



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 30 OF 2012

[FORMERLY NYERI HCCR NO. 50 OF 2010]

REPUBLIC.....PROSECUTOR

VERSUS

ISAIAH IRUNGU MWANGI.....ACCUSED

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the **Penal Code**.
2. The particulars are that on 12th December 2010 at Iichagaki Trading Centre within Murang'a South District of the former Central Province he murdered *Peter Muchoki Mburu*.
3. He pleaded not guilty. The Republic only managed to call *one* witness, Eunice Wanjiru Mburu (PW1). She is the mother of the deceased. She first testified before *Ngaah J* on 7th October 2013. On 30th September 2015, the trial started afresh before *Waweru J*. PW1 testified that on 20th December 2010, she attended the postmortem examination at Murang'a Hospital. She was accompanied by another person.
4. In her earlier testimony, before *Ngaah J*, PW1 said that she got a call from one Lucy Njeri who informed her that the deceased was killed. When she identified the body at the morgue, the pathologist told her that the deceased was stabbed. That is all she could say about the murder.
5. It also marked the close of the prosecution's case. Neither the learned Prosecution Counsel nor the learned counsel for the accused presented any submissions.
6. I am now called to determine whether the evidence discloses a *prima facie* case sufficient to place the accused on his defence.
7. The accused was first presented to court nearly *11 years* ago; to be exact on 22nd December 2010. On 17th December 2011, the trial was adjourned "*due to non-availability of witnesses*". On 25th July 2012, the matter could not be reached. On 25th February 2013, the matter was adjourned as new counsel had just been appointed for the accused. The trial finally took off on 7th October 2013 when PW1 testified. The prosecution then applied for adjournment to call other witnesses.
8. Further adjournments were sought by the prosecution and granted on 11th December 2013 and 23rd September 2014 for want of exhibits submitted to the Government Chemist. The case then started afresh before *Waweru J* on 30th September 2015 when PW1 testified for the second time. The prosecution again applied for adjournment "*as other witnesses were said to be unwell*".
9. On 23rd October 2017, *Ms. Keya*, Learned Prosecution Counsel, sought an adjournment as no witnesses turned up. The Court ruled that owing to the age of the case and that "*the accused's persons right to a trial within a reasonable time has obviously been violated. . .it is only fair that the prosecution be given warning of a last adjournment*".
10. After a series of mentions, the case was fixed for hearing on 28th May 2019. The prosecution was still not ready but owing to uncertainty on how the date was taken, I granted an adjournment to 8th October 2019. The prosecution was again unprepared but its request for adjournment was not opposed by the defence; perhaps because the accused was now out on bond.
11. When the trial resumed on 21st July 2021, learned Prosecution Counsel, *Mr. Mutinda*, sought yet another adjournment on the grounds that he had no witnesses. The application was opposed. I found little merit and ruled as follows-

This case dates back to 2010. On 23rd October 2017 and for reasons on the record, the prosecution was granted a last adjournment. No explanation has been tendered for non-attendance of the remaining witnesses. The application for adjournment is non-merited and is refused. Matter shall proceed at 10.00 a.m.

12. At the appointed hour, the prosecution had not procured any more witnesses and closed its case.

13. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

14. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

15. There is absolutely *no* doubt about the *death* of the deceased. Although the pathologist did not testify and no postmortem report was produced, the body was clearly identified by his mother (PW1) at the postmortem examination. I also entertain *no* doubt that the cause of death was *unlawful*.

16. However, there was *no* witness to the murder. PW1 only attended the autopsy. There is thus no direct or circumstantial evidence on the cause of death or connection with the accused. As things now stand, there is no shred of evidence proving that the accused killed the deceased. Paraphrased, there is no evidence to *convict* if the accused opts to *keep silent*. **Bhatt v Republic** [1957] E.A. 332 at 334.

17. It follows as a corollary that the Republic has not proved a *prima facie* case against the accused *sufficient* to place him on his defence. I enter a finding of *not guilty* under section 306 (1) of the **Criminal Procedure Code**. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 23RD DAY OF SEPTEMBER 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Ms. Waititu for Mr. Mwaniki Warima for the accused.

Ms. A. Gakumu for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.