



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 24 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MWIKWABE GICHERE ..... ACCUSED**

**RULING**

1. The accused herein, Mwikwabe Gichere was arraigned before this court on an information of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 26<sup>th</sup> day of July 2008 at Nyabikerege village, Ikeege sub location in Kuria District within Nyanza Province, he murdered Mwitwa Mwise. The accused pleaded not guilty to the charge when he appeared for plea on 25<sup>th</sup> September 2008. The case then proceeded to trial.

2. The facts of the case according to the record are that on 26<sup>th</sup> July 2008 at about 3.00 p.m., the deceased Mwitwa Mwise went to the grazing field where his step-brother, Christopher Mwise was herding cattle. The deceased had gone to the grazing field to find out what the accused and his father were up to. The deceased had seen the pair approaching the grazing field armed with a panga and spear. As the deceased approached the two he asked them what they were doing. The accused then got hold of the deceased as the deceased's father stabbed the deceased in the stomach and ribs. After stabbing the deceased, the two neighbours ran away. The deceased was rushed to hospital where he died.

3. The prosecution managed to call two (2) witnesses by whose evidence the prosecution sought to establish that the fatal stabs by the accused and his father led to the death of the deceased. By the said evidence, the prosecution also sought to show that in stabbing the deceased to death, the accused had the requisite malice aforethought.

4. The first prosecution witness was Christopher Mwise Werema. He stated that at about 11.00 a.m. on 26<sup>th</sup> July 2008, he took cattle to the grazing fields. At about 3.00 p.m. as he went to untie the cows, he saw Mzee Gichere together with his son Mwikwabe Gichere, the accused herein walking towards the cows. Mzee Gichere was armed with a spear while the accused was armed with a panga. The two approached PW1 rather speedily and sensing danger, PW1 ran away, but after a short distance, PW1 heard the deceased asking the accused and his father to stop. The two temporarily stopped, but as PW1 started going towards the cows, he saw the accused move towards the deceased.

PW1 testified that the accused got hold of the deceased as Mzee Gichere stabbed the deceased on the chest and side. After stabbing the deceased, the accused and his father ran away.

5. Thereafter, PW1 called for help from the people around. The deceased was taken to hospital but he died just before they got to the hospital. On the 27<sup>th</sup> July 2008, PW1 helped in identifying the deceased's

body to the doctor for post mortem examination. The accused was subsequently arrested and arraigned in court on the present offence.

6. PW2 was Joseph Matinde Mwise, a brother to the deceased. He testified that on the 26<sup>th</sup> July 2008 at about 3.00 p.m., he was at his home when he saw two people moving to the grazing field where PW1 was grazing cows. PW2 saw the accused who was armed with a spear and a panga. As PW2 walked towards the grazing field, he saw the accused and his father chasing the deceased. PW2 stated further that as the deceased ran towards the pair, he saw the accused get hold of the deceased as Mzee Gichere stabbed the deceased with a spear. The pair then ran away. The deceased who was bleeding profusely was taken to the hospital but he succumbed to the injuries while in the hands of PW2.

7. In cross examination, PW2 stated that he was about ½ km away when he saw the accused and his father running towards the grazing fields. He also said that there was no dispute between the family of the deceased and that of the accused. PW2 said that though the land terrain was somewhat slanting towards the grazing field, he was still able to clearly see what was happening between the deceased on the one hand and the accused and his father on the other hand.

8. The last prosecution witness testified on 17<sup>th</sup> June 2010 and though the case was fixed for further hearing on 23<sup>rd</sup> September 2010, 24<sup>th</sup> February 2011, 26<sup>th</sup> May 2011, 26<sup>th</sup> September 2011, 30<sup>th</sup> November 2011, 14<sup>th</sup> March 2012, 21<sup>st</sup> May 2012, 30<sup>th</sup> July 2012, 23<sup>rd</sup> October 2012 and 22<sup>nd</sup> November 2012, for one reason or another, the case never took off for further hearing. On the 22<sup>nd</sup> November 2012, the court refused the prosecution's application for adjournment after noting that the state had sought and been granted a last adjournment on 14<sup>th</sup> March 2012. The prosecution had to close its case as there were no witnesses in court.

9. This ruling is on whether or not from the evidence of the two prosecution witnesses, the prosecution has established a prima facie case to warrant placing the accused on his defence. In my humble view, the prosecution has not discharged the onus of demonstrating to this court that this court could convict if the accused says nothing in his defence. Looking at the evidence by both PW1 and PW2, the prosecution has tried to show that the deceased died from stab wounds administered to him by the father of the accused with the help of the accused. Though this may be so, such evidence needed to be fortified by Medical evidence from the doctor who performed the post mortem examination as to the cause of the deceased's death. It was also the duty of the prosecution to call the evidence of the Investigating Officer to tell this court why, when, how and from where the accused was arrested. According to BLACK'S LAW DICTIONARY, EIGHTH EDITION, "**prima facie**" is defined as "**At first sight, on first appearance, but subject to further evidence or information.**" In the same Dictionary "**prima facie case**" is defined as "**the establishment of a legally rebuttable presumption.**"

10. In the absence of additional evidence to that given by PW1 and PW2, it would serve no useful purpose to put the accused on his defence at this point. It is likely that the accused will simply controvert the two testimonies, and if that happens, it will be the accused's word against the word spoken by PW1 and PW2 without the benefit of expert medical evidence as to the cause of the accused's death. Since it is not the duty of the accused to prove his innocence, the chances of getting any further evidence or information to support the prosecution's case are greatly reduced in the circumstances. Putting the accused on his defence would therefore be an exercise in futility.

11. In the premises, I have reached the conclusion that the prosecution has not established a prima facie case against the accused to warrant his being put on his defence. Accordingly, the accused is accordingly acquitted under the provisions of **section 306 (1)** of the **Criminal Procedure Code**. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

12. It is so ordered.

**Dated and delivered at Kisii this 31<sup>st</sup> day of January, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. S.M. Sagwe for Moracha (present) for Accused

Mr. Shabola for State

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**