IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 152 of 2006

JANE WANJIRU KINYUA …….....…… APPELLANT

AND

REPUBLIC …….…….....…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu, J) dated 14th July, 2005

in

H.C. Cr. Case No. 71 of 2003)

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JUDGMENT OF THE COURT

Jane Wanjiru Kinyua, the appellant herein, was tried before Okwengu, J, with the aid of assessors, on three counts of murder contrary to **section 203** as read with **section 204** of the Penal Code. On count one, the appellant was charged that on the 4th day of July, 2003 at Gatunganga village in Nyeri District, Central Province, she murdered Nicholas Ndiritu Wanjiru. In the second count, it was alleged that on the same day and at the same place, she murdered Anthony Kinyua Wanjiru while in the third count, it was alleged that on 5th July, 2003 at the same place, she murdered Kennedy Mureithi Wanjiru. Following upon her trial during which the prosecution called a total of seven witnesses and the appellant testified on oath, and after the learned trial Judge had summed-up the case to the three assessors (i.e. two ladies and one gentleman) the said assessors unanimously returned a verdict of guilty on each of the three counts. The trial Judge in her judgment dated and delivered on 14th July, 2005, found the appellant guilty on counts one and three, but acquitted her on count two. She sentenced the appellant to death on count one and count two. The appellant now appeals to this Court against the two convictions and the sentences imposed thereon. The appellant field a total of six grounds of appeal and these were that:

" **1. Your Lordship I pleaded not guilty to the charge.**

2. The learned Judge misdirected herself in not considering my alibi that I was living at Gitunduti and my children were staying with my mother at Gatunganga. Also the witnesses said that I was living at Gatunganga which was pure lies.

3. Your Lordship the police officer who arrested me is not the one testified (sic) against my case. So it was not clear who said the truth between me, the witnesses and the police officer.

4. The trial Judge never considered my mitigation that it was not known either if it is my mother

or me who is guilty for the offence because when my two children were found dead my mother disappeared and was found dead after three weeks. It shows clearly that she committed suicide due to the offence.

5. Your Lordship P.W3 was not sure of the dates when he (sic) last saw my children which means he (sic) was told by somebody to say in order to frame me and he was not sure of what he (sic) was saying.

6. My Lordship I could not have gone to report about my children missing because I was not staying with them, my mother could have gone since she was the one who could know their whereabouts."

Mr. Wanjohi Mburu argued the appellant's appeal before us. He abandoned grounds 1, 4 and 6. However, before we can go into the substance of Mr. Mburu's submissions on the remaining three grounds and bearing in mind the fact that this is a first appeal to the Court, we must set out the evidence which was put before the learned trial Judge and the assessors. Being a first appeal to us, the Court is under an obligation to the appellant to –

"**reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld" see <u>OKENO V REPUBLIC</u> [1972] E.A 32."**

In order to discharge this duty it is necessary for us to set out the evidence upon which the prosecution relied in support of its charges and the defence of the appellant, if any.

By the time the alleged murders were committed, the appellant was aged about twenty–two years and she was unmarried. The three persons said to have been murdered were the children of the appellant. Nicholas Ndiritu Wanjiru, the subject of count one was 1½ years old, while Kennedy Mureithi Wanjiru, the subject of count three, was five years old. As the appellant was unmarried, she and her three children stayed with her mother. But from the recorded evidence, it is clear that mother and daughter did not have their own land or any place where they could settle and live on as their own. About the time these matters took place, mother and daughter, together with the three children, had been kicked out of wherever it was that they had been living in and for all practical purposes, they were homeless. Margaret Gathigia Maina (PW 3 - hereinafter Margaret) said she first came to know the appellant on 3rd July, 2003. On 5th July, 2003 the appellant went to Margaret's house and spent the night there. The appellant had with her only Nicholas Ndiritu Wanjiru. Kennedy Mureithi Wanjiru was not with the appellant. It appears from the evidence of Margaret who was clearly confused about the dates that the appellant went to her home in the evening of 4th July, 2003, slept there and in the morning of 5th July, 2003, the mother of the appellant also came to the home. The mother asked the appellant where Kennedy was but the appellant merely said she was not with Kennedy. The child Nicholas was then asked where Kennedy was and the evidence of Margaret was that the child said Kennedy had been chased away by the appellant and he (Kennedy) had gone to Mama Wangai. The appellant then left with Nicholas saying she was going to Mombasa. The appellant's mother also left and at about 1 p.m., Lucy Wanjiru Kiberenge informed Margaret of a body of a boy being found in a nearby well. Lucy Wanjiru Kiberenge (Lucy) gave evidence as P.W 4. She knew the appellant and the appellant's mother as she used to work with them. According to Lucy, on 2nd July, 2003 when she arrived home from her shamba she found the two children of the appellant at her home. She gave their names as Tony and Ken. She stayed with the two children until 4th July, 2003 when the appellant's mother came and told Lucy that they had found a house at Gitunduti and that the appellant would come and collect the children. In the evening of 5th July, 2003, the appellant went to Lucy's home. The appellant told Lucy that someone had found a job for her in Mombasa and she would go there the following day. Lucy asked the appellant where her other child was and the appellant said the child was with the woman who was to employ her in Mombasa. Lucy asked the appellant to leave the children with her as she (the appellant) was to go and collect her clothes, apparently from the home of Margaret. The appellant stated that she wanted to go and sleep with the children so that she could wake up early in the morning and meet the Mombasa woman at Karatina. The appellant left with the two children while her mother who was unwell remained in Lucy's house and spent the night there. It is apparent from the

evidence that if the evidence of Margaret is true, and the learned Judge and the assessors found it to be true, that after the appellant left Lucy's home, she must have proceeded to the home of Margaret. Margaret, as we have pointed out, was obviously confused about the dates, and it is apparent to us, on the recorded evidence, that the appellant went to Margaret's home in the evening of 5th July, 2003. She had left Lucy's home with Nicholas and Kennedy. When she reached Margaret's home she was with only one child – Nicholas. Next was the evidence of Police Constable Rose Nyatoro Maina (PW 5) of Kiganjo Police Station. On 6th July, 2003, she received a report of a body in a well in the shamba of one Karan Malichu. She went there and from that well she retrieved the body of the 5 year-old Kennedy. That body was removed and taken to the Nyeri Provincial General Hospital. Dr. Ezekiel Machira (P.W 2) performed a post-mortem examination on that body on 14th August, 2003 and his conclusion upon the examination of the body was that Kennedy had been strangled and then thrown in the water.

Next was the evidence of Inspector Purity Wamuyu (PW 7) who was by then at Kiganjo Police Station. Rose had sought instructions from Purity when she found the body of Kennedy in the well and it was Purity who instructed Rose to retrieve the body and take it to the mortuary. Purity thereafter learnt that the appellant had been arrested and was at Karatina Police Station. She (Purity) went to Karatina Police Station and collected the appellant who was with her boy-friend, Gikonyo. Purity swore that on 19th July, 2003, the appellant led her to Kiriko Village within Gorano area and at that village, the appellant led her to a pit latrine, which was demolished. From that pit-latrine, the body of the child – Nicholas was recovered. The appellant then took Purity to Kihari forest, apparently in search of the child Anthony. Nothing came out of that search. Once again, Dr. Machira performed a post mortem examination on the body of Nicholas and though the body was badly decomposed, Dr. Machira concluded from his examination that Nicholas had been strangled using a piece of cloth (lesso) which was still around his neck. From all this evidence, the prosecution contended that though no one had seen the appellant actually strangling her two young sons, it was her who left the home of Lucy with the two boys sometime after 7 p.m. on 5th July, 2003. She reached the home of Margaret on the same evening but she was with Nicholas only. The body of Kennedy was thereafter found in a well while that of Nicholas was removed from a pit-latrine to which the appellant had led Purity. The Republic had no doubt that it was the appellant who had killed her two sons and hence the charges against her. The prosecution also thought the appellant had killed another child of hers – Anthony Kinyua Wanjiru, but the learned trial Judge thought that that charge was not proved and hence the acquittal on count two.

What was the appellant's answer to the allegations made against her by the Republic?

In sworn evidence, the appellant told the trial Judge and the assessors that prior to her arrest, she used to work as a tea-picker at Gitunduti. On 3rd July, 2003, she was at her place of work picking tea and she took the tea to the buying centre at 2 p.m. She then went back to the home of Githungo, her employer. She worked on like that until 13th July, 2003 when she was arrested with Gikonyo. She denied that she was living with Gikonyo. She then continued and we quote her:

"**After my arrest I was taken to the police station. I did not record any statement. I was taken to Karatina Police Station where I did also did (sic) not record any statement. It is not true that I showed IP Purity anything. I did go with IP Purity to Narumoru to a place called Guara. We went to my mother's sister to look for my mother. We did not find her. We then came back to Kiganjo. I cannot recall the date we went to Guara. It is when I was arrested that I was asked if I was the one who had killed my children and I denied. I do not know what happened as I left the children with their grandmother."**

In cross-examination, the appellant asserted:

"**My mother is Mary Wambui. I was not staying together with my mother. She was staying at Gatunganga and I was staying at Gitunduti. My mother was working as a casual farmer. I was also doing casual work. I was working for one Githungo. I was earning an income. I was not staying with the children because my mother said I was not going to visit her often and that she would take the children so that I could visit her often. It was also too cold where I was working.**

My mother had a sister – Margaret Muthoni. My children were staying with my mother not my aunt. I last saw my aunt in Naromoru. It is my mother who was staying with the children at Gatunganga; her health was not very good. The children were aged 5 years, 4 years and 1 year and 3 months. Kennedy Mureithi was the one aged 5 years, Anthony Kinyua was the one aged 4 years and Nicholas Nderitu was the one aged 15 months. …….”

Put simply, the appellant's defence was that she herself was employed as a tea-picker on the farm of Githungo which was at Gitunduti. She lived there alone while her three children lived with her mother – Mary Wambui, at Gatunganga. By the time her children died, at Gatunganga, she was at her place of work at Gitunduti and so she could not have killed her children. Put in the language of lawyers, her defence was one of *alibi*. That is the basis of her complaint in ground two of her memorandum of appeal that:

“**The learned Judge misdirected herself in not considering my alibi that I was living at Gitunduti and my children were staying with my mother at Gatunganga. Also the witnesses said that I was living at Gatunganga which was pure lies.”**

We readily accept Mr. Mburu's submission that the case against the appellant was entirely on circumstantial evidence and even the learned trial Judge fully appreciated this. In her summing-up to the assessors, the learned Judge directed them as follows:

“**Note that there is no direct evidence against the accused as no one actually saw her cause any of the deceased person any harm. The evidence implicating the Accused is, therefore, circumstantial evidence. Consider the evidence, what incriminating facts do you find established against the Accused person? Are the established facts incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis other than the guilt of the accused? Are there any co-existing factors that may weaken the inference of guilt? Was there any intention on the part of the Accused to cause the death of her deceased children?”**

That is the established and accepted definition of circumstantial evidence and we did not understand Mr. Mburu to challenge the decision of the learned Judge on that aspect of the matter. She clearly and correctly appreciated the nature of the evidence she was dealing with and we can add nothing useful to her summary with regard to the definition of circumstantial evidence.

The main issue in the appeal must be on the question of whether the learned Judge correctly dealt with the *alibi* defence raised by the appellant and which, as we have seen, was raised on oath. Dealing with that aspect of the matter in her summing up to the assessors, the learned Judge stated:

“……. **Note that the Accused has raised an alibi defence which must be disproved by the prosecution. Do you believe the prosecution witnesses that the Accused was at Gatunganga with her children around the time two were discovered dead, or do you believe the Accused that she had left the children under the care of her mother? Note that the mother of the Accused was not called to testify as she is said to be deceased. We do not therefore, have the benefit of her evidence.”**

Once again, the learned Judge clearly appreciated that once the appellant had raised the defence of an *alibi*, the evidential burden shifted back to the prosecution to prove and prove beyond any reasonable doubt that the appellant's *alibi* was false. We would repeat and we shall continue to assert that there is no burden upon any accused person who raises the defence of an *alibi* to “prove” the truth of that defence. That is on the basis of the wider principle which has even found its lodgment in **section 77(2) (a)** of the Constitution that in all criminal cases, the burden of proving guilty is on the prosecution and never shifts. Of course the evidential burden would shift from side to side in the course of a trial. In the trial of this appellant, for instance, Margaret and Lucy said they saw her with two of the deceased children at Gatunganga. That was, *prima facie*, evidence which, if not answered and is accepted, may well lead a court to the conclusion that the appellant was seen with two of her children at Gatunganga. In those circumstances, it can be said that the evidential burden had shifted to the appellant to say something about the allegation by Margaret and Lucy that she was at Gatunganga. But as in all circumstances where an

accused person may be required to say something in answer to the case against him, all that he is required to do is satisfy the court on a balance of probabilities, or put another way, to raise some reasonable doubt on the prosecution case. Defences such as that of insanity fall in the same category with an *alibi* and we repeat that there is no burden upon such as accused person to prove it – see for example **Kiarie vs. Republic [1984] KLR 739**.

Did the prosecution prove beyond any reasonable doubt that the appellant was not at Gitunduti as she asserted in her evidence but that she was in fact with at least two of her children at Gatunganga?

On this aspect of the matter, there was first the evidence of Margaret and that of Lucy. Though Margaret was not quite clear about her dates, she nevertheless insisted that she had seen the appellant and her mother and at least one of the appellant's children. Lucy was clearer and more certain than Margaret. She knew the appellant and her mother. She was with them at her home in the evening of 5th July, 2003 and the appellant left her home after 7 p.m. She took away the two children with her and gave a reason as to why she was going away with the children – i.e. so that she would be able to travel with them early in the morning to Karatina where she was to meet the woman who was to take her to Mombasa for a job. Was it possible that Lucy would manufacture that kind of tale? Neither the assessors nor the learned Judge who saw those witnesses testifying before them thought so.

Then there was the evidence of Inspector Purity. Though the appellant complains that the police officer who actually arrested her did not come to give evidence, yet she agreed she was arrested on 13th July, 2003 and was taken to Karatina Police Station. Inspector Purity testified that she later learned that the appellant had been arrested and was at Karatina Police Station. She went and collected the appellant from there. In the face of that evidence, we do not see what material evidence the arresting officer could have given to the trial court.

Inspector Purity swore that it was the appellant who led her to Kiriko Village and showed her a pit-latrine from which she retrieved the body which turned out to be that of Nicholas Ndiritu Wanjiru, the appellant's 15 months-old son. There cannot be any doubt on the recorded evidence that the body was retrieved from a pit-latrine; even the state of the body as described in the post-mortem form supports Inspector Purity's evidence that she retrieved the body from a pit-latrine. Of course the appellant swore she never took Inspector Purity to the latrine-pit but looking at the evidence as a whole, we are satisfied that there was no way by which Inspector Purity could have known of the presence of the body in the pit-latrine. She only retrieved the body from the pit-latrine after she had collected the appellant from Karatina Police Station. It is to be remembered that the body of Kennedy Mureithi was retrieved from a well even before the appellant was arrested and if Inspector Purity had known about the body in the pit-latrine before collecting the appellant from Karatina, she would have had the body removed as she had done with that of Kennedy. The learned trial Judge and the assessors clearly believed the evidence of Margaret, Lucy and Inspector Purity. They had the advantage of seeing those witnesses and the appellant testify before them. We have not had that advantage ourselves. On our own assessment of the recorded word we are satisfied the prosecution proved beyond all reasonable doubt that it was this appellant who strangled her two sons to death. She left the home of Lucy with both boys and that very same evening, she got to the home of Margaret only with Nicholas. The next day the body of Kennedy was found strangled and dropped in a well. The appellant did not say where he had left Kennedy after they left Lucy's home. Again after she left Margaret's home with Nicholas, the boy was never seen again until 19th July, 2003 when she led Inspector Purity to the pit-latrine from which the boy's body was retrieved. The appellant's *alibi* that she was at Gitunduti and not at Gatunganga where her two sons were killed was proved by the evidence of Margaret and Lucy who saw her with her two sons during the relevant evening. Having been seen with the boys at Gatunganga, she could not at the same time be at Gitunduti. Her *alibi* was bound to be rejected and was rightly rejected. Though the evidence against her was wholly circumstantial, the circumstances proved were incompatible with her innocence and could not have been explained upon any other reasonable hypothesis except that she killed her own sons. There were no other co-existing factors to weaken the inference of her guilty. Her mother could not have killed the children because the appellant and her two children left the mother (Mary Wambui) in the house of Lucy and the mother spent the night in Lucy's house.

We have said enough, we think, to show that we agree with the learned trial Judge that the evidence brought against the appellant proved beyond any reasonable doubt that she killed her two sons named in counts one and two and that she was rightly convicted on those two charges. We accordingly dismiss her appeal against the two convictions. The learned trial Judge sentenced her to death on each count but ordered that the sentence on count three shall be held in abeyance. There is nothing unlawful with the sentences and we dismiss the appeal against them as well.

Dated and delivered at Nyeri this 27th day of October, 2006.

R.S.C OMOLO

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JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

W.S. DEVERELL

…….**……**

JUDGE OF APPEAL

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

DEPUTY REGISTRAR