



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 75 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS GITAU WANJIKU.....ACCUSED

RULING

Francis Gitau Wanjiku, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the 9th of May 2015 at Korogocho Slums in Kariobangi area within Nairobi County he murdered Mumtazi Mohamed Abdi. The accused has denied committing this offence.

The case for the prosecution has been heard and concluded after this court received evidence from eight (8) witnesses. It is the duty of this court to consider that evidence and determine if the prosecution has established a prima facie case against the accused person or not in order to determine whether the accused shall be placed on his defense or not as required under section 306 of the Criminal Procedure Code.

Out of the eight witnesses, only Abdi Mohamed Abduba, PW1, was at the scene. He told the court that on 9th May 2015 he and other friends were going home from Provide Hospital in Korogocho where they had taken another friend known as Maslah for treatment after he had been assaulted and injured on the head. They were accosted by a group of young men among them the accused person. According to PW1 the accused stabbed Mumtazi Mohammed Abdi, the deceased, on the chest. The deceased was taken to Visions Mission Hospital in Kogorocho. He was pronounced dead on arrival at the Hospital. PW1 said that the accused was known to him as a neighbour and referred to the accused as Gitahi, He identified him in court as the person who had stabbed the deceased. He said Gitahi is accused's nickname.

The other witnesses received information after the stabbing of the deceased had taken place. The report of the stabbing was made at Kariobangi Police Station. Police Constable Geoffrey Mwiti, PW2, testified that on 12th July 2015 he was in patrol within Korogocho slums in company of other police officers from Kariobangi Police Station. He testified that on reaching Gitathuru area they arrested a young man suspected to be one of the people terrorizing members of public. He said that they held the suspect pending interrogation and that the young man was identified by members of public as a suspect for murder. He said they took the suspect to Kariobangi Police Station where they confirmed the murder report.

Sadia Mohamed Ali, PW3, is the mother of the deceased. She testified to how she received the report of the death of her son on 9th May 2015 from one Mohamed Ibrahim. She said that she went to Visions Hospital and confirmed that her son had died. Dr. Mercy Karanja, PW4, examined the accused on 24th August 2015 and certified that he was fit to stand trial. Nadhifa Abdi Maalim, PW5, cousin to the deceased identified the body to the pathologist Dr. Peter Muriuki Ndegwa, PW6, for post mortem.

CPL Rita Tatu, PW7, was the duty officer at Kariobangi Police Station on 9th May 2015 when a report was made of a commotion at Korogocho. In company of other police officers she visited the place. She learned that the deceased had been stabbed and taken to Visions Hospital. They went to the Hospital and confirmed the death of the deceased. Scenes of crime personnel were called to take photographs. CPL Rita told the court that they did not manage to arrest the suspect although a witness called Maslah gave them the name of Gitahi as the suspect. She said that the said Gitahi was arrested much later. This evidence was confirmed by the Investigating Officer PC Joseph Munyogo, PW8.

Prima facie, according to the Black's Law Dictionary Ninth Edition means "sufficient to establish a fact or raise a presumption unless disproved or rebutted". ***Prima facie case*** means "the establishment of a legally required rebuttable presumption." The term *prima facie* is used to signify that upon initial examination of the evidence before the court, there is sufficient corroborative evidence that unless rebutted would support a case. *Prima facie case* has been defined to mean "one on which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defense" (see **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332**).

The question I wish to pose here is: Can this case pass the above test? The prosecution bears the onus of proving a criminal case. In a murder trial like this one, the prosecution must prove beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act or omission as provided under Section 203 of the Penal Code. To meet the test of proving a prima case set by the **Bhatt case**, the prosecution

must tender evidence that even if the accused offers no explanation this court can rely on it to find the murder case against the accused proved beyond reasonable doubt.

PW1 Abdi Mohammed Abduba, PW3 Saadia Mohammed, PW5 Nadhifa Maalim, PW7 CPL Rita and PW8 PC Joseph Munyogo all testified to the death of the deceased. Dr. Ndegwa, PW6 confirmed that death by examining the body of the deceased. He noted a penetrating stab wound on the left chest measuring 5cm long and 2cm wide with perforation of the left atrium. The opinion of the doctor is that the deceased died due to exsanguination due to severe chest injuries due to penetrating sharp force trauma. A stab wound is an unlawful death. The fact of death of the deceased has been proved beyond reasonable doubt.

Turning to the identity of the person who stabbed the deceased, it is my considered view that the evidence of PW1 is crucial to establishing this fact. He told the court that he knew the accused before 9th May 2015 as a neighbour. He knew him as Gitahi. He explained that Gitahi is the nickname of the accused. On intensified examination, the evidence shows that it took police about two months to arrest the accused. The accused was not arrested because he was a suspect in the death of the deceased. He was arrested as a suspect for terrorizing members of the public. I have found no evidence from any witness to prove this point. According to PC Geoffrey Mwitii it was after they arrested the accused on suspicion of terrorizing members of the public that some people told the police that he was suspected of having killed someone. There is no evidence to show the identity of the members of public who gave police this information or the person allegedly killed by the accused. PC Mwitii told the court that upon arriving at Kariobangi Police Station, the police confirmed there was indeed a report of a murder case. The excerpt of the Occurrence Book (OB) capturing that report was not tendered in evidence nor did the police give details of who was the victim of murder in that report.

PW1 Abduba did not give the description of the accused to the police when he told them that the suspect was called Gitahi. He did not show the police where this Gitahi lived despite his being a neighbour. PW3 Saadia told the court he did not know who had killed her son the deceased. One would expect that PW1 told PW3 the name of the accused but this did not come out in the evidence of PW3. The Investigating Officer PC Joseph Munyogo told the court in cross examination that the mother of the deceased, who in this case would be Saadia, gave him the tip off of the whereabouts of the accused. Saadia herself did not state so in her evidence. She repeatedly told the court that she did not know who killed her son. Could it be possible then that PW1 did not see who had stabbed the deceased? The evidence of PC Joseph Munyogo shows that one Maslah, now deceased, is the one who gave him information about the accused stabbing the deceased. The court did not benefit from the evidence of Maslah.

The evidence of PW1 about the identity of the accused as the culprit is evidence of identification by recognition. He told the court that it was about 8.00pm or 8.30pm and it was dark at the scene. He also said there was some light. It cannot have been dark and lighted at the same time. Neither the prosecution nor the defense keenly followed up this line of the evidence. The evidence surrounding the identification of a suspect in circumstances like the ones in this case has been intensely examined by the courts. In *Wamunga v. R [1989] KLR 424* the Court of Appeal examined the complexities of an identification of a suspect in the following manner:

“It is trite law that where the only evidence against a defendant is evidence of identification of ‘recognition’ a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

In *R. v. Turnbull (1976) 3 All ER 551*, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remain good at the close of the defense case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state that:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

I have subjected all the evidence touching on the identification of the accused to careful examination. I have also considered submissions by both counsels. It is my view that the issue of the identity of the accused person has not been resolved by the prosecution. I have shown in this ruling the failure by the prosecution to present credible evidence pointing positively to the accused as the culprit. The intensity of light at the scene, if it existed at all given the contradictory evidence by PW1, was not described; the source of that light and the distance to the scene is not given. There is no explanation as to why the police took about two months to arrest the accused if he was clearly seen by PW1. It is expected that PW1 would have described the accused to the police on the first instance and perhaps shown them where he lived since PW1 said he knew him as a neighbour or at the very least told PW3, deceased’s mother the identity of the accused.

This evidence leaves a lot unsaid. There is no further evidence expected from the prosecution. Short of the accused admitting or confessing to the crime there is nothing more to expect in proving this case to the legal standard. Other than proving the death of the deceased by unlawful act of stabbing, the prosecution has failed to prove the identity of the culprit let alone proving malice aforethought. The law under section 306 (1) of the Criminal Procedure Code must be obeyed that:

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 of several accused persons committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defense may desire to submit, record a finding of not guilty.

I find the evidence by the prosecution insufficient to make a finding that the prosecution has made out a prima facie case. As a result of these shortcomings in evidence, it is my finding that the accused has no case to answer. I hereby record a finding of not guilty and order that the accused shall be at liberty to go home and enjoy his rights unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 8th March 2018.

S. N. Mutuku

Judge