



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC ::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

JAMES MWICIGI GITHINJI ::::::::::::::::::::::ACCUSED

RULING ON NO CASE TO ANSWER

1. The Accused Person herein, James Mwicigi Githinji (“Accused”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing James Mutua Mbugua on 31/12/2014 at Gamba village in Lari within Kiambu county.

2. The Prosecution called nine witnesses. The Prosecution’s case unfolded straightforwardly: The Accused was in the company of three others on the fateful night – New Year’s eve. The Accused and at least two others in the company had had a few drinks and ended up seated by a roadside – finishing up some drinks they had brought along and, ultimately, listening to, and dancing to some music blared from the mobile phone of one of them. It was, by now deep in the night and along came the Deceased in the company of one other person. The Deceased, whose house was directly across the scene, claimed that the music was too loud and demanded that it be switched off. Both the Deceased and his colleague had, apparently, taken a few drinks too. The Accused, apparently enraged that the Deceased was asking him to put off music in a public place, refused to switch off the music and a confrontation ensued between the Accused and the Deceased. In the midst of that confrontation, the Accused stabbed the Deceased to death.

3. Altogether, there were five people at the scene when the incident happened: The Accused and his three friends and the Deceased and his friend. Three of those at the scene testified for the Prosecution: Two of the young people who were with the Accused on that night and the friend who was with the Deceased. Suffice it to say at this point that their testimonies were unanimous. The other Prosecution witnesses either supplemented the story (providing, for example, post-offence conduct of the Accused and the manner of his arrest) or were of a formal kind (confirming the cause of death).

4. Against this evidence, the Defence makes the argument that the Prosecution has not established a *prima facie* case warranting calling the Accused to his defence. Mr. Wakaba pivoted his submissions on two points:

a. First, that the visibility at the scene was so bad that the identification evidence in the case is not sufficient: it cannot be established that it is the Accused who, in fact, stabbed the Deceased.

b. Second, Mr. Wakaba argued that there were many contradictions in the post-stabbing events that should raise doubt as to the credibility of the Prosecution witnesses and its case as a whole.

c. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

6. To successfully end up with a verdict of guilty in murder charge, the prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*)
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

7. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.
- c. Intent to commit a felony.
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

8. It is important to recall that at this point in the proceedings, I am required to make a determination whether if I properly direct my mind to the law and the evidence, I could reasonably convict if no explanation is offered by the Defence. (see ***Bhatt –vs- R [1957] EA 332.***)

9. The question is whether the Prosecution has produced evidence sufficient to render reasonable a conclusion in favour of the allegation it asserts against the Accused. The question was phrased in the following words in ***R -vs- Jagjivan M. Patel and Others 1, TLR, 85:***

All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply, its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.

10. To return to the present case, can we say that the Prosecution has presented evidence which, if accepted and taken at its highest – meaning without final determination as to its creditworthiness or weightiness (See ***R v Galbraith 73 Cr. App. R. 124***) – a reasonable court could convict if no explanation is offered by the Defence? I think the obvious answer is in the affirmative. Here, the Prosecution’s straightforward case puts the Accused at the scene of the incident, places the murder weapon in his hands, and establishes post-offence conduct that seems inconsistent with innocence. If believed and given full credit, that evidence could lead to a conviction. Both points raised by Mr. Wakaba go to the creditworthiness and “weightness” of the Prosecution evidence. Both those are matters which will be given due consideration during the final determination of the case.

11. Consequently, court finds that the Accused Person has a case to answer and is put on his defence.

Dated and delivered at Kiambu this 17th day of November , 2016.

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JOEL NGUGI

JUDGE