



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**Criminal Case 30 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**EVANS MUYEKA *alias* WAINGO ..... ACCUSED**

**JUDGMENT**

The Accused faces charge of offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63) Laws of Kenya.

It is alleged against him that on 26th May 2002 at Jamhuri Estate Phase II he murdered Catherine Wambui Kamau.

It is sufficiently established by the prosecution that the body of the deceased was found in a bed room in the house along Jamhuri Estate Phase II which was being constructed by the deceased. Her body was found with her two hands tied and a gag pushed in her mouth. She had human bowel discharge on her private parts. As per the post mortem report she had bruising on the dorsum of hands and forearms, bruising of oral cavity due to dentures and conjunctival haemorrhage. On observing of those injuries the pathologist formed an opinion that the cause of death was Asphyxia due to smothering (manual strangulation).

The body of the deceased was identified by her sister Caroline Njeri Mungai (PW.5).

In view of the aforesaid, I can safely find that the Prosecution has proved that the death of the deceased occurred as a result of external force and not due to natural cause.

It is also sufficiently established that the Accused herein was working with the deceased as the caretaker of the place where the body of the deceased was found. The Accused himself has agreed to this in his defence statement. Similarly it is sufficiently established that the Accused was arrested at a hotel on 28th May, 2002 at about 7.30 p.m. As per evidence of Joshua Gatoto (PW.3) he saw the Accused begging for food at that hotel and Ndegwa (PW.2) pointed the Accused to him as a suspect of murder of a lady. When he asked his name, Accused replied as 'Waingo' but tried to run away but was captured and handed over to the police. The Accused has, in different version, accepted that he was

arrested when he went to take his meal at the hotel which was usual for him.

The version of how the body of the deceased was found is given by testimonies of Philip Mwaura (PW.1) and Charles Ndegwa (PW.2).

According to evidence of PW.1 Philip Mwaura, he with PW.2 Charles Ndegwa Ngugi and one Maina Njuki were watering a construction site at Jamhuri Estate phase II on the material day. They went to rest at about 11 a.m. When they were so resting, he heard screams and saw a young man standing on a verandah of a house from where the screams were heard. He asked the young man what was the problem and he said there was nothing. After about 30 minutes he heard the screams again and at that time the young man agreed he heard the screams and that they were from the place where he was.

The young man came towards him when he was alone as others had gone away. The young man told him that he had seen a key and when he opened the door with it he found a lady lying. He with Ngugi (not called as witness) went with the young man and confirmed that the body of the lady was lying in that bedroom. This witness said he had neither seen the Accused nor the deceased on the material day. The young man referred to him has not been called as witness even though the court was assured that he would be a witness in this trial. What the court was later informed was that the young man now identified as Kevin, has gone to U.S.A. and was untraceable. No further details were offered as to how the said information was obtained by the Prosecution and whether Kevin had a family in the country. In my opinion there cannot be any doubt that this witness was a material witness from what has been testified before the court.

PW.2 testified that the material day was a Sunday and at about 2.30 p.m. he was resting with PW.1 and Ngugi. He also heard screams and saw the young man on the verandah and on asking the young man responded it was nothing, as has been previously testified by PW.1. According to this witness they all went away. His home was nearby and after about half an hour when he was outside his home, he saw the Accused (referred as Waingo by the witness) coming out from the house where body of the deceased was later found lying. He called the Accused but he did not stop. After five minutes he left his home to check on repair of his bicycle and met the Accused on the way. He asked the Accused about screams he heard but the Accused told him he was in a hurry and would see him later on. On his return home, he was told by PW.1 that the body of the deceased was found. Apart from timings when the screams were heard, there is consistency in material aspects between in evidence of these two, witnesses.

PW.4 Rtd. Major Michael Macharia was neighbour to the deceased in Jamhuri Estate, Phase I where the deceased was staying. They both were developing their plots at Jamhuri Estate Phase II. He was informed of the body of the deceased being found at about 3.00 p.m. on the material day. He also mentioned Kevin being present at the scene when he was there. He specified that Kevin's family were tenants to the deceased in her house at Jamhuri Estate Phase II. He had seen the Accused during his visits to construction site of his own plot.

PW.5 Caroline was informed about the death of the deceased who was her sister the next day. Apart from identification of her body she was not a material witness to the prosecution. But she became material for the Defence as she was closely asked questions on relationship between the deceased and one Mr. Kamuyu. She was very emphatic that the two had very intimate relation for about five years but the relationship broke one year prior to the incident. She also stated that the said Mr. Kamuyu stopped working for the deceased few months prior to the incident. She denied they had any violent disagreement. She also denied that the two were carrying on business together and had acquired properties together.

However, it also came out from her evidence that there was a dispute between the Accused and the deceased in that the Accused refused to vacate the room he was occupying in the house constructed by the deceased till he got an alternative place to stay.

Accused in response to the Prosecution case, gave an unsworn statement. He stated that 26th May, 2002 was his off-day and left his room at about 11 a.m. He returned at about 3.00 p.m. as he wanted to collect some money. Then he stated that when he went on off-duty he could come back on Thursdays as he had two days' off and then stated that he could delay to come back either on Wednesdays or Thursdays. He did not mention about dispute between the deceased and one Mr. Kamuyu even though PW.5 was closely questioned on the issue. He also did not mention of any salary dispute between him and the deceased as was suggested during cross-examination. All these facts seem to be within his knowledge but was not specified or even mentioned. I also can safely note here that if he had come back at 3.00 p.m. as suggested by him, he was bound to have seen people gathered as the body was found by that time. There is evidence to that effect (PW.4). The Police had also received report by 4.00 p.m.

This is the evidence on record. I also caution myself that the case of the prosecution rests on circumstantial evidence and that the burden to prove guilt of the Accused beyond reasonable doubt is squarely on the shoulders of the prosecution case.

Has the prosecution discharged this burden"

Apart from hearing of screams and finding of the body in the house being constructed by the deceased, the only evidence against the Accused is testimony of PW.2 who places the Accused on the scene at 3.00 p.m., the time the Accused stated he came back to get money. But PW.4 stated he was informed of the death by that time. PW.1 puts the time after 11.00 a.m. and according to his evidence he was amongst the first ones to see the body. That time can be placed around 12.00 pm. Police was informed at about 4.00 p.m.

Moreover, the stumbling block in the prosecution case is absence of evidence from Kevin who could have been a missing link of the prosecution case. Uncertainty of the time of commission of crime is not at all an irrelevant factor whose discrepancies can be casually disregarded.

Kevin was the one who had the key to the room where the body was found. He was the one who opened and then called PW.1 to join him. This court does not know how and from where Kevin found the key and why he opened the door. Did he know the key was for that door" Was he alone in the house at that time" Who were his family members" All these questions remain unanswered in absence of his evidence.

In view of this lack of evidence which could have strongly linked the Accused in this crime or otherwise, I cannot comfortably state that the Prosecution has been able to point an unwavering finger of guilt at the Accused. The case falls far behind the required standards of proof. I need not repeat the famous and apt observations made in the case of ***R. Kipkering arap Kosek 16 EACA (1949) 135.***

I also note that the doubt howsoever strong cannot become a basis for the conviction which has to result from solid evidence led before the court.

In the premises, I find that from the evidence produced, it shall be unsafe to convict the Accused. Hence, I record a finding of not guilty against the Accused and acquit him of the charge of murder of Catherine Wambui Kamau.

Due to the above observations and reasoning I do not agree with the opinion of the Assessors.

I also direct that the Accused be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi this 25th day of July, 2005.

**K.H. RAWAL**

**JUDGE**

**25.2005**



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