon the request of the police, he conducted a post mortem on the body of the deceased. He observed the body of the deceased had been soiled with mud. There was a piece of cloth round the neck of the deceased. He also saw that there was micro-bleeding under the skin of the deceased. He saw the neck of

the deceased had blisters. There were blisters on both of the legs of the deceased. He formed the opinion that the blisters on the neck had been caused by strangulation. After examining the internal organs of the deceased, PW3 formed the opinion that the deceased had been strangled to death before being thrown into the well. The postmortem report was produced as prosecution's exhibit No. 1. PW3 also produced the P3 form which had been filled by Dr Oguttu in respect of the subject. Dr Oguttu found that the subject was sixteen years. He established that the subject was unfit to stand trial at the time. The P3 form was produced as prosecution's exhibit No. 2.

After the three witnesses had testified, the prosecution twice sought adjournments to enable them produce witnesses, one of whom they claimed was a police officer who had retired. When the prosecution sought the adjournment for a second time, this court marked the said request for adjournment by the prosecution to be the last one. When the case was listed for further hearing on the 21st of September 2005, two months after the prosecution had been granted a last adjournment, the prosecution still was unable to produce the said witnesses before court. This court was therefore left with no alternative but to order that the prosecution to close its case in view of its inability to produce witnesses during the hearing of the case. This court was therefore left with the task of ruling on whether, on the evidence adduced, the prosecution had established a prima facie case to enable this court put the subject on her defence. Before giving reasons for the ruling of this court, I wish to state that the subject was tried after the Psychiatrist, who was treating her, had recommended that the subject was fit to stand trial. The said report was handed to this court on the 24th of February 2005. The prosecution's case is premised on circumstantial evidence. According to the evidence of PW1 Margaret Wangare Karanja, the mother of the subject, on the material day she had gone to church and left the subject at home to look after two young children. One child was called Evan Metho while the other was the deceased, Miriam Wambui. According to her evidence, Miriam Wambui was slightly over three years old at the time.

When she came back at about noon, she could not be able trace the whereabouts of the deceased. She inquired from Evan Metho, the other child who was left at home, where the deceased could be. The said Evan Metho informed PW1 that the deceased had fallen into the well. PW1 went to the well and saw that the trap door of the well had been left open. PW1 screamed and was overcome by grief. She lost consciousness. When she regained consciousness, she found that the body of the deceased had been retrieved from the well. PW1 did not know how the deceased ended up being inside the well. PW2 Isa Mbaya, assisted in the retrieval of the body of the deceased from the well. He also made the report to the police. PW3 Dr John Osiemo Bongoriko conducted a postmortem on the body of the deceased. He established that the deceased had been strangled to death before she was thrown into the well.

The evidence adduced by the prosecution proves that the deceased died from strangulation and not due to drowning. PW3 testified that the deceased was killed before she was thrown into the well. No evidence was however adduced by the prosecution to establish a connection between the subject and the death of the deceased. The only evidence, which in my view was very tenuous, that the prosecution adduced to connect the subject with the death of the deceased is that the evidence of PW1 who testified that she left the subject to take care of the two children while she herself went to church. The deceased was in good health when she was left at home with the subject. When PW1 returned, she found the deceased was no longer alive.

No evidence was adduced to suggest that it was the subject who strangled the deceased. The only evidence that the prosecution wants this court to consider to reach a finding that the subject was responsible for the death of the deceased, is the fact that the subject was mentally unstable at the time of the death of the deceased. It is the prosecution's case that the subject could have strangled the deceased. This evidence is however evidence of mere suspicion. The evidence did not rule out the possibility that someone else could have killed the deceased during the material period that PW1 was in church. It does not in any way connect the subject with the death of the deceased. Suspicion, however strong cannot form a basis of conviction of an accused person in a criminal case. As was held in the case of **Sawe -vs- Republic [2003]KLR 364** suspicion however strong cannot be a substitute of cogent evidence against an accused person. From the circumstances of this case, the prosecution has failed to prove that no one other than the subject caused the death of the deceased. Infact we are not told the whereabouts of the subject when the deceased was strangled to death. There is no irrefutable circumstantial evidence that can

connect the subject to the death of the deceased.

In the circumstances, I do find that the prosecution has failed to establish a *prima facie* that would enable this court to put the subject on her defence. It would be an exercise in futility if this court were to order the subject to be put on her defence. She is consequently acquitted. She is ordered released from the Children's remand where she has been in detention and set at liberty unless otherwise lawfully held. It is so ordered.

**DATED at NAKURU this 5th day of October 2005.**

**L. KIMARU**

**JUDGE**