



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 15 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JOHN GACHATHI GITAU.....ACCUSED

RULING

This is a ruling to determine whether the prosecution has established a prima facie case against John Gachathi Gitau, the accused person, at this stage of the trial. He faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged in the particulars of the offence that he murdered John Gachathi, deceased, on 22nd November 2009 at about 10.00pm at Mirano Village in Kiambururu Sub-location in Githunguri District within Kiambu County, jointly with others not before the court.

I took over the conduct of this case after the evidence of Joseph Gitau Gachathi (PW1), the father of the deceased, had been taken. I took evidence of Police Constable Bernard Munderu (PW2), George Ndichu Mbugua (PW3); Corporal Jassay Mutiso (PW4) and Dr. Oduor Johansen (PW5). This case has been limping for some time and the court record clearly shows its checkered history. The problem in the delay in determining this case has been caused by lack of prosecution witnesses and lack of effort on the part of the investigating officer to avail them. In the course of that checkered history, this court managed to receive evidence of four witnesses. At the conclusion of the prosecution case after the testimony of five witnesses, defence counsel Mrs. Kinyori submitted no case to answer for her client. She told the court that the prosecution has not established a prima facie case against the accused person to warrant his being placed on his defence.

I understand Mrs. Kinyori to be stating that the evidence adduced falls short of the required legal standards; that Mbugua who is said to have informed PW1 that the accused assaulted the deceased did not testify; that PW2 re-arrested the accused from members of public he named as Esther and Norman who did not testify; that PW4 said he recovered two pangas from the scene yet these pangas were not mentioned by PW1 who was the first person at the scene; that the same pangas were not examined by Government Analyst and had no bloodstains. Counsel cited the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A** to support her submissions for no case to answer.

My duty at this stage of the trial is simply to determine whether the prosecution has made out a prima facie case against the accused. If so, the accused shall be placed on his defence and if not, then the law requires that he be acquitted. As stated in the **Ramanlal Trambaklal Bhatt v. R [1957] E.A** above, it may not be easy to define what is meant by a “prima facie case”. The court in that case was of the view that prima facie case means 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. Guided by this definition, this court has analysed the evidence of the five prosecution witnesses as shown hereunder.

I find there is proof of death of the deceased. PW5 testifying on behalf of Dr. Ngulungu who performed the post mortem on the body of the deceased and prepared the report produced in evidence as Exhibit 3 testified that the deceased had two stab wounds: one on the left femoral area measuring 3cm long with the artery and vein in the same area injured and a second wound on the left shoulder measuring 3cm long. The cause of death was confirmed to be due to loss of blood (haemorrhage) as a result of the stab wound and injury to the artery and vein. This evidence coupled with that of PW1 that the deceased died before he reached hospital confirms to this court beyond reasonable doubt that the unlawful death of the deceased occurred.

Who caused the death of the deceased and did they intent to cause that death? These questions must be asked at this stage to inform the final decisions this court intends to make.

PW1 told the court that he was informed by one Michael Mbugua that his son, the deceased had been assaulted. He was given the name of two people who had assaulted his son, the accused before the court and another whose name PW1 did not tell the court. When PW1 arrived at the scene he found his son and noticed he was bleeding from the chest. I have found no evidence to support any injury on the chest. PW1 did not find the accused or any other person at the scene. Michael Mbugua is not a witness in this trial and therefore the information that he named the accused as one of the suspects cannot be verified. Court records show that this witness is at large and could not be traced.

The circumstances leading to the arrest of the accused are equally unclear. He was arrested over one year later in Sunton area in Nairobi. PW2 testified that he re-arrested the accused from members of public who took him (accused) to Sunton Police Post in Nairobi and informed PW2 that the accused was implicated in a murder that had occurred in Githunguri. PW2 contacted Githunguri Police Station and passed the information of accused's arrest. PW4 in company of another officer went to Sunton Police Post and took the accused with them to Kibichoi Police Station. PW2 named Esther and Norman as some of the members of public who took the accused to Sunton Police Post. The two, Esther and Norman are not witnesses before this court. There is no evidence as to how the accused was identified as a suspect in this murder.

I have also considered the evidence that the handwritten statement of PW2 contained the name of one Francis Njuguna Gitau as the suspect in this murder. This name was cancelled and the name of the accused inserted in that statement. The typed statement contained the name of the accused. PW2 could not explain during cross examination how this happened.

There is the issue of two recovered pangas. PW4 said he found them at the scene of assault. These exhibits were not mentioned by PW1 who was the first at the scene. Given that there is a possibility that PW1 missed seeing the two pangas, I find no evidence that these two pangas are connected with the accused before the court. Evidence shows that the pangas, which had no bloodstains on them, were taken to the Government Laboratory but there is no evidence as to what became of them.

The evidence in this case is weak. It cannot be relied on as a basis for calling on the accused to give his defence. This would be tantamount to this court hoping that the gaps left by the prosecution case will be filled by the accused. This court empathizes with the family of the deceased and is alive to the fact that they have not been accorded justice due to the poor investigations in this case. However, it would be a miscarriage of just towards the accused if this court were to proceed with this case to the defence stage only to come back to the same finding that the evidence is weak and incapable of proving this case to the standard required by the law.

I find I have no choice in the matter other than to acquit the accused of the murder of John Gachathi in compliance with section 306 (1) of the Criminal Procedure Code, which I hereby do. He shall be released from custody without further delay unless for any other legal reason he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered in open court this 30th November 2015.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Magoma, prosecution counsel

Mrs Kinyori, defence counsel

Mr. John Gachathi Gitau, the accused

Mr. Daniel Ngumbi, court clerk