



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL CASE NO. 13 OF 2003

REPUBLIC.....PROSECUTOR

VERSUS

BETH WANGARI KIMANGU.....ACCUSED

RULING

The question to be decided in terms of Section 306 of the Criminal Procedure Code is whether the Accused person should be put on her own defence, the prosecution having closed its case. In other words, is there evidence that the accused committed the offence charged?

Much has been said during the submissions on that issue. But since this is a case I am hearing with the assistance of assessors, I should be careful not to say as much. My approach would therefore be as follows:

The Prosecution's case as to what happened to the Accused's children, Winnie Wangui Wangari and Alice Muthoni Wangari, revolves around the evidence of Mary Wangari Nyambura, a young girl who told the court she was 14 years old schooling in primary school standard seven. She did not actually see the Accused person throw any of the two children into a river. But somehow information came to be around that the Accused had thrown each child into a river. That is disputed by Mr. Mahinda, learned Counsel for the Accused in his submissions, where he says that none of the members of the public said to have who arrested the Accused has been called to testify in this case, and I add that that is a good example of the police who do not want to do all that they should do in a case to achieve a conviction because they will always say:

“we arrested the of fender. We took him to court. The court acquitted him. We are not to blame.”

That will be the day when people of this country will know that courts are not and should not be there to prosecute for the Prosecution. Courts are and should be there to administer justice only and to do so, a court acts on the evidence brought before it. If you conceal the evidence you have, the court will not be able to act on it. If you do not tell the court the whole truth and nothing but the truth, you mislead the court. In those circumstances, if the decision of the court turns out to be injustice, it is you yourself to blame and not the court.

In this matter therefore, the Accused was arrested by members of the public who took her to the chief's centre where she was re-arrested by the Police from Othaya Police Station. Upon information from undisclosed sources and without guidance from any of the Prosecution's witnesses who have given evidence in this court, Police Officers from Othaya Police Station retrieved bodies of two dead children, one from Chinga River and the other from Gikira River. They took the bodies to the mortuary at Nyeri Provincial General Hospital.

Thereafter Police Officers from the same Police Station instructed or requested Dr. J. K. Mburu to go to the said mortuary to perform a postmortem on the bodies of two dead children.

Two people said to be a paternal grandmother and a stepfather of the children are said to have been also instructed by the Police to go to the mortuary and identify the bodies to the doctor. I have already said that none of the Prosecution's witnesses who have given evidence had guided or assisted the police in recovering the two bodies of the children Othaya Police Officers recovered. This court has not been told anything to that effect, nor has it been told that after the police retrieved those two bodies, any of the witnesses was called to identify the bodies.

The paternal grandmother, Winnie Wangui Muchiri, who gave evidence as P.W.4, said nothing to show that she went to any of the two rivers to see the bodies recovered or that she had identified the bodies before the police at the mortuary or anywhere else. In fact although during her evidence in this court she was made to say that she had identified the bodies to the doctor who performed the postmortems, she had not recorded any statement to that effect and that suggests that she never actually identified the bodies to the doctor. Her statement was recorded on 8th June 2002. No further statement was recorded from her thereafter. The postmortem was done on 13th June, 2002. Furthermore, P.W.4 in her evidence did not impress as an all through truthful witness as she was slippery in some aspects of her evidence. Moreover, dead bodies sometimes change from known appearances of deceased persons especially where death is caused accidentally.

The children's stepfather, Samuel Wambugu Muchiri, did not even record a statement suggesting he did not identify the bodies to the doctor. He did not therefore give evidence. It is doubtful whether he was in a better position than Winnie Wangui Muchiri. It is doubtful whether he was at the mortuary as he could have recorded a statement to that effect. The court has no evidence from him and the doctor who produced postmortem forms, Dr. Gathangi, was not the doctor who performed the postmortems and therefore could not have claimed that he saw the two relatives of the children identify the children's bodies to him.

A mortuary serving a big hospital like Nyeri Provincial General Hospital contains many dead bodies of people at various ages whose deaths are caused variously many of them dead from similar causes.

In the absence of a police officer who handled the children's dead bodies from where they were retrieved up to the mortuary, how can this court be convinced that the bodies Winnie Wangui Muchiri identified to Dr. Mburu, if she did identify any bodies at all, were bodies of the children of the Accused?

Since the police were legally in custody of those bodies though kept for them at the mortuary, how about the fact that a part from their failure to join Winnie Wangui Muchiri in identifying the bodies to Dr. Mburu, there is also no evidence that the police handed over those bodies to the husband of the Accused or her mother in law or her brother in law to go and bury?

In a prosecution like this one, it is vital for a police officer who has recovered a dead body, firstly, to bring the people thought to be relatives of the deceased to see whether they can identify the body he has recovered to be that of their relative, and secondly, if they identify the body, that police officer to be on hand, jointly with the aforesaid relatives of the deceased, to identify that body to the doctor requested to perform a postmortem, and thirdly, that police officer to subsequently release the body, formally, to relatives of the deceased to go and bury. All that should be in the evidence adduced before the trial court.

Failure by the Police to play that role, as they have failed to do in this case, creates a gap fatal to the Prosecution's case as it could well be that the postmortem evidence the Prosecution is relying upon in this case, though having the names of children of the Accused as the dead persons and having names of Winnie Wangui Muchiri and Samuel Wambugu Muchiri as identifiers, relate to bodies which are not children of the Accused. In those circumstances, I do not see how the Accused should properly be put on her own defence as in my opinion that failure by the police erases any prima facie case that may have been there against the Accused.

She may have committed the offence of murder. But that offence must be specific, clearly defined, and specifically and clearly proved so that dead bodies not satisfactorily identified to be her children's bodies should and cannot be used to prosecute her. Such evidence does not prove that the Accused committed the offence charged which is to the effect that she murdered her children. That being so, why call upon her to defend herself?

Accordingly, I do hereby rule that there is no case for the Accused person to answer, and under Section 306(1) of the Criminal Procedure Code, find the accused not guilty and order her released forthwith unless lawfully detained in some other cause.

Dated this 27th day of November, 2003.

J. M. KHAMONI

JUDGE