IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 333 OF 2006

JANE WANGECHI NDIRANGU.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nyeri

(Okwengu, J.) dated 14th December, 2006

in

H.C.CR.C. NO. 139 OF 2003)

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JUDGMENT OF THE COURT

The appellant, *Jane Wangechi Ndirangu*, was convicted by the superior court (Okwengu J) sitting in Nyeri for the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. It had been alleged in the Information filed by the Attorney General on 19th December, 2003, that the appellant had on 22nd day of November, 2003, at Cottage Estate in Nanyuki, Likipia District, murdered *John Ndirangu*. The appellant was the natural mother of John Ndirangu (hereinafter "*the deceased"*) who at the time of his death was aged 3 years. Upon her conviction the appellant was sentenced to death. She now comes before us in this first and last appeal against her conviction and sentence. As such we are duty bound to analyse and re-evaluate the evidence on record and come to our own independent findings and conclusions in the matter.

The appellant drew up and filed a memorandum of appeal in person but this was abandoned by the learned counsel appointed by the court to represent her, Mr. Kingori. Mr. Kingori, instead, filed a supplementary memorandum of appeal and put forward four (4) grounds as follows: -

"*1. The learned trial judge erred in law in placing full reliance on uncorroborated circumstantial evidence and proceeding therefrom to convict the appellant.*

2. The learned trial judge erred in law in failing to properly evaluate the evidence on record.

3. The learned trial judge erred in law peremptorily dismissing the appellant's defence whereas the same was plausible

4. The learned trial judge erred in law in failing to appreciate the possibility of the appellant's diminished responsibility and proceeding therefrom to impute an intention to commit the offence against the appellant."

In his submissions before us, however, Mr. Kingori consolidated grounds 1 to 3 which cover the wide area of evaluation of evidence, and then argued ground 4 separately. We shall revert to the complaints raised by the appellant shortly. What evidence was made available to the trial court?

The deceased was under the custody and care of the appellant's grandmother, one ***Jane Wahito*** (Wahito). ***Wahito*** was not called as a witness, although she was available, and therefore the circumstances under which the deceased was left under her care are not clear. There is evidence, however that ***Wahito*** was living in the home of ***Salome Wangechi Ndirangu*** (PW6), (Salome), a retired teacher. Their relationship is not clear because Salome did not disclose it and simply said Wahito was her long time friend and was living at her home which she constructed on a ¼ acre at Cottage Estate, Nanyuki. The home has her main house which she occupies, but she made extensions at the back where several tenants stayed. Apparently, Wahito stayed in one of the extensions to the main house. There is other evidence, from Wahito's friend ***Virginia Nyambura*** (PW3) (Virginia), a vegetable seller in Nanyuki, and ***Esther Nyawira Wamiti*** (PW2) (Wamiti,) a shopkeeper in the estate, that Wahito was an employee of Salome.

On 19th November, 2003, three days before the deceased's disappearance on 22nd November, 2003, Wahito went with him to the home of Virginia in Ichuga Estate which is 4 to 5 Kms from Nanyuki. Virginia knew where the appellant lived in Ichuga and according to her, Wahito told her she was looking for the appellant because she had disappeared leaving the deceased with Wahito. As Wahito did not testify despite her availability, such information was hearsay. Virginia then left Wahito and the appellant together and returned to her home. Other than hearing from Salome later on 28th November, 2003 about the disappearance of the deceased, she had no further information.

There is evidence that the appellant was at the home of Salome in Cottage Estate on 22nd November, 2003 and that the deceased was also there, alive. Salome testified that she was also there in the morning, and so was Wahito, who according to her, was to go for a funeral somewhere. Again, whether Wahito went to the funeral or not is not in evidence. The next time she is heard of, according to Salome was "*just before lunch"* when Wahito was with Wamiti and were reporting to Salome that the deceased had disappeared. Salome herself left her home at 9 a.m. that morning and says she left the appellant holding the deceased. Upon returning home after hearing the news of the disappearance, Salome found the appellant who told her that she had gone to the shop to buy salt and left the child with another woman, but on her return she found both had disappeared.

The appellant had indeed gone to buy salt from a retail shop within Cottage Estate, owned by ***Esther Nyawira Wamiti*** (PW2) (Esther). Esther did not say what time the appellant went there but she testified that after leaving the shop, the appellant returned and asked her whether she had seen a woman with the deceased. Esther knew the deceased but not the appellant. The appellant mentioned the name of the woman who had been left with deceased and described her, stating that the woman had gone to visit Salome in the house. Esther had not seen them, and so she accompanied the appellant in walking round the estate looking for the child. When they did not find the child, Esther telephoned Salome who returned home in a taxi within 30 minutes. They drove to Nanyuki Police Station and reported the disappearance of the child. It is not in evidence which officer received the report in the police station, but Esther and Salome testified that they were given two police officers to assist in tracing the deceased and the woman. Eventually they found ***Esther Mwihaki Macharia*** (PW10) (Mwihaki), who was staying in Likii Estate in Nanyuki and the appellant identified her as the woman who was left with the deceased and disappeared with him. Mwihaki was arrested at 11.30 p.m. and was subsequently charged before Nanyuki court with the offence of stealing a child.

Mwihaki testified that she was nowhere near the home of Salome on 22nd November 2003 and did not even know Salome, the appellant, or the deceased. She woke up in the morning and stayed home with her mother ***Zipporah Nyambura*** (not a witness) until 11 a.m. Then she went to Nanyuki town in the offices

of M/S. Ndagathi Insurance Agencies where she arrived at 11.30 a.m. She stayed there until 1 p.m. waiting for her friends, ***Mary Kariuki*** (PW4) and ***Agnes Wanjiru*** (PW5) who were working there. It was a Saturday and she wanted them to assist her in some shopping. The two friends confirmed her alibi to the police but still, Mwihaki was charged for the offence of stealing a child. According to Mwihaki, the case took about 1 year and 8 months after which she was acquitted because no one turned up in court to testify.

Eight days after the disappearance of the deceased, .i.e. 30th November 2003, Salome testified that "*an anonymous call was received that the child was in a latrine in my home*." She did not say who received the anonymous call or who informed her about it. But her son who worked as a casual labourer with the British Army and was living in a neighbouring house in Cottage Estate, gave a different version. He was ***Samuel Mwangi Ndirangu*** (PW7) (Samuel) . He said at 2 p.m that Sunday he went to his mother's house and found their housemaid, one ***Wambui*** (not a witness). Wambui then gave him some information as a result of which he borrowed a torch from a neighbour. He went to a shallow pit latrine near the house and shone the torch. He saw a baby inside. He then informed Wahito (not a witness) who called Salome. He did not wait to see the baby recovered from the pit latrine although he was near the compound. Asked whether he knew the appellant, Samuel said he did because she used to come sometimes and stay with Salome for two or three days then go away.

The body of the deceased was removed from the latrine at 4pm by ***P.C. Francis Ndemi*** (PW8) and other Police Officers. It was in a decomposed state but Salome identified it as that of the deceased and it was taken to Nanyuki Hospital Mortuary. The appellant was not at home at the time because she had left in the morning, but when she returned at about 7 p.m., Salome called the police and she was arrested. The investigating officer was ***Chief Inspector Elijah Ouma*** (PW9) (C.I Ouma). He led the other officers in recovering the body which was 4ft inside the latrine on top, in the presence of Wahito and Salome. Salome informed him that the latrine was only used by Wahito and the appellant. Salome also told him the appellant is the one who had the child last when he was alive. It was also Salome's evidence, on information from Wahito, that the appellant had abandoned the child and disappeared four months before the incident. As Wahito did not testify, this information was again hearsay. ***C.I Ouma*** explained the set up of the compound and according to him Salome had her own compound while the appellant and Wahito lived in the servants' quarters. There were other tenants in another house within the compound but he did not count the number. There were also two gates to the compound, one used by the tenants, the other by Salome, Wahito and the appellant. As for the court case against Mwihaki (PW10) whom he knew had been arrested and charged with stealing the same child, CI Ouma said he did not know what became of it as he had gone on transfer.

A postmortem was conducted on the deceased by ***Dr. Walter Kayaywa*** of Nanyuki District Hospital on 1st December 2003. The body was semi decomposed. The lungs had collapsed and the cervical spine was very soft. It was twisted and compressed by the cervical bone. He formed the opinion that the immediate cause of death was cod comprehension and asphyxia. In cross-examination, the doctor said there were no physical injuries but the fact that the spine was soft was a sign of strangulation. Asphyxia is the cutting of oxygen.

In her sworn defence, the appellant denied that she had anything to do with her son's disappearance or death. She was living with her grandmother, Wahito, in Salome's house since Wahito was employed there by Salome. On the material day, 22nd November, 2003, in the morning Wahito told her to assist Salome in planting maize since Wahito was planning to go to a funeral. Salome also left but returned and informed the appellant that the maize seed was not enough and therefore they had to go to town and buy some more, in addition to fertilizer and chicken feed for her chicken. Salome advised the appellant to leave the child with the woman who used to wash clothing for her every Saturday. The woman was "Mama Macharia" and the appellant knew her. She is the same woman she identified as Esther Mwihaki Macharia (PW10). The child was left with "Mama Macharia", and the appellant went to town with Salome. After purchase of the items, Salome received a telephone call from a friend who was on medication and decided to go and see her. She instructed the appellant to return home and gave her Shs.100/= to pay the woman who was left at home washing clothes. Salome also asked the appellant to pass through Esther's shop to buy salt and maize meal for cooking. She went through Esther's shop and

bought the items and went home. She then went to the main house but did not find the woman or the deceased. She went to the rented side of the compound to the house of one ***Rebecca***. She did not find her but found Rebecca's house girl called Wambui. The house girl, said she had not seen them. The appellant returned to Esther's shop and asked her whether she had seen the woman and the child. Esther had not. Esther closed her shop and both of them went looking for the deceased and the woman in vain. She called Salome who arrived shortly after and upon the appellant explaining what had happened, Salome took them to Likii Estate where "Mama Macharia" stayed. They did not find her and Esther suggested they report to the police but Salome resisted, saying they should wait. The appellant and Esther nevertheless went to the police and reported the matter. Later at about 6.30 p.m. they returned to the police, this time with Salome and were given two officers. They returned to the house of "Mama Macharia" and found her. She denied having taken the child but was arrested and taken to the police station where she was subsequently charged with the offence of child stealing.

On 30th November, 2003, the appellant was away in Gatheri area where Salome had sent her. Upon her return in the evening she learned about the finding and recovery of the deceased's body. But then some two police officers arrested her and later charged her with the murder of the deceased.

It was the appellant's evidence that she was not in good terms with Salome because the appellant used to urge her grandmother, Wahito, to leave the work and go back to her shamba. She insisted that PW10 was the woman who was left with the deceased. Since her arrest on 30th November, 2003, she remained in custody and was not summoned to give evidence in PW10's case.

The learned trial Judge appreciated, and correctly so, that the case rested wholly on circumstantial evidence since no one witnessed the killing of the deceased by the appellant, and she directed the assessors accordingly in summing up. Two of the assessors returned the opinion that the appellant was guilty of murder, but the third assessor was of the view that there was no clear evidence that it was the appellant who committed the offence and returned an opinion that she was not guilty.

In her judgment, the learned Judge relied mainly on the evidence of Salome (PW6) that the appellant was the last person to be seen with the child alive and that the appellant had, for a period of time, abandoned the child with her grandmother, Wahito. On that basis the learned Judge made the finding that the appellant had both the opportunity and the motive to cause the death of the deceased. The Judge also believed the evidence of Mwihaki (PW10) that she was not "Mama Macharia", the woman said to have been left with the deceased and disappeared with him. On that basis, the finding was made that the appellant lied and her defence was peremptorily rejected.

The appellant now argues, through counsel, in her first three grounds of appeal that the circumstantial evidence relied on to convict the appellant was not conclusive. There was evidence, Mr. Kingori submitted, that there were other people within Salome's compound, who had an opportunity to harm the deceased. For one, there was the grandmother, Wahito ,whose movements on the day in question were not clarified. Then there were tenants whose number or activities on that day were not investigated. The theory that other people had equal opportunity, in his view, was lent credence by the manner in which the body of the appellant was discovered – either through an anonymous call or from information given by a housemaid. It was not clear how the housemaid could discover a body which needed a torch to locate in the latrine. The housemaid did not testify. He further submitted that the alibi of Mwihaki (PW10) was not credible since her friends, PW4 and PW5, gave inconsistent evidence in her favour in an effort to exonerate her. The fact that the police charged her with the offence of child stealing meant that they had enough and credible information to sustain the charge. Her acquittal after 1 year and 8 months due to absence of witnesses was not a credible explanation since the appellant was already in police custody but was never taken to court or given the opportunity to testify against Mwihaki. In all the circumstances, Mr. Kingori concluded, the conviction of the appellant was unsafe.

In arguing ground 4 of the appeal, Mr. Kingori made reference to the record where the prosecution submitted the medical report on the appellant before the trial commenced, indicating that she was "*looking distressed/disturbed hence may require keen follow-up (psychotherapy) clinic and monitoring*". At the time, the prosecution stated that the appellant was "*not mentally fit to stand trial*". In his

submission therefore, no proper enquiries were made to ascertain the mental capacity, and therefore the *mens rea*, for the appellant to commit any offence. In passing, Mr. Kingori, also submitted that the deceased was aged 1 year according to some of the prosecution witnesses and therefore the only offence that could have been committed by the appellant, if at all, was infanticide contrary to ***section 210*** of the Penal code, the punishment for which is equivalent to manslaughter.

In response to those submissions, Mr. Orinda, Senior Principal State Counsel, was in no doubt that the circumstantial evidence relied on to convict the appellant was watertight. Whether or not there were many others who had the opportunity to harm the deceased, it was the appellant who was proved to have been left with the deceased within the compound and the deceased's body was discovered within the same compound on the same day. The chase of Mwihaki (PW10) was a red-herring introduced by the appellant to cover up her guilt. As for the appellant's mental capacity, Mr. Orinda submitted that there was another medical report on the appellant, made shortly before her trial, which indicated that the appellant never had any mental disorder. The finding was made accordingly by the trial Judge that the appellant had no mental disorder but was simply reacting to the reality of what she had done.

We have fully considered the evidence on record and the submissions of both counsel. We agree with the learned trial Judge that this case stands or falls on the circumstantial evidence adduced by the prosecution to support it. The only issue is whether the principles applicable to circumstantial evidence were properly applied on the available facts. What are those principles?

We take them from **Judith Achieng Ochieng V. Republic, Criminal appeal No. 218/2006, (UR)** where the court stated:

"**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-**

i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

All that was stated by this Court in OMAR CHIMERA V REPUBLIC CR. A. NO.56 of 1998. In an earlier decision on the same principles, the Court stated:-

"***In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition p 31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V THE QUEEN [1952] AC 480 at page 489].***"

- See Mwangi v. R. [1983] KLR 522.

Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge.''

We are alive to the principle that an appellate court should be slow to disturb the findings of fact made by the trial court. Such findings will, however, be interfered with if the findings are based on no evidence; or on a misapprehension of the evidence, or the Judge demonstrably acted on wrong principles

in reaching the findings. The only caution before such interference is to allow for the added advantage, which the trial court had, of physically seeing and hearing the witnesses.

There was total reliance in this case on the evidence of Salome (PW6), particularly her evidence tending to the conclusion made by the trial Judge that only the appellant had the motive and opportunity to commit the offence. It was Salome's evidence that the appellant had abandoned the deceased with her grandmother for four months prior to the incident. The evidence of abandonment of the child and disappearance of the appellant was also given by Virginia (PW3). Both of them, however, purportedly received that information from Wahito but Wahito was not called to testify although she was available. The record shows she was identified in court when Virginia testified. As already observed in passing, such evidence was hearsay and was not probative of the fact of the appellant's disappearance. Indeed, Salome's son, ***Samwel*** (PW7), testified that the appellant was staying with his mother but would go away for a few days and return. The appellant herself testified that she was staying with her grandmother, Wahito, in Salome's compound since the grandmother was employed there. And why would Salome and her son, Samwel not disclose that Wahito was employed by Salome? Salome simply said Wahito was "*a friend for a long time*" while Samuel said she "*used to stay there (mother's home)*". The information about employment came from two other prosecution witnesses and the appellant. The investigating officer, ***CI. Ouma*** (PW9) also said Wahito and the appellant stayed with Salome. He had no evidence that the appellant had returned to Ichuga Estate even before the body of the appellant was recovered. There was therefore no factual basis for the trial Judge to make the following findings and conclusions in her judgment: -

"**The conduct of the accused prior to the death of the child and even after the death of the child showed that she did not care for the child. She abandoned the child with her grandmother Cucu Wahito, but her efforts to free herself of the child were unsuccessful as Cucu Wahito successfully traced her at Ichuga where she had disappeared to. Interestingly accused went back to Ichuga after the child disappeared even before the body was found."**

The appellant's defence was dismissed on the basis of the evidence of Salome (PW6) and Mwihaki (PW10). The only reason given as to the improbability of the appellant's defence was that the version of the two witnesses was unreservedly believed. We have carefully re-examined that evidence and we think it only confirms the contention by the appellant that other persons had the opportunity to abduct and harm the deceased. Mwihaki latched on her acquittal for the offence of child stealing after a period for 1 year and 8 months in court and according to her the reason for acquittal was that no one came forward to testify in the case. The fact remains that she was properly suspected of complicity in the disappearance of the deceased. The appellant was the complainant and was in police custody since her arrest and arraignment in court on 30th November, 2003. The investigating officer in this case, C.I. Ouma who knew about Mwihaki's arrest gave no details about the case and there was no evidence given as to why the appellant, who was available to give evidence in Mwihaki's case, was never taken to court to do so. The appellant's assertion that the child was left with Mwihaki was not therefore properly tested. Nor was the assertion that there were other persons in the same compound who had the opportunity to commit the offence. There were tenants whose number the investigating officer did not bother to confirm. One of them appears to have given the information which led to the discovery of the body but again, there was no investigation on how she came by the information. She was not even called to testify although such evidence was critical. Both the investigating officer and Samwel (PW7) needed a torch to find the deceased's body. How did one Wambui, if she was the source of the information, find it in the first place? The evidence of Salome when tested against the evidence of the investigating officer, does not, in our view, establish any exclusivity of Salome's compound and the latrine to the appellant and no one else. Furthermore, Wahito, who according to Salome and Virginia, was apparently tired of looking after the deceased and had to go out in search of the appellant, had the same motive and opportunity as the appellant. There was no evidence that she left home to attend any funeral as stated by Salome. The evidence is that she was still at home "*just before lunch"* when ***Esther Wamiti*** (PW2) called Salome to inform her that the child had disappeared. To compound matters, the investigating officer merely believed what Salome had to tell him and went no further. Nothing was done either, to disprove the facts stated by the appellant in her sworn defence, which information the police must have had well in advance.

From what we have said so far, it is clear that we do not find cogent and firm evidence, unerringly pointing to the appellant as the perpetrator of the crime and to no one else. We also think the evidence on record did not exclude other persons as there were co-existing circumstances which were equally consistent with the appellant's innocence as with her guilt. In the event, the benefit of those doubts ought to enure to the benefit of the appellant with the result that this appeal succeeds. We need not in that event examine the other grounds of appeal.

The appeal is allowed. The conviction of the appellant is quashed and the sentence is set aside. The appellant shall be set at liberty unless she is otherwise lawfully held.

Dated and delivered at Nyeri this 12th day of June, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APEPAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR