REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT NYERI

CRIMINAL CASE NO. 27 OF 2009

REPUBLIC

-VERSUS-

JOHN MUNGAI KIMANI.....1ST ACCUSED

PETER KIMANI KARIUKI.....2ND ACCUSED

JUDGMENT

As soon as Beatrice Nyambura woke up in the morning of 8th April, 2009, her attention was drawn to the partly damaged mud-wall of the house in which her mother, Mary Wambui Mungai, slept. The damage was such that some sort of hole had been carved into the wall. Her curiosity was further aroused when she noticed that the door to the house was open yet her mother could not respond when she called her out. She, together with her son, entered the house only to find the lifeless body of her mother sprawled on her bed.

The 1st accused who happens to be the deceased's grandson (Nyambura is his mother) and who lived in the same compound as the deceased and his mother, though in different houses, was suspected to have been behind the murder together with the 2nd accused; they were accordingly charged with the offence of murder in accordance with section 203 as read together with section 204 of the Penal Code. The particulars of the offence were that on the night of 7th and 8th April, 2009 at Riandegwa village in Murang'a South District of the Central Province, they jointly raped and murdered Mary Wairimu Mungai.

According to Nyambura, who testified as the first prosecution witness, the deceased appeared to have been raped. The house in which the deceased lived was about 50 metres from her own house. Other people who lived in the same compound were her other sons, Patrick Rugano and Daudi Mwangi and of course, the accused. The compound was open and through it was a path used by members of the public.

Like Nyambura, Monica Wairimu Kiarie (PW2) and Henry Kariuki (PW3), the assistant chief of Kabati location from where the deceased hailed, also saw the damaged wall and deceased's body on the bed when they visited the deceased's house on 8th April, 2009. They were also in agreement that the 2nd accused was a stranger in their village and also that the 1st accused was at the scene the material day. They suspected the deceased could have been raped because, according to the assistant chief, her legs were 'wide open.' While at the scene, he asked the 1st accused to show him his house after he was mentioned as a suspect; he could not however recall who, in particular, mentioned him. Nevertheless, he recovered clothes from the 1st accused's house which were stained with what, in his words, looked like 'mango juice' and 'mucous'. Upon further interrogation, the 1st accused allegedly told him that he had spent the previous night with the 2nd accused in the 1st accused's house; it is then that he sent for the 2nd accused who confirmed that the two had spent the previous night together. With this information, he summoned police from Kabati police station who came and arrested the accused and also collected the clothes.

Police constable Samuel Gatoto (PW7) confirmed that indeed he was made aware of the incident after one Inspector Kiplangat called and told him that he had received a report of a murder from Kariuki (PW3). He also confirmed the accused were handed over to him by Kariuki. Like the first two prosecution witnesses, he testified that the deceased appeared to have been raped. It was also his evidence that the 1st accused's clothes were stained with blood and spermatozoa. His decision to charge the accused was based on this evidence though he admitted that he charged the accused before he received the government analyst's report.

The clothes were later to be analysed by Albert Kathuri Mwaniki (PW5), a Government Analyst. According to his evidence, on 17th April, 2009, he received from police constable Samuel Gatoto PW7), an assortment of clothes belonging to the 1st accused; the deceased's vaginal swab and hair tissue; and blood samples of both the accused. His task was to examine the clothes and establish whether there was blood, semen or spermatozoa. He was also to establish whether there was human hair on the clothes and semen on the vaginal swabs; finally, he was required to classify the blood samples.

He came to the conclusion that the 1st accused's clothes did not have blood stains, semen or spermatozoa. Human hair was also not detected on the clothes and the vaginal swab did not have semen or spermatozoa. The 1st accused's blood sample was established to be that of group "O" while that of the 2nd accused was of group "A". The deceased's blood sample was rotten and therefore could not yield any positive analytical results. He concluded that he couldn't deduce much from the results.

Another expert who testified for the state was Dr Obiero Okoth (PW6) whose brief was to produce a report on the post-mortem conducted on the deceased's body. According to his testimony, post-mortem was conducted by the Government Pathologist, Dr. Johansen Oduor at Nyeri Provincial General Hospital after the body had been positively identified as that of the deceased by her grandson, Stephen Mwangi Wairimu (PW4). According to the pathologist, there were traces of blood from the deceased's vagina and also tears on the vaginal wall. There was contusion on the neck. There was also scleral conjunctival haemorrhage and extensive haematoma on the muscles of the anterior neck. He opined that the cause of death was asphyxia secondary to manual strangulation; he also observed that there was a possibility of rape. He confirmed a vaginal swab having been done; the deceased's blood sample and pubic hair were also extracted for examination.

The accused persons flatly denied the charge against them. The 1st accused denied having slept in the same house with the 2nd accused and denied having known him. As a matter of fact, he stated that he saw him for the first time at the police station. The 2nd accused testified that he happened to be in the deceased's village because that is where his aunt lived; he was helping her with menial jobs and that he was at the aunt's home on the material night. According to him, he was only arrested when he, like the rest of the curious villagers, went to the deceased's home in response to the screams emanating from there. In fact, it is after he left for his aunt's home that he was arrested.

There can be no dispute from the evidence available that indeed an offence of murder in which the deceased was the victim was committed. Her death was certified by a Government pathologist who established that the deceased was strangled to death. The doctor's evidence of the death of the deceased corroborated that of her daughter Nyawira, her neighbour Wairimu, the assistant chief Kariuki and police constable Gatoto all of whom testified that the deceased was found dead in her house on 8th April, 2009. There is therefore sufficient proof of the fact of death of the deceased and the manner she died. Based on these facts, it is apparent that the deceased's death was caused by some other person and was unlawful. The first two elements that constitute the offence of murder contemplated in **section 203** of the **Penal Code** were therefore proved beyond reasonable doubt. That section reads:

> ***203. Murder***
>
> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

The next hurdle which the state ought to have surmounted was to prove that accused were the people who strangled the deceased and in doing so they had the necessary intent to commit the offence or otherwise had malice aforethought.

Without any direct evidence of who murdered the deceased, the evidence against the accused was always indirect or circumstantial. The circumstantial evidence in this case arose from the suspicion that the deceased may have been raped in the course of the murder and I suppose it is for this reason that the particulars are clear that the accused 'raped and murdered' the deceased.

Upon seeing the deceased's body, her daughter's and the assistant chief's first impression was that the deceased was raped. This led the assistant chief to collect the 1st accused's clothes which were alleged to have been stained with blood and what was thought to be semen and spermatozoa. It is worth noting that the pathologist gave some weight to this evidence when he testified that there were traces of blood from the deceased vagina and there were visible tears on the vaginal wall. With this evidence there was some credence to the suspicion that indeed the deceased might have been raped and perhaps it is for this reason that a vaginal swab was done on the deceased and taken for examination for traces of semen, amongst other tests.

The Government analyst's report on his examination of the accused's clothes and the vaginal swab was therefore pivotal to the prosecution case. If, as a result of this examination, it was to be established that there traces of the deceased's human tissue on the accused or his clothes or, if on the other hand, any of the accused's human tissues were traced on the deceased, it may well have been argued that this is the link which, by and large, constitutes evidence from which an inference of guilt on the part of the accused would have been drawn. The converse is true; if there was no such connection then these facts would turn out to be exculpatory for the simple reason that there would be nothing to connect both or either of accused to the offence.

The latter scenario turned out to be the case; to this extent, one needs look no further than the government analyst's evidence. Contrary to the investigation officer's evidence, this officer was categorical that the accused's clothes were not stained with blood, semen or spermatozoa. Neither was human hair detected on the same clothes. Again, the vaginal swab of the deceased did not have any traces of semen or spermatozoa. With these findings he came to the conclusion that he could not deduce anything useful for the prosecution case.

Yet it was the evidence of the investigation officer that he only charged the accused because of the traces of 'blood' and 'semen' that were found on the accused's apparel. The evidence of the Government analyst shows that there was no such basis for prosecution of the accused or any other person for that matter. His evidence totally contradicted that of the investigation officer in its material respect.

If I have to add something about circumstantial evidence, I can only echo the words of the Court of Appeal for East Africa in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135;** while quoting Wills on Circumstantial Evidence, the Court stated as follows:

> ***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.***

In the present case, what has been touted as inculpatory facts have been proved not to exist by the state's own witness. What this effectively means is that there is nothing from which an inference may be drawn and therefore the question whether there are facts incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than the accused's guilt does not arise.

In short, there is no evidence that the accused murdered the deceased.

In these circumstances, I have to come to the conclusion that the state has not proved its case against the accused persons beyond all reasonable doubt. Accordingly, the accused are hereby acquitted of the offence of murder.

Dated, signed and delivered in open court on 8th March, 2019

Ngaah Jairus

JUDGE