



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 103 OF 2005

REPUBLICPROSECUTOR

-VERSUS-

JOHN GICHAMBA MWANGIACCUSED

RULING

John Gichamba Mwangi is charged with the offence of murder contrary to s.203 as read with s.204 of the Penal Code (Cap.63, Laws of Kenya). The particulars of the offence are that the accused, on 8th July, 2005 at Riruta Trading Centre within Nairobi in the Nairobi Area, murdered **Purity Wanjiru Gichamba**.

The accused pleaded not guilty before **Lady Justice Rawal** on 9th November, 2005 and on 4th July, 2006 I selected the following three assessors: **Philip Nzuve; Michael Aguno; and Henry Kariuki Njeru**.

Hearing began on 4th July, 2006 when P.W.1, **Salome Njeri Waweru** was sworn and testified as follows. She is a housewife, living at Riruta in Nairobi. She also practices farming.

At about 12.00 noon on Sunday, **10th July, 2005** as P.W.1 was returning home from Church, she met her mother-in-law who, in the course of conversation, told her that in that neighbourhood, at a certain residence, a mother had recently left her child at home when she went out to buy charcoal-fuel, but when she returned she found the child missing. It is this alarm that led P.W.1, some four hours later, to team up with two mothers in the neighbourhood, for the purpose of visiting the afflicted family and praying with them. They found the child's mother weeping, while the child's father was bowing down. P.W.1 and her team asked the family to join them in prayer, invoking God's mercies so the lost child may be found. After prayers, she and her team left for their homes.

Three days later, on 13th July, 2005 P.W.1 went to her plot to water her vegetables, using bore-hole water. She needed to relieve herself, and left her bucket by the bore-hole as she walked into the bush. While there, P.W.1 saw something striking – a child, dressed, lying prostrate. She screamed and uttered a word of prayer. She was unable to water her plants, and took her bucket and returned home.

P.W.1 then went to the plot of **Mama Ciro** who had recently lost her child; told her what she had just seen; described what the child she had seen was wearing. **Mama Ciro** thereupon burst into screams; that was her child! P.W.1 led **Mama Ciro** and neighbours to the place where she had sighted the body of a child. **Mama Ciro** confirmed that it was her child; she collapsed and fainted; whereupon P.W.1 carried **Mama Ciro** on her back up to a dispensary on Kakongena Road, in the neighbourhood. The "doctor"-in-charge was able to resuscitate her; and **Mama Ciro** was able to return home.

On cross-examination by learned counsel, **Mr. Mutembei** P.W.1 testified that it was about 5.00 p.m. when, after relieving herself, she had sighted the body of the child (**Purity Wanjiru**), at a place some 300 metres from **Mama Ciro's** home.

P.W.2, **Joseph Mukabi Mwangi**, testified that he lived at Buru Buru Estate and works there as a charcoal seller. He heard on 10th July, 2005 that her sister-in-law had lost her child; so the following day at 7.00 a.m., he went to his brother's house at Riruta. He met his brother and a neighbour heading towards the Police Station, for the purpose of identifying a child's body. He joined them, and they went up to Kilimani Police Station. They found that the child in question was a two-year-old one, not the six-month-old one who had disappeared at Riruta.

P.W. 2 heard the following day, Tuesday, 12th July, 2005 from her sister-in-law that his brother had been arrested and was being held at the Riruta Police Station. He went to the Riruta Police Station and spoke to his brother. The Riruta Police told P.W.2 that they had arrested his brother on suspicion. When the witness spoke to his brother, he got the indication that the brother "did not know the child had gone missing".

On Wednesday, 13th July, 2005 P.W.2 was at his brother's house in Riruta, having tea with his sister-in-law, when a woman-neighbour came along, wailing: she had just seen the body of a child, somewhere in the bush. He joined his sister-in-law and the lady who had brought the report, and others to the place where the child's body had been sighted. After seeing the place where the child had been dumped, the whole group went over to the Riruta Police Station to report. The Police later retrieved the body of the child.

P.W.2 had not scrutinised the body of the child, who he had not seen since she was born. The child was a girl, and appeared to be about five-months old; her name was **Purity Wanjiru**. The witness knew the name **Wanjiru** but had not known the name **Purity** until after this incident.

On cross-examination by learned counsel **Mr. Mutembei**, P.W.2 confirmed that he had known of his brother's arrest on 12th July, 2005. He averred that for a whole year he had not seen **Mary Wanja**, the mother of the deceased child. P.W.2 testified that the accused had been distressed over the disappearance of the child, and had participated in the search, when the child went missing. He averred that his brother (the accused) had not told him at any time prior to this incident, that he was experiencing any family problems.

P.W.3, No. 55635 **Police Constable Patrick Kyalo Mulinge** introduced himself as an officer attached to the Riruta Police Station, charged with general duties. At 8.00 a.m. on **18th July, 2005** he was at the Crime Branch Office when he was asked to go to the City Mortuary for a post-mortem examination on the body of one **Purity Wanjiru**. **Mary Wanja** the mother of the deceased, identified the body, and **Dr. Kuria** the Government Pathologist conducted the procedure. The doctor did not hand over the post-mortem report to the witness. On 22nd July, 2005 P.W.3 filled in a P3 form and escorted **John Gichamba** (accused) to hospital to have his age and mental status assessed; and P.W.3 later recorded a statement.

Cross-examined by learned counsel **Mr. Mutembei**, P.W.3 averred that he had made a statement with the Police on **26th July, 2005** and he had therein stated what was in the Government Pathologist's report – that the deceased was probably killed by being hit on the head. He averred that he had made a further statement with the Police on 13th September, 2005 indicating that the Government Pathologist had given him nothing to take to the Government Chemist for analysis.

P.W.4, **Dr. Julius Gikonyo Kuria**, holder of MB. Ch.B. degrees of the University of Nairobi and a lecturer at that institution, as well as Government Pathologist since 2005, testified that on 18th July, 2005 he had conducted an autopsy on the body of **Purity Wanjiru**, a baby girl.

Dr. Gikonyo found the body of the deceased covered in a white overall; had black panties; had napkins; had a green pair of trousers. The deceased was a female African child; about five months old; 70 cm in

length; good nutritional status and physique. The body had been refrigerated, and as to external appearance, it showed no obvious wounds or injuries. The body had a bruise on the forehead, covered with garbage; it had missing flesh on the left hand and temple; the brain was partially decomposed. The witness stated in his report (exhibit No. 1) that the autopsy could not show cause of death, and P.W.4 testified that some tissues had been taken to the Government Chemist for further analysis.

On cross-examination by **Mr. Mutembei**, P.W.4 testified that he had queried in his report “whether even a rodent could have severed the body of the deceased”. He did not remember who took samples to the Government Chemist. He found the skull intact, and the brain was not exposed.

P.W.5, No. 56832 **Corporal Peter Mwangi** testified that he works with the Scenes of Crime Department at the Police Force, based in Nairobi, and his duty is to take photographs at scenes of crime. On 13th July, 2005 he was called by **Senior Sergeant Wangui** (P.W.6) from Riruta Police Station, and asked to proceed there and take photographs at the locus of the dead body of a child. He went to Riruta, and took three photographs – No. 1 and 2 showing a general view, and No. 3 showing injuries to the face of the child. He had developed the photographs, and he now produced them as Exhibits No. 2, 3A, 3B and 3C together with his report.

P.W.6, No. 29607 **Senior Sgt. Margaret Wangui** testified that she was attached to the Riruta Police Station and performed crime-branch duties. She had been in the office on 26th July, 2005 when called by the Officer Commanding the Station (O.C.S.) at the Riruta Police Station. She was asked to investigate a case of murder – which previously had been reported as a case of child-stealing. She read the statements which had been recorded, and compiled a file. She conducted further investigations and returned the file to the District Criminal Investigation Officer (D.C.I.O.), Langata Branch who later forwarded the same to the Provincial Criminal Investigation Officer (P.C.I.O.), Nairobi. The file was later returned, with information for the purpose of laying a murder charge.

P.W.6 had sought to know from the doctor who conducted the post-mortem examination if tissues had been taken to the Government analyst; but she was told that this was not done; and this made it necessary for her to see **P.C. Mulinge** (P.W.3) who witnessed the autopsy – and he wrote a second statement.

On cross-examination by learned counsel **Mr. Mutembei**, P.W.6 testified that a charge had been brought against the accused on the strength of the information prepared by the Attorney-General. The witness had requested the Officer Commanding the Station that an inquest file be opened on this matter, but his response was to request that the file be dealt with through normal channels. She further averred: “In my assessment, an inquest was more appropriate than charging the accused”.

P.W.6’s investigations had shown that the deceased had been left with the accused, and that the child’s mother and the accused had been living together in one house. The mother, **Mary Wanja Gichamba**, after the arrest of the accused, told P.W.6 that she had been unable to pay rent, and had had to shift residence; but she then became unavailable notwithstanding that the witness had bonded her to appear in Court.

The prosecution case having closed, learned counsel **Mr. Mutembei** made submissions, the main contention of which was that the prosecution had not established a *prima facie* case deserving of an answer by the accused. The law on whether there is a case to answer, it was urged, is stated in the East African Court of Appeal decision in **Ramanlal Trambaklal Bhatt v. R** [1957] E.A. 332; in the words of **Sir Newnham Worley, P.** in that case (p.335):

“A mere scintilla of evidence can never be enough; nor can any amount of worthless, discredited evidence. It is true ... that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

From the **Bhatt** case learned counsel submitted, quite correctly, with respect, that the onus of proving that the accused has committed the offence charged, is always on the Prosecution; and the obligation to answer to the charge does not arise at all unless the Prosecution has already laid before the Court a **prima facie case**. A **prima facie case**, in my understanding, is a well-based case which, at first glance, carries clear pointers that the accused has a substantial involvement in the circumstances attending the commission of the offence; so that a closer examination of those circumstances **could** well lead to a finding that the accused did commit the offence – and hence it makes practical sense that the accused be given a chance to explain his position in the matter.

Mr. Mutembei also relied on this Court's decision (**Onyango Otieno, J** – as he then was) in **Daniel Manuthu v. Republic**, H.C.Crim. C. No. 9 of 1998 in which it had been held that there can be no criminal liability unless there is a nexus between the act of the accused and the death of the deceased. Counsel submitted, and with justification, I believe, that the evidence of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 put together failed to show a **link** between actions by the accused, and the death of the deceased. One possible witness, **Mary Wanja Gichamba**, would have – I believe – had a central role in the establishment of such a connection; yet, notwithstanding that she is alive and well, she was not called as a witness.

Mr. Mutembei questioned the propriety of the report and evidence of P.W.4, **Dr. Julius Gikonyo Kuria** – the Government Pathologist. The deceased had disappeared on **9th July, 2005** and was discovered on **13th July, 2005**; and between those dates the accused had already been arrested; but the pathologist's report does not indicate the approximate time of death of the deceased. Besides, the Government Pathologist had been unable to ascertain the probable cause of death. It is apparent that due care had not been taken to have tissues of the body subjected to analysis by the Government Chemist – and this, it was submitted, leaves a gap in the Prosecution evidence.

Learned counsel urged the Court to acquit the accused under s.306 of the Criminal Procedure Code (Cap. 75).

In response, learned State Counsel **Ms. Mwanza** maintained that the prosecution had discharged the onus of proof resting upon it, by calling its six witnesses; and that this evidence has shown that the accused had been with the deceased at the time of her disappearance.

I am in agreement with counsel for the accused, that if the accused were to be put to his defence, and then he exercised his right to remain silent, the evidence which has been adduced through the Prosecution's witnesses, by and of itself, could not possibly be held to carry such probative force as would justify a finding of **guilt**. The main weakness of the evidence adduced is that it does not at all link the death of **Purity Wanjiru Gichamba** to any act or omission on the part of the accused. In the absence of any clinical or scientific report determining the **cause of death**, it is not possible to attribute the death to the accused. And in the absence of the deceased's mother as a witness, the evidence that is potentially the most valuable in the proof of criminal liability, is missing.

In an earlier case, **Republic v. Cosmas Mwaniki Mwaura**, H.C.Cr.C. No. 11 of 2005, I had stated the basis upon which an accused person may be called upon to answer to a charge, and this remains my understanding to-date:

“The basic principle applicable in criminal trial is that, any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the Court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment.”

On the foregoing principles, I do find that the Prosecution has in this instance made no case that would

justify putting the accused to his defence.

Accordingly, by virtue of s.306(1) of the Criminal Procedure Code (Cap. 75), I hereby acquit the accused, and order that he shall forthwith be set at liberty, unless he is otherwise lawfully held.

I discharge the assessors who had been serving in this trial.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of October, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung'u

For the Prosecution: Ms. Mwanza

For the Accused: Mr. Mutembei