



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CORAM: BEFORE R. MWONGO, J**

**CRIMINAL CASE (MURDER) NO. 26 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STANLEY KARIUKI GITHINJI.....ACCUSED**

**RULING**

1. The Accused is charged with the murder of Kerenge Kamoiro on 1<sup>st</sup> September, 2016 at Moi Ndabi, Kongoni, Naivasha contrary to **Section 203** as read with **Section 204** of the Penal Code.
2. This case comes for determination as to whether or not there is a case to answer, the prosecution witnesses having concluded their evidence. The question is whether the evidence discloses a *prima facie* case against the accused.
3. Under **Section 211** of the Criminal Procedure Code the court has to determine whether there is a case to answer. The parties opted not to file any submissions choosing to rely on the evidence already adduced.

**Background**

4. This case commenced on 5<sup>th</sup> September, 2016 almost three years ago. Plea was taken on 22<sup>nd</sup> September, 2016 when Accused pleaded not guilty. Hearing was fixed for 6<sup>th</sup> and 7<sup>th</sup> December, 2016. On 8<sup>th</sup> November, 2016 the prosecution indicated that the Government Analyst report would not be ready on 6<sup>th</sup> and 7<sup>th</sup> December, 2016. Hearing was thus adjourned to 15<sup>th</sup> and 16<sup>th</sup> March, 2017.
5. On 15<sup>th</sup> March, 2017 the court directed that hearing proceed on 16<sup>th</sup> March, 2017. On 16<sup>th</sup> March, 2017 the prosecution indicated that witnesses had not been bonded.
6. On 10<sup>th</sup> May, 2017 prosecution expressed embarrassment that Kongoni Police Station as no witnesses had been availed. The evidence of Doctor Ngulungu was however taken. On 11<sup>th</sup> May, 2017 PW2 testified.
7. During the remainder of 2017 the matter did not move. On 12<sup>th</sup> July 2018 PW3 testified and PW4 testified on 30<sup>th</sup> October, 2018. The prosecution indicated it had three more witnesses and applied for and was granted summons for Stephen Muriithi Nkanatha and Edward Gitau Ndora.
8. On 5<sup>th</sup> February, 2019 prosecution stated that the witnesses summoned had not been traced by the Investigating Officer; further that the Government Chemist Report had not been analysed, However PW5 testified. A hearing fixed for 4<sup>th</sup> March, 2019 for conclusion of the prosecution case. Prosecution was so directed.
9. On 4<sup>th</sup> March, 2019 the Investigating Officer was not present in court. The prosecution also stated that the witness from the Government Chemist was available as he had been bonded for another case. The court, in the interest of justice, granted the prosecution a final adjournment and fixed a hearing for 2<sup>nd</sup> May, 2019. The court directed that should witnesses fail to turn up at the hearing the prosecution shall close its case.
10. On 2<sup>nd</sup> May, 2019 the investigating officer testified and the prosecution closed its case.

11. **PW1 Dr. Titus Ngulungu** conducted the post mortem on the Deceased's body. He produced his post mortem report as Exhibit 1. He found that the deceased death was caused by head injuries with blood loss due to multiple sharp force trauma to the head and upper limbs. The body had two incisions on the right temporal region extending across the right eye socket; and left parietal region. The left forearm also had incision. Internally, the head had a fracture at the right temporal region through which the lacerated brain was visible.
12. **PW2 David Kelemoi**, testified that he worked for the deceased. On 1<sup>st</sup> September 2016, he was travelling on a motor cycle at about 7.00pm having been given a ride home by Muriithi. On alighting, a man appeared from the maize and beat him up. He recognized the assailant but did not know his name. He pointed to the assailant as the Accused. The deceased came to the scene with a motorist and the assailant hinged at him and attacked him. The assailant kept asking for money but he said he had no money.
13. The Assailant (Accused) then slashed the deceased and, PW2 fearing for his life, fled the scene. He notified the deceased's son of the incident upon arrival at home, and the son went to inquire. PW2 went to hospital and also to Kongoni Police Station to report. The deceased was weak but alive when he was brought to hospital.
14. In cross-examination PW2 said he did not know the Accused before the incident. He confirmed that Muriithi is the one who gave him a ride on a motor bike. He stated that he saw the attack when he alighted, as the Assailant had emerged from the maize patch by the road side. That the assailant hit him with a rungu.
15. PW2 further testified that Muriithi summoned deceased to the scene and Gitau also emerged at the scene. That the Deceased had a rungu and a simi, and is a very old man. The deceased tangoed with the Accused, but PW2 did not see the deceased slash the Accused. The deceased had hidden a simi under his coat, and during the comb between the accused and deceased, the accused snatched it and slashed the deceased with it. He denied that he, Gitau and Muriithi had joined the fray.
16. In re-examination PW2 said he did indeed see the deceased and accused in combat. The deceased, he said, was about 80 years old and was disarmed by the Accused. He utterly denied that he owed Accused any money.
17. **PW3 David Njogu**, testified that on 1<sup>st</sup> September 2016 at about 7.00pm he was at Moi Ndabi centre. Pauli Esho then called him on phone and asked where he was. He could hear screams in the direction of his house. So he took his motor bike and rode home.
18. On the way he received another call, this time from Muriithi who told him someone had been hurt near his home. When he got home, he found Mzee Kamoiro screaming and Gitau and Muriithi were next to him. He asked then why they were not taking Mzee to hospital, and then one Legundunyu came and they all assisted in putting Mzee on a motorbike. He saw several injuries on Mzee, and they took him to hospital.
19. At hospital they were referred to another hospital, and they took Mzee to Naivasha Hospital. After a short while they were told Mzee had died. PW3 said he heard Mzee say *"Nimechukuliwa kwangu kwenda kuuawa."*
20. In cross examination PW3 said he recorded his statement some days later. He confirmed that Muriithi and Gitau had told him they found Mzee with injuries; that they did not know who had injured him; and that he did not see any weapon at the house.
21. PW4 Lemayan Kamuyu is the deceased's son. On 1<sup>st</sup> September, 2016 he was at home at Moi Ndabi when Gitau, his father's friend came at about 7.00pm. He told PW4's father that the shepherd, PW2, was being attacked but did not say where the attack was taking place. He stated that his father, the deceased, did not follow Gitau to see what was happening, and Gitau went back.
22. Soon, Muriithi showed up and also spoke of the attack on PW2, and this time the deceased got onto a motor bike and went with Muriithi to see what was happening. PW4 stayed behind. After a while he telephoned the deceased, but the call was picked, which surprised him.
23. PW4 then phoned his neighbour, Jeremia and told him that Muriithi and his father had gone, but his father was not picking his phone. It was then that Jeremia told him his father, the deceased had also been attacked and had been taken to hospital. As he prepared to go to hospital, PW2 told him that his father had been attacked by the same person who had attacked him, PW2.
24. PW4 went to Ngondi Health Centre and met Jeremia there. He found the deceased had been cut on the head and hands. He stated that the deceased had told him that the people he, PW4 had gone with had attacked him and Muriithi had rescued him. Thereafter, PW4 consulted his family and they took the deceased to Naivasha Hospital. Thereafter, PW4 consulted his family and they took the deceased to Naivasha Hospital. The following day he received a report that his father had died in hospital.
25. In cross-examination, PW4 said his father did not go out with Gitau but with Muriithi. That they went at about 7.30pm, and did not carry anything with him, but was wearing a long coat. He asserted that Gitau and Muriithi are the ones who came for him. PW4 stated that deceased said that he was attacked by *"wale watu"* meaning Muriithi and Gitau.
26. **PW5 Kayoni Redison Kamuyu**, a son of the deceased gave evidence that on 8<sup>th</sup> September, 2016 he went to identify the body of his father. There was a doctor there who was checking the body for post mortem. He confirmed that the body was that of his father.
27. **PW6, PC Charles Muthoka**, was the Investigating Officer. He testified that he was at Kongoni Police Station on 2<sup>nd</sup> July 2016 when he received a report of death at Moi Ndabi. The case had been reported on 1<sup>st</sup> July 2016, by PW2. PW6 restated the evidence of PW2. He testified that a confrontation broke out where PW2 was present with the Accused. The deceased showed up and injured the accused who, in anger decided to revenge. Accused snatched a knife from the deceased and cut deceased with it twice in the head, and he fell down. Accused then ran away.

28. PW6 produced a knife as P. Exhibit 2. He said that the knife was found in the Accused's house and he was arrested and brought the station. PW6 also stated that PW2 had explained to him about the money when confronted by Accused to pay it, that PW2 sought to borrow money from a neighbour but was unsuccessful. This evidence on money contradicts the evidence of PW2.

29. PW6 finally produced Exhibit 4 being an Exhibit Memo for a blood stained panga and blood sample provided to the Government Chemist. According to the report the blood from the panga matched that of the deceased.

### **Analysis and Determination**

30. PW2 testified that Accused beat him up, then when Deceased showed up with a rungu and simi, he did not see Deceased slash Accused on the head. He however saw Accused snatch the simi and slash deceased.

31. PW6, recounting the story given to him by PW2, stated that the Accused acted in revenge and cut the deceased.

32. PW6 did not testify as to how the arresting police officers were able to identify the Accused, how they went to or found his house, and when they recovered the alleged knife. No dates were given of the date of arrest; no indication is given as to who showed the police the house of the accused. It must be recalled that PW2 stated in his evidence that he did not know the accused before the incident. How then could he recognize the Accused?

33. Further the incident occurred at about 7.00pm. No evidence was availed as to whether or not there was sufficient light to enable identification or to see a rungu and a simi in the darkness. All witnesses testified that the events surrounding the incident occurred around 7.00 - 7.30pm on 1<sup>st</sup> July, 2016. It will be impossible for the prosecution to fill in these gaps in the evidence.

### **Death of Deceased**

34. According to PW3, David Njogu, he was amongst those who took Mzee (Deceased) to a nearby hospital before they were referred to another hospital. He was there when they then took the deceased to Naivasha Hospital D. Exhibit 1. He testified that after a short while they were told that the deceased had died. His evidence contradicts that of PW4.

35. According to PW4, he took his father (Deceased) to Naivasha Hospital. It appears that he must have left him there and gone away, because he heard only the following day, that the deceased had died.

### **Gitau and Muriithi the missing witnesses**

36. PW2, PW3 and PW4 all spoke of some individuals called Gitau and Muriithi. These two persons appear to have been intimately connected with the events of the 1<sup>st</sup> July, 2016 at the time the incident occurred.

37. PW2 said he was given a ride home on a motorbike by Muriithi at about 7pm. When he alighted he was attacked. Was Muriithi still there or had he already gone? PW2 then said that Muriithi summoned the deceased to the scene, and that Gitau also emerged at the scene. Was there a fight that involved all of them? Yet PW2 said he fled the scene when Accused slashed the deceased.

38. PW3 said that at about 7.00pm he received a call from Muriithi saying someone had been hurt near his home. When he went there he found Gitau and Muriithi with the deceased, who had already been injured. Yet PW2 said Muriithi is the one who gave him a ride and when he alighted he, PW2, was accosted and beaten by the Accused. The sequence of events makes no sense.

39. PW4 testified that at about 7.00pm on 1<sup>st</sup> July 2016 Gitau showed up at his father's home and told him about an attack on PW2. He did nothing until Muriithi also showed up and told him the attack. It was then Deceased went with Muriithi on a motorbike to the scene. Later on, one Jeremia told PW4 that his father had been attacked and taken to hospital. When he went to hospital he found Jeremia there with the deceased.

40. PW3 also testified that when he found Gitau and Muriithi with the Deceased he asked why they were not taking him to hospital. It was not until one Legundunyu came that they took Deceased to the hospital. What was happening at this time between Muriithi, Gitau and Deceased?

These two individuals ought to have been called as key witnesses, and indeed may have had something to do with the incident.

41. The offence of murder with which the Accused is charged can only be proved if both the act of killing (*actus reus*) and malice aforethought or intention are proved as against the accused. Given the prosecution evidence as it presently stands, such burden of proof will not be met.

42. Accordingly, I find that a prima facie case has not been made out against the accused. As such there is no need for him to be placed on his defence.

43. The Accused is therefore hereby acquitted and shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and Delivered at Naivasha this 30<sup>th</sup> Day of May, 2019.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. ....for the State
2. ....for Accused
3. Accused -
4. Court Clerk –