



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 38 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

GITAU NDUNGU NJOROGE.....ACCUSED

RULING

GITAU NDUNGU NJOROGE, the accused herein, is before this Court on the information of the Attorney General dated 27th August 2007 to face a charge of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the offence are that on the 25th day of June 2007 at Karuri village in Murang'a South District within Central Province, the accused is alleged to have murdered Joseph Ndungu Njoroge.

The prosecution had tendered the evidence of three witnesses when the case came up for further hearing on 10th November 2010. On the aforesaid date, the prosecution unsuccessfully applied for the hearing to be adjourned hence Mr. Makura, learned Senior State Counsel, was prompted to close the prosecution's case. At the close of the prosecution's case, learned counsels were invited to make submissions on the question as to whether or not the accused should be placed on his defence under *Section 206* of the Criminal Procedure Code.

It is the submission of Mr. Ng'ang'a, learned advocate for the accused, that the prosecution, has failed to make out a *prima facie* case to enable the accused answer. Mr. Ng'ang'a further argued that there was no evidence to establish malice aforethought. It is also argued that the cause of death was not established. Mr. Makura, learned Senior State Counsel, did not make any submissions in reply to those of Mr. Ng'ang'a. He simply urged this Court to consider the evidence on record and make a finding that the

accused has a case to answer.

I have carefully considered the evidence of the three witnesses who testified in support of the Prosecution's case. **Elias Njoroge Ndungu** (P.W. 1) narrated to this Court how he came to learn of the death of his father, the deceased herein. He said he was informed by his step-mother, Margaret Wanjiru, that the accused had hit the deceased with a stone before escaping. It is important to note that Margaret Wanjiru did not testify. **Peter Kamande Ndungu** (P.W. 2) said he was cut twice by the accused when he passed by the accused's house on 25th June 2007 but was restrained by P.W.2's daughter. P.W. 2 said he was taken home to be given first aid. While he was being nursed at home, he said the deceased visited him. Shortly the accused is said to have returned whereupon he hit the deceased with a stone on the head. It is said that as a consequence the deceased fell down and later succumbed to his injuries. The accused is said to have been chased and arrested by neighbours and members of the public. **Mary Wanjiku** (P.W.3) stated that she was at home when she heard the accused ask her husband (P.W.2), whether he was Kamande. Shortly, P.W.3 said, she heard her daughter, Ann Waithera calling her while screaming. P.W. 3 rushed to the scene where she found P.W. 2 lying down. P.W. 3 and some neighbours took P.W. 2 to be nursed at home. P.W. 3 said she saw the accused pick up a stone which he threw at the deceased. It is obvious from the evidence of the three witnesses that the accused who is a person well known to them is placed at the scene of crime. There is ample evidence to show that he hit the deceased on the head with a stone. There is no doubt that the deceased passed away soon thereafter.

In order to establish the offence of murder, two ingredients must be proved. First, the prosecution must establish that there was malice aforethought. Secondly, there must be proof of *actus reus*. I have already stated that there is no dispute that the deceased passed away. The question is whether there was proof of the cause of death. The prosecution was forced to prematurely close its case before presenting the medical evidence in form of a postmortem report to establish the cause of death. Such a report serves two purposes: First, it will show the cause of death. Secondly, it may also be used to prove malice aforethought on the part of the deceased's assailants. Under *Section 206(a)* of the Penal Code, malice aforethought shall be deemed to have been established by evidence showing *inter-alia* that the deceased's assailant intended to cause the death of or to do grievous harm to a person. The postmortem report if produced will be able to show the kind and degree of injuries the deceased sustained. In this case, the prosecution failed to produce the postmortem report. The evidence tendered did not establish malice aforethought on the accused's part. The cause of death has not also been established. In **CRIMINAL APPEAL NO. 8 OF 1996 HILLARY BWIRE WAFULA =VS= REPUBLIC** (unreported) the Court of Appeal expressed itself *inter-alia* as follows:

“Having said what we have said above and counsel for the State having admitted that the failure to call the doctor left the cause of death unclear, it could not be said that there was no reasonable doubt as to whether it was the appellant's assault on the deceased that caused her death. The benefit of that doubt should go to the appellant.”

It is obvious that there is a reasonable doubt as to what caused the deceased's death. Even if the accused is placed on his defence and he chose to keep quiet, the Court will return a no guilty verdict since the benefit of doubt will always be given to the accused. In the end I am satisfied that the prosecution has failed to make out a *prima facie* case hence there is no need to place the accused on his defence. He is acquitted for the offence of murder. He should be released forthwith from custody unless lawfully held.

Dated and delivered at Nyeri this 18th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a for the accused and Mr. Makura for the State.