REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 42 OF 2010

REPUBLIC

VERSUS

JOHN MUTUGI RWANDA…ACCUSED

RULING

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, cap 63**, the particulars being that on the 28th day of November 2007 at Mathare sublocation in Nyeri South district within central province, jointly with others not before court, the accused murdered Bernard Wanjohi Mureithi.

According to the evidence of the four prosecution witnesses called by the state, the deceased's body was recovered in a bush in a farm owned by the Catholic arch diocese of Nyeri, on the outskirts of Nyeri town, on 29th November, 2007. According to the deceased's father (PW1) who visited the scene, the deceased had been hit on the head with an iron bar; he could not, however, tell who it was that hit the deceased or how he died.

The other witness who visited the scene was one Philip Waweru (PW2); he said there was blood strewn around the body. According to this witness, the deceased had disappeared the previous day on 28th of November, 2007 and he only came to learn of this disappearance from the deceased's wife who, incidentally, did not testify.

Fredrick Rapenda Owino (PW3) was a senior security officer employed by the Catholic diocese of Nyeri. He testified that indeed the farm on which the deceased's body was recovered belonged to the diocese; part of the farm was used for coffee and tea growing while the other part was a forest; it is on this part of the land that the deceased's body was found.

According to this witness, he was in charge of the security of the farm and his duties included the deployment of security officers to guard the farm at various times. On the 28th day of November, 2007 he had deployed four security guards on a field patrol within and around the farm. One of these security guards was the accused person. It was his evidence that the officers would normally be armed with bows, arrows and whips whenever they were on such patrols.

The guards never reported anything unusual when they went back to their base. On 29th of November 2007 at around 9:30 AM, while he was on his own patrol in the coffee farm, he saw a mob armed with rungus and pangas. He heard the people shout that the security guards had killed one of their own.

Later, the police officers from Nyeri police station came and collected the deceased's body. They also

came and arrested all the guards that were on duty on the 28th November, 2007 but released them on 7th January, 2008. Except for the accused, the rest of the officers who were on duty with him, gave up their jobs and went back to their homes apparently because of the election violence clashes that were rampant at the time. The accused person was later arrested but Mr Rapenda could not remember when he was arrested for the second time.

Joseph Waithaka Mukundi (PW4) was working on the sewage system at Mathari hospital, which is on the same farm on 28th November, 2007. He was with three other workers. On that day at around 10 AM he saw some guards pass by; the accused person was one of them. After they had walked for a distance of about 200 metres, he heard somebody cry out aloud asking his attackers not to kill him. However, none of them went to the scene.

Although the state counsel suggested he had lined up more witnesses for the prosecution, no other witness was ever called and the state ended up closing its case with the evidence of these four witnesses. The closure of the prosecution case was against the backdrop of five consecutive adjournments of the trial occasioned by the state for the sole reason of non-availability of witnesses. At one point the court had to summon the Nyeri County Criminal Investigation Officer to explain why his office could not avail the rest of the witnesses; his representative, who identified himself as sergeant Zablon Wambani appeared in court and undertook to avail the witnesses on the next date that the trial was scheduled for further hearing. Even after this undertaking, no single witness appeared in court when the trial resumed. I found it perplexing that the state could not secure the remaining witnesses yet most of them were civil servants; at least three of them were police officers while the other two were government doctors.

Be that as it may, it is the duty of this court to make a decision based on the evidence presented before it and the pertinent question at this point is whether, considering the available evidence, a prima facie case has been made out as to call upon the accused person to defend himself; this question is not hypothetical for it has its legal basis in **section 210** of the **Criminal Procedure Code** which provides as follows:-

> ***If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***

The leading decision on what amounts to a prima facie case is **Ramanlal T. Bhatt versus Republic (1957) EA 332** where the Court of Appeal held 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 of it if, 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 will not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.***
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> ***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. It is true, as Wilson, J. said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.***

The thrust of this decision is that an accused cannot be put on his defence merely because the

prosecution's case could possibly sustain a conviction; it is not for the court to speculate that if the accused is put on his defence his evidence may tie up the loose ends in the prosecution case if such loose ends or gaps manifest themselves. It is imperative that before the accused is put on his defence, due regard must be given to, among other things, the weight of the prosecution evidence.

If one considers the prosecution evidence from this perspective, it is difficult to see how the accused person can be put on his defence; the reason is simple: there is no link whatsoever, that has been established to my satisfaction, connecting the accused with the deceased's death. The only link, if one was to consider it that way, is the evidence of **Zablon Waithaka Mukundi (PW4)** who testified that he saw some guards pass by and after they had walked for a distance of about 200 metres from where he was, he heard someone cry or shout; he was apparently under attack and he was beseeching his attacker or attackers not kill him.

If the witness was able to tell the distance the guards had covered before he heard someone, presumably the deceased, shout, it is possible that he could also see guards attacking him, if it is the prosecution case that guards, and in particular the accused, attacked and fatally wounded the deceased. Yet it was not his evidence that he saw the guards attack the deceased; all he could tell was that he heard a voice of someone shouting to be spared of his life.

The rest of the four witnesses neither heard nor saw anything from which one could associate the accused with the deceased's death.

In my humble view, the evidence of these witnesses would amount to nothing more than what the judges in **Bhatt versus Republic** (supra) described as '*a mere scintilla of evidence'* which is not sufficient to put the accused person on his defence. It is the sort of evidence which cannot sustain a conviction even if the accused person cannot offer any explanation.

In the same vein, it cannot be said with any sense of conviction that the offence of murder, as understood under **section 203** of the **Penal Code** has been established at least to the threshold of a prima facie case. **Section 203** of the **Penal Code** states as follows: -

> ***203. Murder***
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> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder***.

To mount a case for murder the prosecution must establish, at the very least, the fact of death of a human being; that the death was not natural but was instigated by an act or omission of another person; and that the culprit was ill motivated or had malice aforethought.

The first two elements which, to some extent are intertwined, are of immediate concern here. There is no doubt that as at the time the prosecution closed its case, there was no proof presented before court that one Bernard Wanjohi Mureithi had died, let alone murdered; the fact of death of a particular individual and the cause of the death are two vital and indispensable prerequisites in an offence of murder which ought to have been but were not proved.

It may very well be true that a body was recovered from the bush or a forest as alleged but there was no proof that the body was that of Bernard Wanjohi Mureithi; and even if it was so proved, there was no proof that the deceased died of a cause other than a natural one. Simply put, there was no proof that the deceased died, if he ever died as alleged, as a result of an act or omission of another person. As the following decisions demonstrate proof of death and the cause thereof are two elements that cannot be overlooked in an offence of murder.

In **Republic versus Cheya & Another (1973) EA 500** two accused persons assaulted the deceased and tried to remove him from a group of women who were dancing because they objected to his behaviour of fondling and patting their buttocks. Other people joined in and assaulted the deceased; he later died.

The court held that there was no medical evidence to support the contention by the state attorney that the two accused persons can be said to have caused the deceased's death within the meaning of section 203 of the Penal Code, or that the specific injuries which they inflicted on the deceased in the course of this attack resulted in his death. The learned judge (Mfalila, Ag J) agreed with the views of his assessors that on the state of evidence, it was not possible to link the accused with either the murder or the manslaughter of the deceased. The accused were acquitted of murder but convicted of a lesser offence of assault causing actual bodily harm contrary to section 241 of the Penal Code of Tanzania.

The learned judge, however, held further that the absence of medical evidence as evidence to death and the cause of it was not fatal to the prosecution case because according to him, the post-mortem reports are primarily evidence of two things: the fact of death and the cause of it; in his opinion, it was open to the prosecution to produce and rely on other evidence to establish these two facts.

This latter aspect of the learned judge's opinion was overruled by the Court of Appeal in **Ndungu versus Republic (1985) KLR 487** which held that that decision must be confined to what must have been an exceptional situation; the court was categorical that the judgement was misleading and stated in no uncertain terms that *"we would be lacking in candour if we were to conceal our unhappiness about the decision."* (see page 493). The court proceeded to assert what I suppose is the proper position in law that while there are cases where the cause of death is so obvious such as where one is stabbed through the heart or where the head is crushed and therefore the absence of a post-mortem report would not necessarily be fatal, there must be medical evidence of the effect of such obvious and grave injuries as opinion expert evidence; it supports the evidence of the case of the death in the circumstances relied on by the prosecution. The court reiterated the importance of expert opinion and his report in the following terms:

> ***Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found.***

The court was firm that where the body is available and the body has been examined, a post-mortem report must be produced. In this case, there was no evidence of such post mortem on the deceased's body and if it was ever done, its report was not availed to this court. In the absence of this vital information on the cause of the deceased's death, the court cannot simply proceed on the assumption that the deceased was murdered and that the accused and others who are said to be not before court murdered the deceased.

For reasons I have given, it would be proper if the trial against the accused was halted at this stage; consequently, I hold that no case has been made out against the accused person sufficiently to require him to make a defence; I hereby dismiss the charge of murder against the accused and acquit him under **section 210** of the **Criminal Procedure Code.** He is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 16th December, 2016

Ngaah Jairus

JUDGE