



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 5 OF 2009

REPUBLIC.....RESPONDENT

VERSUS

BERNARD WAMUTI KAMAU.....ACCUSED

JUDGEMENT

The accused herein, **Bernard Wamuti Kamau**, (hereinafter referred to as the accused and Bernard interchangeably is charged with the offence of murder contrary to **section 203** as read together with **section 204** of the **Penal Code**.

The particulars of the offence are that on the 5th day of January, 2009 at Kiamara Estate in Kiambu District within Central Province murdered **F M M** (hereinafter referred to as the deceased and F interchangeably).

The state called 11 witnesses in support of its case.

John Njoroge Kamau, PW1, testified that the accused person is his elder brother. He shared one room with him. On the 5th day of January, 2009 he was working at a neighbours place in Gachanga. The accused person borrowed a shaving machine from the said neighbour. He was shaved by one **Nganga** just in the said neighbour's premises. After shaving accused left for his residence about 30 meters away. Time was now 6.30 pm.

That evening he heard announcement from a preacher, named **John Kimemia**, on a public address system that a child was missing. Reacting to the announcement villagers were mobilized and the search for **F** commenced in earnest.

The following morning he heard screams while still asleep. By the time he woke up a crowd had gathered. He learnt that a pair of sandals belonging to the deceased had been recovered in a coffee plantation. A further search in the shamba led to the recovery of the lifeless body of F. The deceased body was clad in a red sweater. A pair of shorts was lying beside her. From the waist downwards the body was covered in a jacket. He observed vomit on the side of the deceased's mouth. The body was lying on its **back facing** upwards. She was dead. Later he learnt from the crowd that the deceased had been raped.

On 8th January, 2009 he retrieved the clothes, a green trouser and a black stripped shirt with big lines, from the bedroom the accused was sharing with Gichuru (PW2) and handed the same over to the police. By then the accused was not at home.

Paul Gichuri Kamau, PW2, used to dig septic tanks at Ruaka. On 5th January, 2009 he left work between 5.00 pm and 5.30 pm and went home. About 5.45 pm he fetched water using a jerry-can. Thereafter he went to the shop to buy a piece of soap. On the way, he met, **M**, the father of the missing girl. He abandoned his mission and joined M's search party. On the 9th day of January, 2009, while still asleep, about 8.30 – 9.00 pm, police officers invaded the single room they were sharing with the accused and asked for the accused. He informed the police that the accused was working as a night watchman and was on duty at that point in time. He was arrested the same night.

The following morning the accused was arrested and taken to Kiambu Police Station where he (PW2) was also held. After 14 days he was released but accused was not that lucky - he was detained. He later came to learn that the deceased body was recovered on 6th January, 2009, in a coffee plantation within Kiamara Estate.

In cross – examination he was categorical that **Bernard** (accused) and **Njoroge (PW1)** were sharing a single room. He was not sharing his room with anybody. His room had a separate door. Bernard slept in the room only during day time since he was a night watchman at Runda Estate. Usually the accused arrived him at 6.30 am and left for work at 7.00 pm in the evening.

Every morning the accused person used to look for and cut grass, for the cows, when he came back from night shift. **As a matter of routine when looking for grass the accused used to wear a green trouser and a stripped yellow and black shirt.**

J M M, PW3, returned home from work between 5.30 pm and 6.00 pm on 5th day of January, 2009. His wife (PW4) informed him that the deceased, their last born, had disappeared. The child was aged about 3 years. Anytime PW3 and PW4 went to work they used to leave the deceased with his brother's wife.

When the child could not be traced in the neighbourhood his wife (PW3) started screaming. A preacher who had a public address system announced the loss of the child. That day they searched the neighbourhood and the coffee plantation nearby in vain. The following day they repeated the search. This time round he noticed a pink sandal in the coffee plantation. He recalled having bought the same for the deceased. The discovery of the sandal gave them hope. They intensified the search. Ten or so meters from the place the sandals was found, he recovered the naked body of the deceased. The shorts, the deceased wore on that fateful day, were beside her. She had bruises on the neck. She had vomited on her red sweater which was soiled. He took the picture of the deceased in that state using a camera.

On discovery of the body the search party went into a frenzy. Many people gathered at the scene. He proceeded to Kiambu Police Station to report the incident. Police visited the scene and took the body to the mortuary for safe keeping pending postmortem examination. On 6th January, 2009 two ladies – **A M** and **H M** offered vital information to the effect that on the day the deceased disappeared, accused was late for work. That the accused was seen in a green trouser which was soiled at the knees. Accordingly, the OCS Kiambu was given the information and swung into action and facilitated the arrest of Benard on 6th day of January, 2009.

The room occupied by Benard and his brother was searched by the police. Among the things collected from the said room were a green trouser and a yellow black stripped shirt. He confirmed that he had seen **Bernard** wearing the same on several occasions. Last but not least, Benard's residence was about 100 meters from his (PW3) home.

Subsequently, he went to the City Mortuary where he identified the body to the doctor for postmortem purposes. The body was thereafter released to him for burial.

S W, PW4, is the mother to the deceased. On 5th January, 2009 at 6.40 pm she came back home from work. She called the deceased while still at the gate. Being the last born child she was in the habit of bringing her some cookies. She shouted her name but the deceased did not respond. This sent her into panic and she raised alarm. Fellow villagers gathered and the search for F commenced in earnest.

The next day her husband and a group of well wishers searched a coffee plantation in the neighbourhood and recovered the remains of the child.

Through **H M** and **A M**, who saw Benard on the 5th day of January, 2009 with soiled clothes, she had strong suspicion that it was Benard who had committed the heinous crime.

H M M, PW5, was at home on 5th January, 2009. About 9.00 am the deceased, **F M**, came to visit her. The deceased was a child to her sister – in – law whose home was about 100 meters from hers.

The deceased stayed for about 15 minutes and left for her parents residence. About 5.30 pm she went to the shop. On the way he passed through the home of the accused. She heard accused's sister asking him (accused) why he did not go to work yet it was time for reporting. She observed that the accused was dressed in a green trouser and a yellow black stripped shirt. She identified the said clothes in court.

About 9.00 pm the father of the deceased came looking for her (deceased). He acknowledged having seen the child at 9.00 am but explained that she left 15 minutes later. She joined the search team. The following day the lifeless body of the deceased was recovered at a coffee plantation in the neighbourhood.

No. 60109 P.C Nicholas Mutinda, PW6, attached to CID Kiambu Police as at 5th January, 2009 was instructed to assist the investigating officer with the marking and preparation of exhibits to be forwarded to the Government Chemist. He duly compiled and escorted the exhibits to the Government Chemist for analysis.

Dr. Johansen Odiwuor, PW7, performed postmortem on the body of the deceased at the City Mortuary on the 7th of January, 2009. The body was identified by the father (PW3) and one **Alex Wanjau**.

As a result of his examination he formed the opinion that the **cause of death was asphyxia due to manual strangulation**. In addition thereto there were also features of defilement observed, for example, lack of hymen. In cross-examination he opined that visual injuries were occasioned by a blunt trauma. In addition thereto there were also tears and blood clot in the vagina of the deceased.

Stephen Makinde Joel, PW8, the Government Analyst, attached to Government Chemist Laboratory, holds a Bachelors degree in chemistry from the University of Nairobi in the year 1998.

On 13th January, 2009, **P.C Nicholas Mutinda (PW6)** brought to the laboratory assorted items marked (i) – (vii):

- (i) item X1: a green pair of long trouser;
- (ii) item X2: a yellow black stripped short sleeved shirt ;
- (iii) item Y1: blood sample of the deceased – F M M;
- (iv) item R1: vaginal swab of the said deceased;
- (v) item R2: saliva sample of the suspect Benard;
- (vi) item R3: blood sample of Benard the suspect;
- (vii) item S1: soil sample collected at the scene.

He was commissioned to ascertain whether the items were stained with blood. He was to undertake grouping on the blood samples to ascertain if there was any relationship between the items submitted and the deceased/or accused. In addition thereto he was also asked to ascertain if the vaginal swab had any semen. He was also commissioned to undertake the grouping of the semen with a view to ascertaining the possible source of the semen.

As a result of his examination he found that:-

1. X1: was moderately stained with human blood of group A;
2. X2: a shirt was slightly stained with human blood of group A;
3. Y1: Blood sample of the deceased – Y1 was found to be a group A;
4. R1: Vaginal swab of the deceased had no semen or spermatozoa;
5. R2: The saliva sample was found to be of group B secretor;
6. R3: Blood sample of suspect was found to be of group B;
7. 5-1: had no blood stains.

Based on his finding as herein-above he formed the opinion that the blood-stains on the trouser (item X1) and in the shirt (item X2) both matched in group, the blood sample of the deceased. The blood-stains could have come from the deceased after injury.

He prepared the report of his findings on 17th December, 2009 which he tendered in evidence as exhibit seven (7) in these proceedings. A certified copy of the said report signed by his colleague, **Paul Kenge**, whose handwriting and signature he is acquainted with, was tendered in evidence as exhibit No. 6. Last but not least, he did not undertake a DNA test because there was no need having examined the blood groups on the items, and the blood group of the accused and the deceased, and come out with a positive finding.

Catherine Seran Mrambi, PW9, holds a Bachelor degree in Chemistry from Kenyatta University College in 1998. She is designated as a Government Chemist deployed of the Government laboratory. On 13th January, 2009 she received some exhibits from **PC Nicholas Mutinda** itemized (i) – (iv).

- (i) Item X1: blood – stained green trouser which had some muddy stains belonging to accused;
- (ii) Item X2: a yellow/black striped shirt with some vomit substance belonging to the accused;
- (iii) Item Y2: brown solid particles indicated as vomit substance contained in a khaki envelope;
- (iv) 5-1: Soil sample collected from the scenes of crime.

She was commissioned to make a comparison between X1 and S1 and equally to match X2 and Y2.

Her findings were as follows:-

1. Soil sample on item X1 was analyzed and found to be chemically similar to soil marked S1.
2. The vomit substance on item Y2 did not match the white stains on item X2.

She then prepared the report dated 17th December, 2009 which she tendered in evidence as exhibit 7. The said report was signed by his colleague **Paul Kangethe**, whose handwriting and signature she was conversant with and admitted in evidence courtesy of the provision of **Section 33** as read together with **Section 77** of the **Evidence Act (Cap 80)** Laws of Kenya.

NO. 81309 PC Barack Sila, PW10, was attached to Kiambu Police Station as at 6th January, 2009. Together with **P.C Oloo Kasera** they were summoned by the **OCS, Inspector Silas Maguya**, to accompany him to the scenes of crime. He described the scene as follows:-

“She was half-naked. Blood was oozing from her Vagina. It was a coffee plantation. She had visible injuries about the neck. She had vomited at the scene.....”

At the scene they recovered a plastic slippers/sandals. The body was then escorted to the City Mortuary for postmortem examination.

The deceased family suspected the accused. Acting on that information the police searched for the

accused within Runda Estate and, also at his residence. At the accused's residence the police recovered a soiled green trouser at both knees and a yellow black stripped shirt. The shirt had some vomit on it, on the left side near the pocket. The two items recovered were kept at Kiambu Police Station for onward transmission to the Government Chemist for analysis.

The following day he attended the postmortem at the City Mortuary. **Dr. Johansen Oduor (PW7)** requested for vaginal swab. He facilitated the transmission of the said items to the Government Chemist for analysis. The suspect was arrested on 8th day of January, 2009 and taken to Kiambu District Hospital where his blood samples was taken the same day. He facilitated the transmission of the said blood sample to the Government Chemist for analysis.

P.C Kenneth Mwenga, PW11, was attached to Divisional CID Headquarters Kiambu. Superintendent of Police, Koini instructed him to conduct investigations regarding this case. Towards that end, he was given certain items which had been recovered at the scene. These included, but not limited to, plastic sandals (left side) and two statements from the parents of the deceased. The police had by then recovered a green soiled trouser, a yellow black stripped shirt with vomit near the left pocket which they thought had a bearing to this case.

He visited Runda Estate where the accused was reportedly working as a night watchman but did not find him. He proceeded to the residence of the accused where he recovered the green trouser and the yellow black stripped shirt, accused was reportedly wearing during day time on the 5th of January, 2009.

On 8th January, 2009, he succeeded in arresting the accused whom he escorted to Kiambu Police Station. At the said station he assembled all the items recovered from the scene and the room the accused was sharing with his brother Njoroge (PW1). In addition thereto he facilitated the taking of blood samples and vaginal swab, from the deceased at the City Mortuary.

He prepared the exhibit memo form. Together with PC Mutinda (PW6), they escorted the said samples to the Government Chemist for expert analysis. The short sleeves yellow black stripped shirt was tendered in evidence exhibit **No. 1**, the green trouser as **exhibit 2**, pink baby slippers/sandals as **exhibit 3**, the exhibit form as **exhibit 4**, the post-mortem report as **exhibit 5**, the Government Analyst report by Stephen J. as **exhibit 6** and Government Analysis report by Catherine Mrambi as **exhibit No. 7**.

At the close of the prosecution case I placed the accused on his defence after carefully analyzing the evidence tendered by the prosecution witnesses after duly complying with the provisions of **Section 306 (1)** of the **Criminal Procedure Code**.

In his sworn defence the accused herein, **Bernard Wamuti Kamau**, testified that he is a peasant farmer. That on this 5th day of January, 2009 he was at home from about 7.00 am until 5.00 pm. He then left for work at Runda Estate where he was employed as a night watchman. He arrived at his work place at about 6.00 pm. The next day on his way from Runda Estate in the morning hours he met some people from his village who told him that a small girl had been found dead in a coffee plantation in his neighbourhood. The following day he went back home at about 7.00 am. He feed his three (3) cows and in the evening reported to his work place at Runda. He repeated the same routine on the 7th, 8th and 9th January, 2009.

He acknowledged that he used to share a two bedroomed house with his brother **Njoroge** and **Gichuru**. In particular, he was sharing one room with his brother **Njoroge** while **Gichuru** had a separate room. However, the doors to the two rooms were separate and lockable.

Last but not least, he confirmed that, at all times, when working on the shamba, he used to wear a green trouser and a yellow black stripped shirt. He was categorical that was his mode of dressing in his farm on a daily basis. He denied having any connection with the death of the deceased.

In cross-examination he testified thus:-

“My two brothers, Njoroge and Gichuru are younger than me. We are not of the same size

at the waist. They would not therefore fit my trouser. I did not know how the blood of the deceased got into contact with my green trouser. My yellow black striped shirt had vomit on it. But I do not know where the vomit came from”.

On the available evidence, it is clear to me that the accused and the deceased hailed from the same village. The accused person's residence was about 100 meters from the residence of the parents of the deceased. It is not in dispute that the two houses were very close. The accused knew the deceased well. The deceased on one occasion asked her mother (PW3) whether the family to the accused were good people – a premonition.

On the 5th day of January, 2009 the deceased went to visit **H M M (PW5)** whose house was about 100 meters away the house of the deceased parents. Time was about 9.15 am. Nobody in the neighbourhood saw the deceased alive after that until, the 6th day of January 2009, when her lifeless body was recovered from the coffee plantation in the neighbourhood.

The prosecution's case is thus based on circumstantial evidence. Towards that end, the prosecution pieced together certain instances/events and placed them before me as circumstantial evidence thus:-

- (i) the accused and deceased were neighbours at Kanara Estate within Kiambu District;
- (ii) in the morning of 5th January, 2009 the accused borrowed a shaving machine from a neighbour;
- (iii) he was shaved by one **Nganga** just in the same premises occupied by the owner of the shaving machine. Accused then left and took the direction of his residence;
- iv) in the evening, accused left for work late. **M M (PW3)** was informed by **A M M (PW5)** and **H M** that they saw accused with the green trouser soiled at both knees;
- (v) the same evening **John Njoroge (PW1)**, a brother to the accused, heard announcement that the deceased had disappeared;
- (vi) on the 6th day of January, 2009 a pair of sandals (left -side) belonging to the deceased was recovered in a coffee plantation about 100 meters from the village by a search team;
- (vii) shortly thereafter, on the same day, the body was also recovered in a nearby coffee plantation. A man hunt for the killer then ensued;
- (viii) by reason of the fact that two ladies **A M** and **H M** met the accused on the 5th day of January, 2009, in the evening, and noticed that his green trouser was soiled at both knees and that the accused was also late for work for unexplained reasons, the accused became a suspect. ***In fact the two ladies even joked that he had raped somebody;***
- (ix) this piece of information led the search team to focus on the accused. **J M M; (PW3)**, the father of the deceased, informed the OCS Kiambu Police Station of the aspersion cast on the accused as aforesaid;
- (x) acting on the said information the residence of accused and his brother **Njoroge** and **Gichuru** was raided by the police;
- (xi) in the room the accused was sharing with the **Njoroge**, a green pair of trouser and a yellow black striped shirt was recovered;
- (xii) ***these two (2) items were unique.*** The same were clothes the accused person used to wear while cutting nappier grass for his cows on a daily basis. This aspect of evidence was supported by accused person in his sworn statement;

(xiii) but there was more to it: ***the trouser was soiled on both knees and had traces of blood while the yellow black striped shirt had traces of blood and vomit on it near the left pocket;***

(xiv) this aspect of evidence resonated well with the fact that at the scene the deceased clothes also had traces of blood thereby creating even stronger suspicion against the accused;

(xv) the Government Analyst, PW7 and PW8, reports equally resonated well with the rest of the evidence. In particular the blood stains from the green trouser of the accused matched the blood group of the deceased (group A). While the blood on the yellow black striped shirt matched the blood of the deceased (group A) recovered at the scene;

(xvi) based on those findings the Government Analyst opined that the blood on the green trouser of the deceased and the yellow/black striped shirt of the deceased could have come from the deceased after defilement;

(xvii) soil sample on item X1- ***green trouser*** – was found to be similar to soil mark S1 (from the scene). This also equally corroborated the fact that the accused person was at the scene of the crime;

(xviii) in his defence the accused acknowledged that he was in the habit of wearing the green trouser and the yellow/black striped shirt while cutting grass in his shamba at all times. That on 5th January, 2009 he wore the same clothes while cutting napier grass for the cows. That he left for work at Runda Estate in the evening hours;

(xix) in cross-examination accused admitted that they shared a room with his brother ***Njoroge*** while his other brother ***Gichuru*** occupied a separate room. That the two rooms were however, separate but had lockable doors;

(xx) police officers [PW7 and PW10] who conducted the investigations recovered the green trouser and the yellow black striped shirt in the room accused and Njoroge occupied;

(xxi) that ***Njoroge*** and ***Gichuru*** were his younger brothers. That the two boys waist could not match his. In which case ***Njoroge*** and ***Gichuru*** could not fit the green trouser as they were not of the same size at the waist with the accused;

(xxii) though he denied the offence the accused did not come out clearly how the blood of the deceased (group A) got into contact with his green trouser and yellow/black striped shirt.

I am alive to the law in order to justify circumstantial evidence, 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 other than his guilt. That there must be no other co-existing circumstance weakening the chain of circumstances relied on. 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. That it is a burden that never shifts to the party accused. In this connection I call in and the authority of ***KIPKERING ARAP KOSKEI – VS- R. (1949) 16 E.A.C.A 13***

I am equally aware that circumstantial evidence is very often the best. It is evidence of 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 that it is circumstantial. In this connection I call in and the authority of ***REGINA VS TAYLOR WEAVER & DUNCUN (1928), 21 CR. APP. R. 20.***

On the totality of the circumstantial evidence presented before me, it is clear as daylight that the accused was at the scene of crime on the 5th day of January, 2009 past 6.00 pm in the evening. The accused then left for work. On the evidence of ***A M (PW5)***, who was in the company of ***H M***, accused was late for work that evening and the sister to the accused even questioned him why he was late. On seeing his green soiled trouser at the knees ***A M*** and ***H M*** even teased him that he had ***defiled and/or raped somebody.***

When the room he was sharing with his brother *Njoroge* was searched the green soiled trouser and the yellow black stripped shirt were recovered. ***When examined in the Government Laboratory the soil on both knees of the trouser matched the soil at the scene.*** The blood on the green trouser and yellow/black stripped shirt matched the blood of the deceased (group A).

During cross-examination the accused was unable to explain how the blood of the deceased (group A) got into contact with his green trouser, a fact established by the Government Analyst. Accused equally acknowledged that his yellow black stripped shirt also had blood of group A which matched that of the deceased. But he was unable to explain how the said blood group happened to be on his clothes yet his blood group was B.

In my judgment, based on circumstantial evidence, it is the accused person who lured the deceased to the coffee plantation on the fateful day and defiled her. In the process he manually strangled the deceased who vomited and died of asphyxia. This finding is supported by the presence of deceased blood (group A) on the accused green trouser. This finding is further supported by the presence of blood (group A) on the yellow black stripped shirt of the accused which was similar to the blood group of the deceased. Last but not least this finding is supported by the post-mortem report.

Against that backdrop of evidence, on the one hand, I had the advantage of seeing the accused person in the witness box. He appeared to me to be a person who is economical with the truth. In this regard I make a findings, under ***Section 199*** of the ***Criminal Procedure Code***, that he is unreliable witness. I discount his evidence.

On the other hand, I equally had the advantage of seeing the prosecution witnesses in the witness box. They appeared to me to be witnesses of truth. I believe their evidence. I base my judgment on the same.

In the result, I find that the prosecution has proved its case against the accused person beyond any reasonable doubt. I find the accused guilty as charged, on the basis of circumstantial evidence. I convict him of the offence as charged.

I sentence the accused to suffer death as prescribed by the relevant law after, taking into due consideration, all the mitigating circumstances as presented to me by his able counsel.

Dated and delivered at Nairobi this 4th day of November 2014.

N.R.O. OMBIJA

JUDGE