



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION**

**CRIMINAL CASE NO.171 OF 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**KENNETH MAINA WAMBUGU ..... ACCUSED**

**JUDGMENT**

This case has intriguing facts. A young man is charged with an offence of murder. It is alleged that on 28th July, 2003 at Kitasuru in Nairobi he murdered Purity Irene Wanjiku.

It all started with a scream heard by one Mwangi around 8.45 p.m. to 9.00 p.m., who was at the material time a driver of one Mr. Kirima and next door neighbour of the father (PW.5) of the Accused person. There was a history of disputes between the said Mr. Kirima and the father of the Accused (PW.5). I.P. Thomas Kituku (PW.3) confirmed that he had received complaint of criminal activity against the said Mr. Kirima by the father of the Accused (PW.5).

From the evidence produced before the court it could be safely deduced that the commission of crime could have occurred between 8.30 p.m. to 9.00 p.m. PW.11 Fredrick Jairo is the closest witness of the prosecution who was around the area of the scene. He is a watchman employed by a security firm. On the material date i.e. on 28th July 2005 he was on night duty along Kitasuru Road, Nairobi. At about 9.00 p.m., while he was resting outside a home of one of the clients, he was approached by the above referred Mwangi in the company of Michael the gardener of father of the Accused (PW.5) who told him he had heard a scream and had earlier seen Ken and a lady alighting from Bus No.119 at the junction of International School of Kenya and Peponi Road. He was in the bus with them.

I shall pause here and observe that neither the said Mwangi nor the gardener who accompanied Mwangi throughout the time till body of the deceased was recovered has been called to testify before the court. No explanation is given by the prosecution on their absence from the trial. I shall also emphasize this point because PW.14 stated in his testimony, and I quote:-

**“I charged the accused on the ground of this communication”** (by the word communication the witness was referring to print outs of two mobile phones which again were referred but not produced in evidence) and some witnesses who had seen both the Accused and the deceased together in the same bus that night. They alighted leaving the witness.

Furthermore he had this to state about Michael the gardener and Mwangi during cross-examination and I quote:

***“I talked to Michael the shamba boy and Mwangi the driver. It was Michael who had heard screams coming from down the farm (emphasis mine ). He was at Servant’s quarters or not I could not say. It was on the compound. I saw servant quarter where Michael was staying. The body was found at a distance of about 30 to 40 metres.”***

In absence of the production of the authorized print outs from the mobile companies (Safaricom and Kencell), the evidence of these two witnesses were crucial to the prosecution case, simply because, in absence thereof the testimonies of all the witnesses stating what they were told by the above two persons clearly became hearsay and hence inadmissible. I cannot do anything but to ignore and strike out the same. I cannot simply refer or rely on them. What now remains in the prosecution case to connect the accused person is production of six greeting cards (Ex.4A to 4F) which are alleged to have been written by the Accused to the deceased. The prosecution has shown that specimen handwritings from the Accused person as well as known hand writings of the Accused person were obtained. They were also marked for identification. However, once more the prosecution miserably failed to produce them by calling the Document Examiner and also to produce the report on the above writings. It became a mere conjecture by the prosecution to show the motive and/or any connection between Accused and the deceased. Once more I am absolutely dissatisfied with the quality of prosecution shown in this trial.

Absence of one vital witness or evidence could be pardonable, but when there is totally inadequate evidence, the absence of all the above mentioned witnesses as well as that of exhibits forces me to presume that the same would have tended to be adverse to the prosecution and I am constrained to find so. {see - Bukenya & others -vs – Uganda (1972) EACA 549}.

I have advisedly stated that the evidence without the vital witnesses and exhibits is barely adequate because prosecution witnesses. (PW.1) Patrick Amani, (PW.2) Ruth Mumbi Kariuki and (PW.9) Nicholas Njuguna Mwangi had, with one voice, testified that the Accused was with them at a Bar along Umoja called Beams Wines and Spirit, up to and after 9.00 p.m. They were drinking at the bar. PW.2 Ruth who is the owner of the bar specifically recalled that the Accused switched off the music to hear 9.00 O’clock news on television. There is no evidence to rebut their testimonies apart from the hearsay evidence which I am not entitled to admit as per law.

Furthermore, I have to note evidence of (PW.4) Boniface Maina a brother to the deceased who testified that he went to his bed room at about 8.45 p.m. and after some time he was called by the gardener whose absence I have already talked about. Going further, two workmates of the deceased (PW.6) Susan Wanjiru Kanyara and (PW.10) Grace Wawira Gichuku had testified that one Issa (PW.12) and one Ken were friends to the deceased. They both stated that they had seen Ken twice but were unable to identify him. Thus none of them identified the Accused even in the docks.

The father Anthony Maina Wambugu (PW.5) gave a very lengthy testimony. I shall refrain from commenting on the stated differences between him and his neighbour one Mr. Kirima, but only to observe that he had stated under oath that Mr. Kirima had told him that ***‘he would finis h him’***.

Then he testified how on finding the body of the deceased on his compound in the presence of the police, he tried to contact the Accused (because he was named by the absent witness Mwangi) and eventually the Accused came home around 2.00 a.m. He also stated that it was at the insistence of the Accused to clear his name, he accompanied the Accused to Spring Valley Police Station at about 1 p.m. next day when police failed to come home to take his statement as was told the previous night.

The evidence as to how the greeting cards were recovered also is full of contradictions. (PW.12) Issa Mulama was a close friend to the deceased. He had a duplicate key to the house of the deceased. He said even though their relation was a bit dented due to sickness of his uncle, they continued to be good friends. When (PW.7) Florence Kanyu Kimari the Landlady of the Accused informed him on 30th July 2003 that she had not seen the deceased at work, he visited her house but did not find her. He removed her ID card from her hand bag which was in the house on 1st August, 2003 after her opening the house. According to what he testified he was alone when he opened her house According to PW.7 Florence

however they opened the house on 8th August, 2003, after getting permission to open the house to get a photograph or national ID of the deceased.

On the issue of greeting cards he stated that he once again opened the house in presence of police officers and also the brother to the deceased Mureithi (PW.8). The house was searched and several photographs and greeting cards were found and police carried some cards and cassettes.

PW.8 the brother to the deceased stated that the police took away only one card and he found other six cards after the funeral when he was cleaning the house. There are only six cards (Ex.4A to 4F before the court). He said he was alone when he found those cards and did not mention about recovering Shs.8000 and bank pass book. But PW 12 Issa stated that he was with Mureithi (PW.8) when cards were recovered and that they were only two of them and the money and pass book as well as greeting cards were received from a bag belonging to the deceased. The police officer (PW.14) Supt. Moses Didi stated he was given greeting cards by Mureithi (PW.8) on 11th September, 2003 when the Accused was already charged with the offence. The recovery of the greeting cards purportedly written by the accused to the deceased, are thus shrouded in conflicting evidence and in any way it is not proved that it was written by the Accused by calling a Document examiner. Thus the presence of greeting cards also does not help the police at all.

The body was found at a distance of between 2 to 5 metres from the fence of the home of the father of accused. According to evidence a pair of shoes and a pair of jeans were lying near the body. According to evidence of the father (PW.5) the shoes were not soiled nor were the feet of the deceased. The pair of jeans has not been shown in the photographs produced by the scene of crime personnel (Ex.3). There was blood around thighs and back part of the deceased near her private parts. The report of the government chemist was produced and its findings were that the under-pant showed that the vagina of the deceased had no semen or spermatozoa. Similar findings were as on the pubic hairs of the deceased. There were similar findings on the under-pant of the accused as well as his pubic hairs. The blood found on the deceased was not tested. Even Dr. Wasike (PW. 15) who performed the postmortem on the body of the deceased, specifically stated that there was nothing remarkable in her genital parts. According to her, the death was caused by neck compression most likely strangulation. As per the evidence before this court, there is nothing to show how the body happened to come to the compound from the valley, where the screams were allegedly heard.

The accused gave sworn testimony and gave count of his whereabouts from 5 p.m. to 2 a.m. In any event his presence up to and after 9 p.m. has been amply corroborated by witnesses from the prosecution around which time according to the prosecution the death occurred.

To sum up, I find that the circumstantial evidence upon which the prosecution intends to rest its case is so weak and it proves that there are yawning gaps in the evidence before the court.

The prosecution thus has fallen short of meeting the requirement of proof of circumstantial evidence as laid down since 1949 (see Kipkerion Arap Koske and another vs. Republic 16 EACA 135) and recently adhered to until the present day case. (See - James Mugambi Muchene -v- R. (Criminal Appeal No.29/02 (U.R).

I cannot but express my reservations and disappointment in the way the police and prosecution investigate and present the cases of such serious nature as those of murder before the court. It is a despicable position and earliest those two organs start showing sincerity and effectiveness in the performance of their duties it shall be better for the dispensation of justice.

With these remarks which have often been repeated by me, I find that the prosecution has failed to prove beyond reasonable doubt that the Accused murdered the deceased in this case, i.e. Purity Irene Wanjiku and that I find the accused not guilty of the offence of murder as charged herein. I therefore direct that he be released forthwith unless otherwise held as per law.

**Dated and delivered at Nairobi this 3rd December, 2004.**

**K.H. RAWAL**

**JUDGE**

**3.12.2004**

**Rawal – Judge**

**Mr. Njanja for the Accused**

**Ms Mwansa for the State**

**Accused – Present**

**Mr. Kariuki – Court clerk**

**Court: Judgment delivered and signed by me.**

**K.H. RAWAL**

**JUDGE**

**Court: Assessors be paid and be discharged.**

**K.H. RAWAL**

**JUDGE**

**3.12.2004**