



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 100 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS KARIKO MWANGI.....ACCUSED

JUDGMENT

1. Francis Kariko Kimani (*the accused*) was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code, (Cap. 63, Laws of Kenya). The particulars are that sometimes between 10th and 13th August 2010 at Engashura JC area in Nakuru North District within Rift Valley Province, the accused murdered Mary Wanjiku (the deceased).

2. The evidence of PW1 Juliet Wamboi Keratha, was that on 12/08/2010 she was washing clothes when she smelt an odour emanating from the toilet. She immediately called Mama Lucas and Lucy who investigated the source of the pungent smell. They realised that it was emanating from the pit latrine. On checking inside using a torch, they saw a jacket which was belonged to the accused's child who had been living with him but had gone missing and a hand floating therein. They then called the accused's brother James Mwangi who established that there was a child's body in the latrine. Upon extraction of the body by the Area Chief, PW1 confirmed that this child was in fact the accused's daughter Mary.

3. In cross-examination PW1 testified that he had known the accused well as he had seen him from time to time in school. The accused had separated with his first wife who had then returned the child to the accused about 2-3 weeks prior to her death. The witness testified that the child had been left in her corridor and she was the one who took him to the accused. At the time of recovery of the body neither the accused nor his second wife was present.

4. PW2 was the deceased's mother. She had been married to the accused for about four years before leaving him. Her testimony was that the accused was violent towards her and the deceased. For instance when the deceased was five months old, the accused inflicted an injury on the child while drunk. PW2 reported the matter at the Chief's Camp but no action was taken against him. On another occasion the accused found her at KCC and beat her up. Thereafter he returned home, broke all the windows of the house and hid under the bed. When interrogated he informed PW2 that he was waiting for some people who were supposed to come to the house. The accused had on another separate instance beaten up the other children.

5. The witness and the deceased moved out of the accused's house shortly after an incident which alarmed her. This incident happened on one day when the accused threatened to beat her while she was at his Aunt's house. PW2 reported the matter to the Police but was referred

to Kabatini. When she went home she found that the accused had poured some kerosene on a pile of potatoes, clothes and other food items. She moved out of his house and took the child to live with her mother and thereafter took her to the accused's parents before retrieving her again and leaving her in the custody of a caretaker whom she paid Kshs. 50/=.

6. Later that July (2010), following pressure from the accused, PW2 gave back the child to the accused in the presence of his wife and PW1 to whom she referred as “*Mama Kudede*”. When she again sought custody of her child sometimes in August the accused informed her that the child was with her aunt in Embu. She later learned that the child was deceased and that her body had been retrieved from a latrine. When cross-examined the witness testified that at the time she handed over the child to the accused, she had a small injury on her head but it was healing. This wound had been sustained from a fall.

7. PW3 was the deceased's caretaker who had been engaged by the accused to take care of her at a fee of Kshs. 200/=. The child was given to her on 31/07/2010 and remained in her house for two days. On the third day however she observed a wound on the back of the child's head and returned her to the accused. Despite the accused asking her to take and kill the child, the witness refused to do such a thing and left the deceased with the accused. The following day she was informed by the accused that the child had been taken to Ester's Hospital for treatment.

8. PW4 was PW3's husband. He said that he was approached by the accused who sought permission for his wife to take care of the deceased. He however insisted that PW3 return the child to the accused when days later he observed a wound at the back of her head with pus oozing. He was suspicious of the accused when he gave conflicting information on the whereabouts of the child, on one hand he said that she was in hospital and then again stated that she was with his mother. He was present when her body was retrieved from the latrine and observed that she was wearing the same clothes she had been wearing the previous day. He also stated during cross-examination that at the time they took their child she was very sick and could neither talk nor walk.

9. The medical report was prepared by Dr. Omboga who carried out the postmortem of the deceased. This report was produced by PW6, a medical officer at Provincial General Hospital Nakuru who had worked with Dr. Omboga for a period of about 1 ½ years under Section 77 (1) of the Evidence Act (*Cap 80, Laws of Kenya*).

10. The body was identified by Ester Wangui and June Wanjiku. It was of a female child about 3 years old. The examination revealed fractures of the skull and extension of the brain that is the contents of the brain were not found in the intra-cranial cavity. The cause of death was a severe head injury. He further explained that the body may have been in the latrine for between 5 to 14 days. It was his opinion that this injury could not have been from a fall because had this been the case, the deceased would have sustained other injuries in an attempt to prevent or protect herself. Such action of the reflexes would have been involuntary therefore very likely. In this case it was his opinion that the injury had been caused by an agent.

11. The case was investigated by PW5 of Bahati Police Station. He visited the scene on receiving the report and was of the opinion that the child must have been pushed therein because the hole was too small for her to fall into it on her own. The accused was arrested on 01/10/2010 at Runyenjes Embu and charged with this offence.

12. When placed on his defence, the accused gave an unsworn statement. He denied killing the child. He stated that at the time when the child was given to him she had an injury at the back of her head. He however took her to Runyenjes Hospital on being prompted by PW3 where she received treatment. He thereafter left her under the care of PW3 and PW4 before returning to his brother's place in Embu.

13. Mr. Cheche for the accused submitted that the prosecution had not proved its case against the accused. He submitted that the evidence of PW1 was contradictory in that she alleged

to have seen the deceased about 2 days prior to her death whereas the evidence of PW6 was that the body of the deceased had been in the pit latrine for about 2-3 weeks. PW5 testified that the accused was arrested because he failed to report that the deceased was missing PW3 and PW4 who also knew the accused well did not support PW2's contention that he was a drunk or a violent man. It was Counsel's submission that the accused should be acquitted of the charges and set free.

14. On her part Prosecution Counsel relied on the record.

15. There is no doubt that the deceased herein was murdered. Her body was found in the latrine with a severe head injury that had resulted to fractured skull bones with extrusion of the brain. The postmortem report stated that this injury was the cause of her death.

16. There was evidence to suggest that the child already had an injury to her head about a month prior to the time when her body was found. PW2 testified that at the time when she handed her to the accused, she had a wound on her head that had allegedly been sustained from a fall. This same wound was observed by PW3 and PW4 who had been engaged by the accused to take care of the child. PW4 noted in particular that there was pus oozing from this injury to mean that it was quite serious.

17. However it was not, in my view, the cause of death. The postmortem report revealed fractures of the skull bones with extrusion of the intra-cranial matter suggesting the injury had been caused by such severe trauma that at the time when her body was found her skull was open and part of the brain cavity was extended. In addition, PW6 refuted any possibility that the injury that led to the death of the deceased had been sustained during a fall or by accident. It was his opinion that it was caused by trauma whether deliberate or actual, caused by an agent. He explained that if it had been sustained during a fall, then the deceased would have sustained other injuries as she attempted to prevent the fall.

18. The question that follows is whether it was the accused that inflicted this fatal injury that led to the death of the deceased. As stated hereinabove the death of the deceased could not have resulted from the injury that was observed by PW2, PW3 and PW4 because it was quite severe and which had resulted in the fracture of the skull and extension of the brain content.

19. None of the witnesses saw the accused inflict the fatal injury on the deceased. The prosecution case therefore rested on circumstantial evidence. Thus, in order to support a conviction, the inculpatory facts proved must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt (see **MIBEI & 3 OTHERS V REPUBLIC [1993] KLR 28**).

20. The evidence of PW2 was that the accused had a history of violence towards her and the deceased. She reported of an incident when the accused had beaten up the child while drunk. There was also irrefutable evidence that at the time of her death the deceased was living with the accused. She had been handed over to him by PW2 about two to three weeks prior to the time when she was found dead.

21. In his defence, the accused alleges that he took the child to Runyenjes Hospital on the advice of PW3 where she received treatment. He went to live with his brother in Runyenjes Embu while the deceased was left with his cousins PW3 and PW4. This testimony is largely contradicted by the prosecution evidence which I found to be consistent and convincing. On that Wednesday before the deceased's body was recovered, PW2 said that when she called the accused to inquire about the child's whereabouts, he informed her that she was with her aunt in Embu. He also informed PW3 that the child had been admitted at Ester's Hospital. During this time, the deceased was already dead and her body thrown in the pit latrine. PW6 estimated that the body had been in the latrine for between 5 -14 days and it was in fact the odour produced by its petrification that alerted PW1.

22. PW3 and PW4 also denied that the child was later returned to them. PW3 actually refused to take the child when the accused asked her to kill her. When she went to the accused's house the following day, he found that the child was missing and when she called him, he informed her that the child was at Ester's Hospital.

23. The credible evidence is that the accused was with the deceased at the time prior to her death. When she was later found in the pit latrine where he used to live, with a severe head injury, the only conclusion is that he was the one who inflicted this injury before throwing the body into the latrine. There is no reason why PW3 and PW4 who he alleges were in custody of the child could have possibly wanted to harm her.

24. For the above reasons, I find that the prosecution was able to establish beyond reasonable doubt that the accused killed the deceased and I find the accused person guilty of the murder of Mary Wanjiku, contrary to Section 203 of the Penal Code, and I convict him accordingly.

25. I call upon counsel to address me in terms of Section 329 of the Criminal Procedure code, on the question of sentence.

Dated, signed and delivered at Nakuru this 5th day of December, 2014

M. J. ANYARA EMUKULE

JUDGE