



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 37 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JANE NJOKI WAMBUGU.....ACCUSED**

**JUDGMENT**

Jane Njoki Wambugu is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 2/5/2012 at Ngomongo Market Gatimu Location, in Nyandarua, murdered Mary Muthoni. The accused denied committing the offence. The prosecution called a total of 8 witnesses. The accused gave a sworn statement in her defence but did not call any other witness.

PW1, APC Cyrus Ondieki and PW2, APC James Maina, both of Nyandarua West Administration Police Post, recalled that on 17/5/2012, about 9.00 a.m. they received a report from Francis Muchemi and Charles Maina PW3, that the child of their sister, the accused, had gone missing for 3 days and she could not tell the whereabouts of the child. Cpl Richard Kamau sent them to Swara Flower Farms where accused worked to make enquiries. They did not get accused at work but later PW3 and the others reported that she was at work. They went and picked accused for interrogation. On interrogation the accused told them different explanations as to where the child was and later they handed her over to Oljororok Police Station for further investigations.

PW3, Charles Maina, is a brother to the accused and was declared a hostile witness and so his evidence is worthless in this trial.

PW4, Peter Wambugu, is the father of the accused. He told the court that accused had been away from home for over 2 years but returned in 2011. He opened for her a saloon business which she did until 25/12/2011 and left home without a word. She was with her child, Mary Muthoni, the deceased. Accused returned home on 1/5/2012 with the child, slept but left very early next day. He did not hear from her till PW3, his son, informed him that he was required at the Police Station about 19/8/2012. It is then he was shown a body which he was told belonged to his grandchild, Mary Muthoni, but he was not able to identify the body because it was swollen. The body was released to him to go and bury. He found the accused in police cells.

PW5, Veronica Mumbi, is wife to PW4 and mother of the accused. She reiterated what PW4 told the court. She was informed by PW4 to go to Nyahururu mortuary where the child, Mary Muthoni's body was. She said it was swollen and it was later buried in a Government cemetery because they could not meet the expenses.

PW6, Priscilla Nyawira Munene, is a friend to accused and used to work with her at the Swara Flower

Farm. She recalled that on 29/4/2012, accused went to her house and asked her to house her as she had problems having been sent away by the husband PW6 went to request her employer to offer accused a job. On the evening she was not specific about, she found accused with her brother and they left with accused's child claiming they were taking it to her mother. The child had been left with the neighbour and PW6 saw them carry the child away. Accused returned the next day and they stayed together till Thursday when PW6 went on off. She met the aunt to accused and on enquiring about the child, learnt that the child was not at home. It is then she called PW3 to ask him about the child. It is then accused's brother called her asking if she knew where the child was. Accused claimed to have taken the child to her husband. Later she learnt from accused's brother that the body of the child was found in a river. She told the court that the child was fine and had no health problems before the accused left with the child.

The post mortem was performed by Dr. Wahiti at Nyahururu Hospital but could not be available to testify. Instead Dr. James Wagura (PW7) produced the post mortem on his behalf. The doctor found the body of the deceased to be badly decomposed and blotted, there were no external injuries; and he formed the opinion that cause of death was pulmonary arrest due to drowning.

Cpl Richard Nyakora (PW8) of Nyahururu Police Station received information that a body of a child had been seen floating in the river and in company of other officers the proceeded to the scene, retrieved the body from the river and circulated the information to other police stations. On 17/5/2012, he received information from Oljororok Police Station that they were holding a suspect over murder of a child. The accused was taken to Nyahururu Police Station where PW8 interrogated her. After viewing the body at the mortuary, the accused identified the child by the clothes she wore and claimed the child had been left with the mother but went missing. He recorded statements from witnesses and when he found accused to be giving contradictory statements of the whereabouts of the child before disappearing, he preferred charges. In cross examination, PW8 said that the accused alleged to have left the child with a lady by name Mary Wangui; that he interrogated the lady but later she could not be traced.

In her sworn defence the accused stated that she had three children, the eldest one living with the parents and she lived with the second child, Muthoni, now deceased, at her place of work. The third child has been in remand. She said that she used to pay a lady by name Wangui to look after her daughter Muthoni whenever she went to work. She corroborated PW4 and PW5's evidence that she went back to her parents' home with Muthoni on 1/5/2012 and left on 2/5/2012. She went back to work and used to leave the child with Wangui till 17<sup>th</sup> when she went to work as usual and at 1.00 p.m. she was called by Wangui who informed her that she had a visitor. She found two men who claimed to be investigators, they asked her to accompany them to Oljororok Police Station. She was placed in cells despite her complaint that she had a child to collect from daycare. After 2 days, she was taken to Nyahururu Police Station and she asked the OCS to get the child and she was escorted by the Investigations Officer. She found 2 girls in the plot but did not get the lady or child. It is then she was informed that she murdered her child and would be charged. She denied killing the child and denied seeing the body that was recovered. According to the accused her child is still with Wangui.

Having considered all the evidence on record, no doubt this case turns on circumstantial evidence because nobody witnessed the murder of the child, Muthoni. The court can only rely on circumstantial evidence if it meets the threshold set out in the case of **R v Kipkering Arap Koske (1949) 16 EACA 15**, the East African Court of Appeal held that for circumstantial evidence to found a conviction:-

**“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”**

The accused denies that her child is deceased and accuses one Wangui of having her child. There is overwhelming evidence on record that it is the accused's brother PW3 who was declared as a hostile witness, who made the first report that the accused's child was missing and that it is accused who should have disclosed the child's whereabouts. PW1 and PW2 told the court that PW3 and another went to complain to them that they wanted the accused to explain the whereabouts of her child Muthoni. PW4, the accused's father told the court that PW3 informed him that he was wanted by Nyahururu Police Station and when he went there is when he found accused under arrest. He was shown the body of the

deceased child that was swollen. He said that the body was not easily identifiable. He however did not deny that the body was that of his grandchild. The doctor who performed the post mortem recorded that the body was identified by Peter Wambugu, PW4 and Charles Maina, PW3.

I am satisfied beyond any doubt that the body which was recovered in Rwathia River was duly identified by PW3 and PW4. By the time the body was retrieved, the child had been missing for sometime. The doctor who examined the body opined that the child died due to pulmonary arrest due to drowning. I am satisfied from the above evidence that it is Muthoni the daughter of the accused whose body was retrieved from Rwathia River, was identified by PW3 and PW4 and the body was released to PW3 and PW4 for burial.

Who murdered the deceased? The accused denies committing the offence. She claims to have left the child with one Mary Wangui. However, PW1 and PW2 told the court that they decided to arrest the accused after receiving a report from her brothers because she gave very many different explanations as to the whereabouts of the child i.e. that the child was with her mother; that the child was with her husband and when he was contacted and denied having the child, she claimed the child had been sick and admitted and that she had left it with Wangui. That is what caused the officers to hold her in custody. By then the child was still missing. PW6, accused's friend who was living with her told the court that, she last saw the child with the accused and her brother, when they took the child from the neighbour who used to look after the child and left with her claiming that they were taking the child to accused's mother. PW4 denied that the child was left with her. Infact PW6 is the one who seemed to have raised alarm over the child's disappearance. PW6 also told court that accused told her contradictory stories of the whereabouts of the child too. It is unfortunate that the police did not call two very crucial witnesses to this case. PW1, PW2 and PW6 all alleged that accused claimed to have taken the child to her husband but no effort was made to call the said man to confirm whether or not the child was ever with him. Secondly the accused settled on the allegation that Mary Wangui has her child. PW8 told the court that he questioned the said Mary but that when he went back to her house, she had shifted. Even if that were so, the Investigation Officer never demonstrated what effort he made to try and get the said Mary Wangui to come and testify. It is the duty of the prosecution to produce all material witnesses to their case even if their evidence would be adverse to their case. Such relevant evidence would go to help the court arrive at a fair decision. No sufficient or any reason has been given as to why these two key people were not called as witnesses. And the fact that PW8 said that Mary Wangui shifted from her residence, was she running away or did she know what had happened to the deceased? In the case of **Bukenya v Uganda**, the court said:-

“(i)...

**(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;**

**(iii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;**

**(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

....

**While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”**

The prosecution failed to call key witnesses and a doubt is left in this court's mind whether their evidence would have been adverse to their case. Of course the accused is a prime suspect in the death of her child. She may have killed the child because she had just parted with her husband and had many problems as

per PW6's testimony and may have let out her frustrations on the child but that remains suspicion upon which a conviction cannot be founded.

Having carefully analysed all the prosecution and defence cases, I am satisfied beyond any doubt that the accused is a prime suspect in the murder of her child but there is still doubt in my mind whether somebody else might have done it. That doubt must be resolved in favour of the accused. The upshot is that the accused is found not guilty and acquitted of the offence of murder under **Section 322** of the **Criminal Procedure Code** and set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 4<sup>th</sup> day of July, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Bichanga for the accused

Accused present

Mr. Chirchir for the State

Kennedy – Court Assistant