



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NUMBER 16 OF 2017**  
**REPUBLIC .....PROSECUTOR**  
**VERSUS**  
**FRANCIS NGUGI MUNGAI.....ACCUSED**

**R U L I N G**

1. The accused person **Francis Ngugi Mungai** faces the charge of murder contrary to **Section 203 as read with section 204 of the Penal Code**.
2. It is alleged that on the 8<sup>th</sup> February, 2017 at Kihingo Trading Centre in Njoro Sub-County within Nakuru County he murdered **Alex Gathoka**.
3. On 23<sup>rd</sup> June, 2017 the accused took plea and he pleaded not guilty.
4. On 14<sup>th</sup> October, 2020, the trial commenced. The prosecution called six (6) witnesses.
5. **PW1, Peninah Wangui Munyua**, sister to the accused was at the material time running a hotel. On 8<sup>th</sup> February, 2017, she was with her brother in her hotel. She prepared the food and then around 11:00am left her brother at the hotel as she was going to pay for the licence. She went home to prepare leaving her brother in the kitchen. There was a customer in the hotel.
6. She had been at home for about thirty (30) minutes when she received a call that there was a crowd at the hotel. She went there, found people who informed her that her customer had fainted at the hotel and had been rushed to the nearby clinic. She was asked by the people to take him to hospital. She found a motor vehicle Nissan Matatu and took him to Valley Hospital. There she fainted and when she came to she found that other people had also come and the customer was in a bed. She was told he had died.
7. She had known the deceased as her customer for three months and she did not know whether the accused and the deceased knew each other.
8. **PW2, Daniel Githenya Gachoka**, father to the deceased, testified that on 8<sup>th</sup> February, 2017 at about 4.00pm he received a call from his wife saying that that his son had been stabbed. He rushed to Nakuru Valley hospital and found that he had died. He noted stab wounds on the left which he learnt had reached the heart. The body was taken to the mortuary. He was sent to Njoro Police Station where he booked the report and later recorded statements. On 15<sup>th</sup> February, 2017 he identified his body for postmortem. He did not know who stabbed him.
9. **PW3, Dr. Titus Ngulungu**, a pathologist, testified that 15<sup>th</sup> February, 2017, he performed an autopsy on the deceased's body. That upon examination, he noted blood loss, stab wound 15x10mm about 90mm from the sternum and 30mm from the right nipple and right track stab wound from the nipple into the chest. The stab wound had entered cardiac sac, right ventricle about 15mm communicating with the chambers of the heart. He also noticed the deceased's lungs had collapsed, two (2) litres blood in the chest. He was of the view that the cause of death was as a result of a single stab wound, cardiac muscle injury and blood loss in keeping with homicide.
10. **PW4, Dickson Ngatia Gachoka**, uncle to the deceased, testified that he attended the deceased's post mortem examination on 15<sup>th</sup> February, 2017 together with PW2.
11. **PW5, No. 67817 PC Tsanga Tunje**, stated that he received a report that there was a member of the public who was badly injured at Kihingo area. He rushed there only to find that the person had been taken to hospital. He learnt that the person who was injured had gone to PW1's hotel to ask for PW1, had found the accused who is the brother in the kitchen, who told him to leave his sister alone as he suspected

that the said person was having an affair with the sister. It was then that the customers in the hotel heard the deceased screaming. They saw that the deceased had been stabbed in the chest. That he went out and fell. The owner of the hotel was called and took him to hospital, where he died. The report was booked at Kihingo Police Station and accused was arrested the same day.

12. He said that one APC Mike Esinyon visited the scene and recovered the murdered weapon, a knife. He said the knife was not taken to the government chemist for analysis.

13. On cross examination he said that one Richard Onsare a customer in the hotel is the one who heard the argument between the accused and the deceased. He said he recorded the statement of this witness. When the statement was put to him it turned out that Richard told him that he was at the Shopping Centre when he heard the screams of a person who was being chased. He was never in the hotel and he never heard the alleged argument between the accused and the deceased. He stated that it is only after the postmortem that it appeared that the deceased was stabbed. That the persons who heard and even saw the stabbing refused to record statements. He said that his investigations revealed that the accused and the deceased did not have a good relationship because the accused did not like the relationship between the deceased and his sister.

14. **PW6, No. 89017636 PC Mike Isinyo**, recalled that on 8<sup>th</sup> February, 2017, while at Kihingo Administration Police Post, three people came to the Police Post making a lot of noise. He went to check, and they told him that the accused who was among them had stabbed a person. He asked them to identify themselves. One said he was John Maina, the other was Richard and the other was Francis. One by the name Joseph Kamau told him that he was a police officer that he had brought the Francis. That this Francis had stabbed a person at a hotel at the shopping centre. That the person had been taken to hospital. They took him to the scene, a kitchen in a hotel at the shopping Centre. Looking around the kitchen he saw a knife that had been thrown in the fire. He took the knife and took it to the police station. He then escorted the accused and the knife to Njoro Police Station. He learnt that the victim had died.

15. On cross examination he said that the people who brought the accused to the station told him that they had seen him stab the deceased but that he had not recorded this in his statement. He said he was directed to the scene by one Richard and one Joseph. That they looked for the knife and found it in the fire. He said it had been in the fire for about thirty (30) minutes.

#### **ISSUES FOR DETERMINATION**

- **Whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon the accused to give his defence.**

#### **ANALYSIS & DETERMINATION.**

16. **Section 306(1) of the *Criminal Procedure Code*** provides as hereunder:

**“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”**

17. In the celebrated case of ***R.T. Bhatt v Republic [1957] EA 332*** the court stated as follows:

**“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out at the close of the prosecution, the case is merely one ‘which on full consideration might possibly be thought sufficient to sustain a conviction’. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. That the question whether there is a case to answer depends only on whether some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.” A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.”**

18. From the evidence it is clear that none of the prosecution witnesses who testified heard or saw the alleged quarrel between the accused and the deceased, none actually saw the accused stab the deceased. No witness testified to seeing the accused with the deceased before the deceased was rushed to hospital. No one who was at the scene when the stabbing allegedly happened testified.

19. What the other witnesses told the court was hearsay. Even the statement of the alleged eye witness on whose testimony the Investigating Officer relied to charge the accused, did not say that he saw or heard anything that could tie the accused to the murder. The knife collected from that kitchen was not connected to the deceased in any way. It did not have blood stains and was never taken to the government chemist for forensic analysis.

20. Further PW5’s investigations revealed that the deceased was found lying on the ground outside the hotel with stab wounds. What is unclear is whether he had been stabbed somewhere else or at the hotel noting that there is no evidence on record to show that the deceased came out of the hotel after being stabbed and fell on the ground. PW1 did not specify in her testimony whether the customer she had left at her hotel with the accused was the deceased herein .

21. In ***P.O.N. v Republic [2019] eKLR*** the court observed as follows:-

**“...no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable**

**doubt or it is not....”**

22. The upshot of this is that I find that the prosecution has failed to establish a prima facie case against the accused person to warrant his being called upon to make his defence. For that reason I proceed under **Section 306 (1)** of the **Criminal Prosecution Code** to record a finding of not guilty. The murder charge against the Accused is dismissed and he is accordingly acquitted.

23. The accused is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**MUMBUA T MATHEKA**

**JUDGE**

In the presence of:

CA Lepikas

Ms. Murunga for state

Ms. Mumnagi for accused

Accused present virtually