



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 16 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JANE GATHIGIA MAINA.....1ST ACCUSED

WALTER NJUGUNA NJOROGE.....2ND ACCUSED

JUDGEMENT

The two accused persons, *Jane Gathigia Maina* (hereinafter referred to as Jane and A1 interchangeably) and *Walter Njuguna Njoroje* (hereinafter referred to as Walter and A2 interchangeably) are jointly charged with the offence of murder contrary to section 203 as read together with 204 of the Penal Code.

The particulars of the offence are that on the 3rd day of March 2010 at Kingeero village in Kabete Location, Kiambu District of the Central Province, jointly murdered Antonita Wairimu Njuguna (hereinafter referred to as Antonita and deceased interchangeably).

The prosecution called 10 witnesses in support of the state case.

John Kangirithe Thungu, PW1, testified that he rented two rooms from a landlord by the name Wanjiku. His neighbour on the left was Mbui; while on the right was Munyi Wanjiru, Maina Mbui and Mama Njambi.

The first accused, *Jane Gathigia Maina*, was at all material time the wife to Walter Njuguna Njoroje (A2).

The houses occupied by the said tenants were made of iron – sheets and wood/timber. The wall separating the room occupied by the 1st and 2nd accused and his neighbour was made of iron – sheet.

On the 3rd day of March 2010 at about noon he was at home. The two accused persons went to their charcoal business 15 – 20 meters away in the company of their child Antonita. A physical fight ensued between the two accused persons. The genesis of the fight was disagreement over some amount money. He heard Jane (A1) telling Walter (A2) that she would not give him sh.4000/= as he would share the same with prostitutes. That was the first round of the fight.

In the evening a second round of fight erupted into their rented room. Their child, since deceased, was in the room. Jane (A1) then left for the place where they were selling charcoal. Walter (A2) followed her. However, the child remained in the room.

A third round of fighting erupted by the roadside. Shortly after the second round ended. This time round it attracted a crowd comprising of neighbours but the couple's child was not at the scene.

After the third round of fighting Jane (A1) went to their room and took her child away. Few minutes later the Walter (A2) accused followed the Jane (A1).

Twenty or 30 minutes later the first accused came back. It was about 9.30 pm. The first accused knocked the door but the 2nd accused refused to open.

When the first accused knocked the door of their room again the 2nd accused this time round opened the door. At that juncture he heard the second accused asking the first accused where the deceased was. In reply he heard the first accused telling the second accused that while walking, she heard someone following her. She thought it was the second accused. Since she did not want a further fight she fled leaving the child behind. She did not see the child thereafter. On 3rd May 2010 he did not see the child. Subsequently he heard that the child had been found dead in a bore-hole in the neighbourhood.

Eunice Wamboi Wakara, PW2, recalled the 3rd day of March 2010 at 8.30 pm while in the house cooking. She heard screams from the road. In company of her husband they went to the place where the screams was emanating from. She found the two accused fighting.

The crowd that had gathered at the scene tried to calm them down. Eventually peace was restored. The crowd went back to the plot where they were staying with the couple.

The first and second accused went to their room in the same plot. A second round of fighting erupted again. He heard the second accused saying they were fighting over money. She knew the couple had a child. She heard the child crying outside their couples room.

Thereafter the two accused went to their business premises where they were selling charcoal.

The following day at 8.00 am the Jane (A1) asked her for her cell-phone to call her father. After talking to her father on cell-phone the first accused entered her residence.

On 5th March 2010 while on her way to work, she hard from neighbours that the child of the couple had disappeared. In the evening when she came from work, she heard that the said child had been found dead in a bore-hole at Chura.

Lucy Mwihaki, PW3 has a shamba at Chura. Her daughter, Hanna Wambui, informed her that some people claimed that a child had been found in a well at her farm in Chura.

She reported the incident to the District Officer. The chief and three policemen accompanied her to Chura where the child's body/remains was recovered in a bore-hole.

She met the first accused lying on the ground. She enquired from her (1st accused) how the child happened to have entered the well. The first accused said there was a piece of paper or carton at their premises to the effect that the body of the child was inside the well. She did not see that paper though. She knew the first and second accused as tenants to one Kariuki (land lord). They had resided at Kariuki's plot as a couple together with other tenants. She confirmed that the photograph taken at the scene was a true description of the shamba and bore-hole/well. The photograph was marked as MFI – 1. The bore-hole/well was 5 kilometers from the residence of the couple. It could take 45 minutes to reach the well/bore-hole.

Maina Githuri, PW4, attended post – post-mortem at the City Mortuary. He identified the body of the

deceased to the pathologist who did the post-mortem. He was in the company of the Kago Kefwe. The doctor opined that the deceased died of drowning - asphyxia.

No. 67941, P.C. Nickson Ibule, PW5, attached to the City mortuary was in the report office when a couple reported that their daughter went missing on 3rd March 2010 at 8.30 pm from their place of work.

He sent them to go and bring a photo of their daughter to assist with investigations. They returned on 4th March 2010 with the news/information that they did not find a photo. He then entered the report in the occurrence book (O.B)

On 5th March 2010 one Njuguna came with a piece of paper or carton addressed to the deceased. Njuguna divulged that the piece of paper or carton contained information of the place where the remains of the child could be found – Chura village at Masara's bore hole.

He was told by the accused that they found the piece of paper/carton paper on their door step when they wake up in the morning.

Accompanied by CPL Maranguri, PC Ngetuji and the two reportees they went to Chura village. At the scene they found curious on -lookers gathered. The scenes of crime personnel who accompanied them took photographs of the scene.

The body was retrieved from the bore hole and taken to the City Mortuary. The first and second accused were arrested and taken to Kikuyu Police Station. He positively identified the two accused persons in court.

Dr. George Kungu Mwaura, PW6, is a registered medical practitioner attached to Kinoo Medical Clinic in Kikuyu.

On the instructions of Kikuyu Police Station, he examined the 2nd accused, Walter Njuguna Njoroje, for the purpose of ascertaining his age and mental status. He established his age at 24 years. His mental status was normal. He completed and signed the P3. Which was admitted in evidence as exhibit No. 2.

On the same day he examined, the first accused Jane Gathigia Maina, also on the request of Kikuyu Police Station for the purpose of assessing her age and mental status. He established her age at 26 years. Her mental status was normal. He completed and signed the P3 form which was admitted in evidence as Exhibit No. 3.

No. 65718 CPL Gerald Wasike, PW7, currently stationed at CID Headquarters in Nairobi accompanied Chief Inspector Riungu in – charge of Kikuyu Police Station and Rigeru Police Post to Turia area at Mazera farm on the 5th day of March 2010.

He was shown the body of the deceased, Antonina Warimu Njuguna, inside the well. With the assistance of members of the public the body was retrieved from inside the well which was about 20 feet deep. Scene of crime personnel took photographs showing the position of the well vis-a-vis the position of the body. He produced the bundle of photographs as Exhibit No. 4.

Antipas Nyanjwa, PW8, attached to CID Headquarters is a forensic examiner of 15 years standing. He holds a Masters degree in Criminology from the University of Sagar in India. He has undertaken forensic science training at Interpol Headquarters in France, the National Police Headquarters in Sydney Australia, the National Authority for investigations and prosecutions of economic Carlton Police Headquarters, Regional International Organization for Migrative Training Academy at Moshi, Tanzania, and the Eresters Freeman in U.K, Last but not least he is an admitted handwriting expert in the United Nations International Court since 1998.

On 3rd March 2010 CPL Peter Mugwengi attached to Kikuyu Police Station took to him a document (piece of paper/carton) marked Exhibit No. 1 whose authorship (read handwriting) was in dispute.

Along side the piece of paper/carton, the investigating officer also brought a set of documents which contained some specimen handwriting marked by the investigating officer as A1 – A5.

He was requested/instructed to examine and compare whether the handwriting on the piece of paper/carton could have been written by the same author of the specimen handwriting marked A1 – A5.

On examination he confirmed that the handwriting on the piece of paper/carton and the specimen handwriting marked A1 – A5 are similar and indistinguishable. He signed and dated the report which was admitted as Exhibit No. 5A, and Exhibit memo as Exhibit No. 5B.

No. 53122 CPL Peter Mwangangi, PW9, was at Kingeero Police Station on 5th March 2010 at 10.30 am. He was informed by P.C Libulu that a reportee by the name Walter Njuguna Njoroge who had been at the station on 4th March 2010 had brought a piece of paper/carton which he presented as containing a piece of information that the missing child was traced at Chura village farm in a bore-hole. He caused this report to be entered in the O.B. of the station of even date.

He interrogated Walter Njuguna Njoroge (A2) with a view to establishing how he came by the note. Accused 2 said that the note was found by his wife (accused 1) outside their charcoal business premises.

He passed this information to the OCS Kikuyu, Inspector Ruingo. In the company of the said OCS, RC Etgetuny and P.C. Libule they went to the scene at Chura at the shamba of one Macharia.

At the scene he established that both accused persons lived 100 meters away. From the information obtained from the owner of the bore-hole he established that the accused persons used to fetch water from the said bore-hole. He organized for the body to be retrieved from the well. He instructed scenes of crime personnel to take photographs of the scene.

On returning to the Police Station, he got further information that on the 3rd day of March 2010 at about 8.30 pm the accused persons had a quarrel which culminated into a fight. The genesis of the quarrel was over some money from the proceeds of the charcoal trade.

Armed with the set of information and the earlier report of the missing child he concluded that the accused persons had something to do with the same. He then decided to arrest both accused and charged them with the offence of murder.

On the 15th day of March 2010 at Kikuyu Police Station he took handwriting specimen of the first accused since he wanted to find out if he was the author of the document which had information where the child could be found. He requested the hand-writing expert to confirm if the first accused was the author of the exhibit No. 1. He requested the first accused to make 5 copies repeating the same message on the carton (document). He marked as A1 – A5. He requested the second accused to make 5 copies repeating the same message which was contained in the piece of paper/carton but he declined sighting lack of formal education i.e. he was illiterate.

From the handwriting marked A1 – A5 he prepared exhibit memo admitted in evidence as Exhibit 5B which he forwarded to the CID Headquarters for further examination.

Subsequently he received a report exhibit 5A and exhibit memo marked as exhibit 5B. He produced in evidence the documents marked A – A5 written by the first accused as Exhibit No. 6.

When the body was retrieved from the well the same was taken for post-mortem at the City Mortuary. The post-mortem form was handed over to him. The same was admitted in evidence as exhibit No. 7.

Dr. Odiwuor Johnson, PW10, holds a bachelor degree in medicine and surgery and a master degree in Pathology from the university of Nairobi. In addition he also holds a Diploma in Forensic medicine from Witwatersrand university in South Africa.

On 11th March 2010 he conducted a post-mortem on the body of the deceased herein. And a result of his examination he formed the opinion that the cause of death was as apyxia due to drowning. He dated and signed the post-mortem report which was produced in evidence as Exhibit No. 7

Having carefully evaluated the sum total of evidence adduced by the prosecution, I put both the accused persons on their defence after explaining to them the provisions of section 306 (2) of the Criminal Procedure Code.

The first accused chose to give sworn evidence and chose not to call any witness in support of her case.

The second accused equally chose to give sworn evidence and chose not to call any witness in support of his case.

In her sworn statement, Jane Githigia Maina, DW1, testified that on the 3rd day of March 2010 she had disagreed with her husband over a sum of sh.3000/=. That notwithstanding she went to their rented apartment. As she was cooking she realized that the maize flour was not enough. He then asked her husband for sh. 100/= to purchase the maize flour. On her way to the shop the deceased was following her. When she finalized the transaction with the shop-keeper she did not see her child. She then went back to their rented apartment without the child. She told her husband about the missing child. The couple then embarked on a mission of tracing the child in vain. They then returned to their apartment. The following day (read 4th March) 2010 on attempt to trace the child equally drew a blank. They then went to Kingero Police Station to report the loss of the child for purposes of being recorded in the Occurrence Book (O.B).

On the 5th day of March 2010 when they wake up in their rented room they found a letter carton pinned at the door to the effect that the lost child had actually died. They took the letter to Kingero Police Station. The police undertook to do their investigations. Later on, the police told them the child had been found dead at Chura village dead in a bore-hole. They were subsequently arrested and charged with the offence of murder.

Last but no the least, she testified that the bore-hole where the child was found was about 45 minutes walk from their rented house while the shop where she had gone to buy maize flour was three (3) minutes walk from their residence.

In cross – examination she testified that she was a class 6 drop – out. That she knows how to write Kiswahili, English and Kikuyu language. That the letter disclosing the place the child could be found was partly written in English and partly in Kiswahili.

That the child who died was born out of wed-lock. After the child was borne they got married. She neither reported to the chief about the loss of the child the same night nor to the police.

The second accused, Walter Njuguna Njoroge, DW2, recalled the events of the 3rd of March 2010 at about 8.00 pm. A quarrel erupted between him and the first accused over a sum of sh.3000/= being part of proceeds of charcoal. The neighbours arbitrated over the issue.

The 2nd accused was resting on bed, while the first accused was cooking. The first accused then informed him that maize flour was not enough for dinner. He gave her sh.100/= to buy the maize flour. That the first accused then left with the child/deceased who was her biological child. About 20 minutes later the first accused come back alone without the child/deceased. The first accused then asked him if the child/deceased had come back alone. He was taken back since the first accused left with the child. He woke up and together they went to look for the child in vain.

On the morning of 4th March 2010 they again searched for the child once again in vain. They then went to Kikuyu police Post to make a report. On 5th March 2010 the first accused was the first to wake up. She then told him that she had found a letter on the ground near their main door. He joined her at the door. She read the letter to him. The letter was to the effect that the child was inside a well at Chura

village. The neighbours advised them to report the piece of information to the police. The police then arrested them. He denied having committed the offence. He was categorical that from their rented house to the shop where the first accused went to buy maize flour was a three (3) minutes walk away.

In cross – examination he testified that they quarreled about 8.00 pm thereafter the first accused went to the shop with the child. Twenty or 30 minutes later she came back without the child.

On the available evidence on record, it is not in dispute that the deceased was the child to the first accused and second accused. It is further not in dispute that the couple had a quarrel in the fateful evening. At about 8.00 pm the first accused went to buy maize flour. The child followed her. The second accused was left sleeping in their rented room. The first accused come back without the child. According to her she thought that the child aged 4 years had returned to the house alone.

The prosecutions case is that the couple murdered their child who was borne out of wedlock by throwing her into a well.

Against that backdrop of evidence, it is clear to me that this case turns partly on circumstantial evidence and partly on direct evidence. With regard to circumstantial evidence the prosecution pieced together certain events whose sum total may be sum that red as follows:-

- 1) That the two accused person had a child out of wedlock and later got married;
- 2) That on the material day the child, Antonita Wairimu Njoroge, the deceased, followed the first accused as she went to the shop to buy maize flour for an evening meal;
- 3) From the house/room occupied by the first and second accused to the shop was three minutes walk;
- 4) However, the first accused took about 20 minutes to return back.
- 5) The question that begs answer is apart from buying maize meal where else did the first accused go; to warrant her taking 20 minutes while the shop was 3 minutes from their residence.
- 6) Two days later the child was found dead in a well/bore-hole at Chura village;
- 7) That Chura village farm, on the available evidence, is about 45 minutes walk from their residence.
- 8) The couple used to fetch water from the same well.
- 9) The other question that begs answer is how the child aged 4 years managed walk alone that far at 8.00 pm in the night;
- 10) Then there is the writing on a piece of paper/carton found by the first accused at the door of their rented room to the effect that the body of the child was at the bore-hole/well at Chura Farm;
- 11) The document examiner made a finding that the author of the document in question was the first accused;
- 12) This is buttressed by the fact that the first accused knows how to write and read English Kiswahili and Kikuyu language well;
- 13) The second accused is totally illiterate;
- 14) Without this document piece of paper/carton - nobody would have known where to retrieve the body of the deceased;

15) From the document examiners findings it is apparent that the first accused decided to write the note after the child got lost to assist in locating the body;

16) The note was positively identified by the handwriting examiner as having been written by the first accused. Coincidentally it is the first accused who left with the deceased at 8.00 pm when she went to the shop to buy maize meal for dinner;

17) The Odiwuor Johnson (PW10) opined that the deceased died of strangulation due to asphyxia due to drowning;

18) This in common parlance means that the child was strangled first before being thrown into the water – hole/well.

19) In which case the child did not enter the well on her own. She was strangled and thrown into the well.

I am aware that, in law in order to justify circumstantial evidence, the inference of guilt, the incaputatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. That the burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. That it is a burden which never shifts to the party accused. In this regard I call in aid SAWE VS REPUBLIC (2003) K.L.R page 364 at page 372.

I am equally aware, that circumstantial evidence is very often the best. It is evidence of the surrounding circumstances, which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial. In this regards I call in aid the authority of REPUBLIC VS – TAYLOR, WEAVER DEMUAN (1928), 21 CR. APP. R.O.

On the totality of the circumstantial evidence, and direct evidence, it is clear to me that the first accused and the second accused had a domestic quarrel in the evening of 3rd March 2010 over family finances.

As the second accused was lying on bed the first accused was preparing the evening meal. Then the first accused informed the second accused that maize flour was not adequate to make “ugali”. The second accused then gave her sh.100/= to go to the shop which was three minutes walk from their residence. The deceased followed the first accused. When the first accused came back alone about 20 minutes she asked the second accused if the deceased had come back ahead of her. The second accused denied. They then went to search for the deceased in vain.

In my judgment that idea of going to buy maize flour confirmed by the first accused was really a red-herring. It was meant to give the first accused an excuse to go along with her child with a view to strangling her and throwing the remains in the bore-hole. Otherwise, if it was buying maize flour the trip could not have taken over 20 minutes because on the evidence the shop was 3 minutes walk from the residence occupied by the couple.

It is with this in mind that I invoke the provision of section III of the Evidence Act (Cap 80) Laws of Kenya which is pertinent part, reads as follows:-

“Section III (1) when a person is accused of offence, the burden of proving the circumstances bringing the case within any exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him”.

The first accused evidence is that the deceased followed her to the shop which was three minutes walk. When she finished the transaction she did not see the child. She thought the child went back to their residence. On reaching the house the husband told her that the child had not returned.

Against that backdrop, only the first accused was with the child between 8.00 pm and about 8.20 pm. As to how the child got lost and was later found strangled and thrown into a well was a fact especially within the knowledge of the first accused. Only she could explain how the child who was in her company disappeared and ended up being strangled drowning in a bore-hole/well within twenty (20) minutes of having left their residence.

The first accused sworn statement does not appear to me to discharge the burden squarely put on her under section III (1) of the Evidence Act (cap 80) laws of Kenya.

In so finding, have not lost sight of the provisions of section III (2) of the Evidence Act (Cap 80) law of Kenya which in effect provides that section III (1) above does not diminish the obligation on the prosecution to establish by evidence the commission of the offence charged.

It is with this in mind that I find the first accused guilty as charged. I convict her accordingly.

In respect of the second accused I find no evidence linking him with the commission of the offence charged. In the result I acquit the second accused of the offence as charged.

I sentence the first accused to serve 10 years imprisonment having taken into full consideration the sum total of the mitigating circumstances of the offence.

Dated and delivered at Nairobi this 5th day of May 2014.

N. R. O. OMBIJA

JUDGE