



**REPUBLIC OF KENYA**

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

**CRIMINAL MURDER NO. 10 OF 2013**

**REPUBLIC.....STATE**

**VERSUS**

**FAUSTO MURIUKI GACHOKI .....1<sup>ST</sup> ACCUSED**

**ANN WAWIRA JAMES .....2<sup>ND</sup> ACCUSED**

**RULING**

**INTRODUCTION**

1. The First accused faces a charge of Murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya.
2. The particulars of offence are that, on the 3<sup>rd</sup> day of November, 2013 at Muchagara Trading Centre in Kirinyaga East District within Kirinyaga County jointly with others not before court unlawfully murdered Stephen Mwaniki Muchiri.
3. The 1<sup>st</sup> accused person pleaded not guilty to the charge and the prosecution presented 11 witnesses to support and prove its case.

**FACTS OF THE CASE**

4. On the 3<sup>rd</sup>.11.2013, the 2<sup>nd</sup> accused person in company of two men went to a local bar at Muchagara Trading Centre where they drank alcohol. The deceased who was previously married to the 2<sup>nd</sup> accused person also went to the bar roughly twenty minutes later and while there, requested the 2<sup>nd</sup> accused person to join him in his table. The 2<sup>nd</sup> accused person declined the offer and thereafter left the bar in company of two men. The following day, the body of the deceased was found lying down in a pool of blood next to the house of the 2<sup>nd</sup> accused person. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons were thereafter arrested and beaten by the mob while the deceased body was thus taken to mortuary. The matter was investigated by the police who eventually charged the 1<sup>st</sup> and 2<sup>nd</sup> accused persons with the offence of murder.

In the course of the proceedings, the second accused pleaded guilty to the charge and was dealt with accordingly. This ruling therefore relates to the 1<sup>st</sup> accused Fausto Muriuki Gachoki. This is a ruling to determine whether the accused has a case to answer on the charge.

5. The 1<sup>st</sup> accused person filed submissions on no case to answer while the prosecution confirmed that they did not wish to make a response prompting the court to issue a ruling date.

**PROSECUTION'S CASE**

6. PW1, Alice Wangari Muchiri stated before the court that she is the mother of the deceased and that the 2<sup>nd</sup> accused person is her daughter in law. That on the 4<sup>th</sup>.11.2013, she was woken by the screams that came from the direction of Muchagara Trading Centre and upon inquiry, she was told that her son Mwaniki was dead. She rushed to the scene and upon reaching, saw her son lying down in a pool of blood. That she realized that he had stab wound on top of his chest and so it passed through her mind that the person who could be responsible was the 2<sup>nd</sup> accused person. She then decided to visit the house of the 2<sup>nd</sup> accused person and upon reaching, she noticed a neck chain, a baseball cap under a chair all belonging to the deceased; and that the floor appeared wet as if it had been cleaned haphazardly.

7. PW2, Joseph Muchiri Murige stated that the 2<sup>nd</sup> accused person was his daughter in law having married the deceased who was his son. That on the 4<sup>th</sup>.11.2013 at 6.00 a.m., a neighbour woke him up and accompanied him to Muchagara Trading Centre where upon he found his son (deceased) lying on the ground. He saw a stab wound on the right side of his neck shoulder joint and his clothes

were soaked in blood. That the face of the deceased was covered by a T-shirt but nevertheless, he knew not the owner of the T-shirt. He then visited the house of the 2<sup>nd</sup> accused person and while there, saw a hat belonging to the deceased and the alleged murder weapon. He further informed court that, that was the day he first saw the 1<sup>st</sup> accused person and that people did allege that the T-shirt that was used to cover the face of the deceased belonged to him.

8. PW3, Isaak Kabengi Ndambiri informed court that he is the chief of Thumaita Location, Kirinyaga East Sub- County. He informed court that he knew both the accused persons and equally the deceased; and that on the material day, he received a call from the assistant chief Julius Gucho informing him of the incident at **Muchagara Trading Centre**. **That he decided to go to the scene and upon reaching, found a large crowd beating the two accused persons herein; at that time, he decided to call the O.C.S Kianyaga for reinforcement. That when the police arrived, he handed the body to them and then (together with police officers) proceeded to the house of the 2<sup>nd</sup> accused person upon which he saw a cap, a knife and presence of blood on the floor which the police scooped for further investigations.**

9. PW 4, Cyrus Kinyua Ndwiga stated that the he is the assistant chief of Thumaita Sub location and that on the material day, he received a call from the area chief, PW3 informing him that there was a dead body at Muchagara **Trading Centre; and that two people had been arrested by the public. That PW3 requested him to go assist him maintain some order and so upon reaching the scene, he saw a body lying down and the face was covered by a blue stripped T-shirt.**

10. PW 5, Zakaria Muruiki Murige did state that on the material day, while having gone to buy cigarettes, he received a call informing him to go identify a body that was lying near a butchery at **Muchagara Trading Centre**. Upon reaching, he saw that the body was covered with a T-shirt; he thus uncovered it and that many people came claiming that the said T-shirt belonged to the 1<sup>st</sup> accused person. At this point, people went to the home of the 1<sup>st</sup> accused person and then brought him to where the body was. He then decided to inform PW2 of what was happening.

11. PW 6, Patrick Kinyua Gichuki informed court that he operated a shop at **Muchagara Trading Centre and that the deceased was his cousin. That he saw PW2 and PW4 pass by his shop and after about thirty minutes, he heard screams and upon getting out to see wat was happening, he saw many people milling around. He did manage to see a body lying on the ground near the road and upon proper scrutiny, saw that it was covered with a T-shirt which was blue in colour with had white stripes. It's at this time that he recognized the deceased and equally realized that the T-shirt belonged to the 1<sup>st</sup> accused person since he had seen him many times in it. That during this time, the mob was thoroughly beating the accused persons and so the police were called in to normalize the situation.**

12. PW 7, JuliusWambugu Muchira stated that he is the assistant chief at Keriru Sub – Location and that he knew the accused persons and equally the deceased since they hailed from his area of jurisdiction. That on the material day while at home preparing to go to the office, he received a call from one Mugo, a resident of **Muchagara Trading Centre informing him that a body had been found near Murani butchery. He then proceeded to the scene and found a crowd seriously beating the accused persons; and further also saw the body of the deceased lying in a pool of blood. That he had an injury on the right side of the neck and was covered with a T-shirt on the head and neck. The T-shirt was blue with white stripes and that it belonged to the 1<sup>st</sup> accused person since he had seen him wear it on Sunday at the Muchagara Trading Centre and further that he had not seen any person with a similar T-shirt. After all that, he went to the house of the 2<sup>nd</sup> accused person and saw blood stains on the floor and a black baseball cap belonging to the deceased.**

13. PW8, Dr. Ndirangu Karomo testified that he did a post mortem on the body and thereafter formed an opinion that the cause of death was cardio pulmonary arrest caused by massive internal hemorrhage secondary to the injury (stab) wound. He then filled and signed the post mortem form and then proceeded to produce it before the court as an exhibit.

14. PW9, Dr. Joseph Thuo testified that, he worked as a psychiatrist at Embu County Referral Hospital and that on the 8<sup>th</sup>.11.2013, the D.C.I did present to him the two accused persons herein as murder suspects and so he was requested to examine their mental status. He found that both the accused persons were normal and intelligent to stand trial and so he proceeded to produce the report before the court.

15. PW10, Henry Kiptoo Sang testified that he is a government analyst based at the government chemist in Nairobi. He confirmed that they received at their laboratory in Nairobi a knife, blood sample of the deceased, and that of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons, a blue T-shirt and cotton gauze collected from the house of the 2<sup>nd</sup> accused person upon which he was requested to examine the items and further analyse the D.N.A. and establish the relationship. That he found that the knife, shirt and the cotton gauze were stained with human blood. After conducting the analysis, he concluded that the D.N.A generated from the knife, shirt and cotton gauze all matched those of the deceased and therefore produced the same as an exhibit before the court.

16. PW 11, Martin Mwarabu did state that he used to work for the D.C.I but then exited to work at the presidency. That he was instructed to take over the investigations from the O.C. S C.I.P. Obonyo. That he was informed that a murder had happened at the **Muchagara Trading Centre and there were two suspects who had been seriously assaulted by the public; he proceeded to attend the post mortem conducted by PW8 at Kibugi Funeral Home where a post mortem was filled then handed over to him and then proceeded to charge the 1<sup>st</sup> and the 2<sup>nd</sup> persons in court.**

The prosecution closed its case after the testimony of PW11.

## **DEFENCE SUBMISSION**

17. The defence submitted that the prosecution had failed to prove prima facie case against the 1<sup>st</sup> accused person to warrant him to be put on his defence.

18. That the 2<sup>nd</sup> accused did admit to having perpetrated the offence when the facts of the case were read unto her and she confirmed that they were correct.
19. That there was no evidence adduced by the prosecution pointing at the 1<sup>st</sup> accused person or directing that the 1<sup>st</sup> accused ever participated in any way in the murder of the deceased.
20. That the 1<sup>st</sup> accused person was linked to the case simply because there was a T-shirt that the mob suspected to belong to him. And further that the description of the T-shirt left a lot to be desired since the same was not properly and specifically described it being a serious murder exhibit; further that, the same T-shirt was never subjected to any analysis to determine its owner.
21. That the mere evidence that a T-shirt was at the scene of the crime that resembles the one the 1<sup>st</sup> accused wore with no conclusive evidence was dangerous.
22. Having considered the prosecution's evidence and the submissions, the main issue for consideration is whether the prosecution have discharged the burden of establishing a prima facie case to warrant this court to call upon him to give his defence.

### ANALYSIS AND DETERMINATION

23. In criminal trials, the burden of proof is always on the prosecution; a trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exists a *prima facie* case against the accused. **Lord Pardon C.J** in the case of **Sanjil Chattai v The State [1985] 39 WLR 925** stated thus:

“A submission that there is no case to answer may properly be made and upheld:

(a) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.”

24. In **Bhatt v Republic [1957] EA 332 – 334 & 335** to define what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus:

“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 if, at the close of the prosecution case, the case is merely one which on fully 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.

Nor can we agree that the question whether there is a case to answer depends only on whether there is 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.”

25. In the same breadth, **Udoma JSC** of Nigeria Supreme Court in the case of **Daboh & Another v State [1977] 5SC 122 at 129** discussed the issue when a no case submission may be upheld in the following passage:

“Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well-known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.

Secondly,....that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

26. Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

27. If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail.”

28. **Section 203 of the Penal Code (Chapter 63 of the Laws of Kenya)** defines the offence of murder and requires proof of the following ingredients if the offence of murder is to be established:

- i. malice aforethought on the part of the accused,
- ii. death of the deceased,
- iii. the cause of the death by an unlawful act or omission on the part of the accused.

29. The prosecution proved the death of the deceased through evidence of PW8 who identified the body of the deceased for post-mortem purposes; PW8 produced the post mortem report confirming the death of the deceased herein.

30. The second ingredient is whether the accused committed the unlawful act or omission which caused the death of the deceased. The deceased according to PW8, Dr. Karomo who performed post mortem on the deceased formed an opinion that the cause of death was cardio pulmonary arrest caused by massive internal hemorrhage secondary to the injury (stab) wound. On the court record notes on page 187 Line 6 that:

.... secondary to the injury (stab wound) ....and further, page 189 Line 8.... there was no other injury other than the one I have indicated.

31. This therefore denotes the fact that the deceased herein did succumb to the injury inflicted by the stab injury. In the absence of any evidence showing that the deceased died of some other causes different from the stab wound, it is reasonable to draw an inference that he died as a result of the bodily harm inflicted on the 3<sup>rd</sup>.11.2013 which from the court record, has already been admitted to by the 2<sup>nd</sup> accused person.

32. This court must work with the evidence provided. The evidence provided to this court is incapable of assisting this court to make a finding that the case for the prosecution warrants the 1<sup>st</sup> accused to be put on his defence. Defence cannot be expected to fill in the gaps for the prosecution's case.

33. **In Public Prosecution vs. Zainal Abidin B. Maidin & Another** court stated that:

"It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts.... It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer."

34. This recognizes the constitutional right of an accused person to be presumed innocent until proven guilty. The right to fair trial under Article 50 of the Constitution gives an accused person the right not to give incriminating evidence and the right to remain silent. It is well settled that the legal burden of proof in criminal matters never leaves the prosecution's backyard. In the case of **H.L. (E) Woolmington -v- DPP 1935 AC 462 PP 481** held as follows on the law on legal burden of proof in criminal matters-

"Throughout the web of the English criminal law one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner's guilt..... no matter where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

35. The prosecution called eleven (11) witnesses none of whom witnessed the killing of the deceased. The investigation officer brought the 1<sup>st</sup> accused to court simply because the members of the public suspected him, that he was last seen with the 2<sup>nd</sup> accused person and further that the T-shirt that was used to cover the deceased allegedly belonged to him. It was upon the investigating officer to conduct investigations to determine whether that suspicion was based on evidence that could support a conviction. Suspicion no matter how strong can never form a basis of convicting an accused person. There was no evidence tabled by the prosecution pointing a finger at first accused as having committed the murder.

36. The prosecution lay capital on an alleged T-shirt found on the deceased and the fact that the 2<sup>nd</sup> accused person had been seen with the 1<sup>st</sup> accused person prior to the murder of the deceased. There was no evidence adduced before this court to connect this T-shirt to the 1<sup>st</sup> accused person and further to the death of the deceased. No witness was called to positively identify the T-shirt as belonging to the 1<sup>st</sup> accused. Identification by its colours is insufficient. There can be several other T-shirts with the same colours. The evidence of the T-shirt is insufficient to prove the guilty of the accused.

## **CONCLUSION**

37. In my considered view the evidence tendered by the prosecution abounds several doubts and in light of this:

- i. The prosecution has failed to establish a *prima facie* case warranting the accused to be called upon to defend himself.
- ii. The 1<sup>st</sup> accused has no case to answer.

iii. I acquit the 1<sup>st</sup> accused under **Section 306(1) of the Criminal Procedure Code**. He be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF DECEMBER 2021.**

**L.W. GITARI**

**JUDGE**

**16/12/2021**

The ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

**16/12/2021**