



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, TUNOI & O'KUBASU, J.J.A.)
CRIMINAL APPEAL NO. 74 OF 2003**

GATAMU WAIGWA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Tuiyot, J) dated 10th April, 2002

in

H.C.CR.A. NO. 634 OF 2001)

JUDGMENT OF THE COURT

The appellant, *Gatamu Waigwa*, was convicted of manslaughter contrary to *section 202* as read with *section 205* of the Penal Code and sentenced to eight (8) years imprisonment by the learned Senior Resident Magistrate (*Mrs. C.W. Meoli*). The particulars of the charge were that on or about the *6th day of June, 1999* at Diamond Hospital, Kayole Estate, Nairobi, within the Nairobi Area, the appellant unlawfully caused the death of *Analise Nabwire*.

The facts of the case may be briefly stated. On *8th March, 1999*, *Rida Namataka Soa (P.W.8.)* employed **Analise Nabwire** (the deceased) as a househelp at a salary of Shs.1,200/= per month. Towards the end of May 1999, the deceased requested to be allowed to go to her up-country home so as to take care of her mother who was ill. On the *2nd June, 1999*, *Rida (P.W.8.)* paid the deceased her salary and instructed her to leave by the end of the day. It was agreed that the deceased would return in two weeks time.

According to *Rida*, the deceased was in good health when she left her house. On that same day, *Caroline Wabwire Ouma (P.W.5.)* learned from her househelp that the deceased had gone to Diamond Nursing Home. As a result of that information, *Caroline (P.W.5.)* went to Diamond Nursing Home which is within Kayole Estate and met the appellant who was the proprietor of the Nursing Home. *Caroline* inquired from the appellant whether the deceased had been admitted in that hospital but the appellant said that he did not have such a patient. *Caroline*, who was a sister-in-law to the deceased, knew that the deceased was expectant. On the following day (*3rd June, 1999*), *Caroline* went back to the appellant's hospital to make further inquiries about the deceased. She met the appellant who turned hostile on being asked about the deceased. The appellant maintained his earlier stand that the deceased was not in that hospital. As *Caroline* was leaving the hospital, she saw the deceased emerge from one of the rooms at the hospital.

The deceased said that she had been given injection but when *Caroline* asked her what was wrong with her she did not answer. Then *Caroline* left hurriedly as she feared that the appellant who had been very

hostile to her might find her there. Caroline briefed her husband *Fredrick Osanya Owichi (P.W.4.)* who was the elder brother of the deceased.

On the morning of *6th June, 1999* the appellant travelled from Kayole to Umoja where he met *Samuel Kangethe Kinyua (P.W.1.)*, James Wachira Nderitu (P.W.2.) and Peter Njoroge (P.W.3.) . These three people were in transport business operating a vehicle number KSQ 249 . The appellant approached Samuel Kangethe (P.W.1.) and asked him to assist in transporting a body from Diamond Hospital to Chiromo Mortuary.

It was then agreed that in the evening of that day these three men would transfer a body from Diamond Hospital to Chiromo Mortuary. That evening the appellant went back to where he had met P.W.1. and others. They all went up to Diamond Hospital where they removed a dead body of a female and put it on the vehicle registration number **KSQ 249**.

The body was driven to Chiromo Mortuary where there were problems in the body being received at the mortuary. They had to go to the police station where the appellant went into an office where he had to answer some questions before he was given some documents. They were able to take the body back to Chiromo Mortuary where it was accepted, that night.

Going back to the family of the deceased, there was evidence to the effect that on 7th June 1999, Caroline was accompanied by *Lilian Ndeda (P.W.7.)* back to Diamond Hospital where *Lilian (P.W.7.)* met the appellant in his office. Lilian inquired about the deceased and the appellant informed her that the deceased had developed internal pelvic bleeding and when the appellant transferred her to Kenyatta National Hospital she passed away. The appellant informed Lilian that the body of the deceased was at Chiromo Mortuary. After the sad news, Caroline and Lilian went and informed the relatives and neighbours.

On that same day (7th June, 1999), the appellant presented himself to Soweto Police post where he reported that the deceased had been admitted in serious condition at his hospital on 6th June, 1999 but that he did not treat her as he referred her to Kenyatta National Hospital. While he was looking for a vehicle to transport her to Kenyatta Hospital, she died.

Dr. Kirasi Olumbe (P.W.6.) conducted post mortem examination on the body of the deceased and in his opinion the deceased died as a result of hyponolemic shock due to a rapture of her uterus.

In his defence, the appellant said that on *4th June 1999* while at his hospital a lady came looking for one, *Analise Wabwire* but the appellant told the lady that no patient by that name was at the hospital. However, as the lady left she met Analise at the hospital and the two left together. Later on the same day in the evening, Analise came and informed the appellant that she had visited a certain clinic the previous week. She complained of vaginal bleeding and fever. The appellant recommended admission but Analise had no money for deposit and she left. She came back to the hospital on 5th June, 1999 and was admitted. The appellant examined her and found vaginal bleeding and foul smell. The appellant concluded that the foul smell was indicating the presence of infection. In his view, it appeared as if there had been an attempt to induce abortion. The appellant spent the night at the hospital in order to observe the patient. She was admitted but her condition was not serious. The following morning she succumbed to infection and died. When her relatives failed to appear at the hospital, the body of the deceased was taken to the mortuary. The appellant reported the matter to Soweto Police post and Kileleshwa Police Station.

The learned trial magistrate considered all the evidence adduced by the prosecution vis-à-vis the defence put forward by the appellant and came to the conclusion that circumstantial evidence taken with other evidence pointed to the appellant's guilt. It was the bizarre conduct of the appellant that clearly showed that the appellant was trying to conceal the death of the deceased. For example, if the appellant indeed made arrangements to refer the deceased to Kenyatta National Hospital why did he have to hire a vehicle and transport her body at night? The vehicle was hired in the morning of 6th June, 1999 but the appellant needed it not that morning but in the evening. Why did he conceal the presence of the deceased to Caroline? Why were there problems in the body of the deceased being received at Chiromo Mortuary if

the deceased had indeed died in the circumstances described by the appellant? Those were some of the salient features of circumstantial evidence which the trial court considered in convicting the appellant.

The appellant was dissatisfied by the decision of the trial court and preferred an appeal to the High Court. In dismissing the appellant's appeal the first appellate court (Tuiyot, J.) stated inter alia:-

“The evidence adduced at the lower court trial of the appellant reveals that the appellant failed to report the death of the deceased to the nearest police station. Taking the deceased's body to Chiromo Mortuary without the knowledge of her relative confirms that the appellant was attempting to procure abortion of the deceased pregnancy and in the process he carelessly ruptured her uterus. The hostility of the appellant to the deceased's relatives caused more suspicion that the appellant was hiding the incident.”

The appellant now comes to this Court by way of second and final appeal. The appellant who appeared in person had prepared long written submission, in two sets – one set is entitled **“Persuasive Fundamental Facts”** and the other simply **“Submissions”**.

We have carefully considered both sets of submissions and it would appear that the appellant's complaints are on the cause of death and the contradictions in the evidence of prosecution witnesses.

This being a second appeal we are concerned with matters of law only. It would appear that there can be no dispute as to the cause of death of the deceased. We have considered the submissions of the appellant on that issue but we find no dispute whatsoever on that issue. The trial court considered the evidence before it and came to the conclusion that it was the appellant who was responsible for the death of the deceased. The appellant's conduct was not only suspicious but that of a guilty person.

We have carefully considered the concurrent findings of the two courts below and it is our considered view that the appellant was convicted upon very sound evidence. No issue of law is raised either in the grounds of appeal or the two sets of submissions and there can be no merit in the appeal against conviction. As regards the sentence it is to be noted that this was a lawful sentence. It therefore follows that the appeal is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 30th day of April, 2004.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR