



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 25 OF 2007

REPUBLIC.....PLAINTIFF

=VERSUS=

SAMWEL MWAURA.....DEFENDANT

R U L I N G

The accused **Samuel Mwaura** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on diverse dates between 14th May and 18th May, 2007, along Eldoret – Gilgil road within the Rift Valley Province, the accused jointly with others not before the Court murdered **Peter Ngige** (hereinafter “**the deceased**”).

The trial commenced before **Ibrahim J.** (as he then was), on 6th December, 2007 when **Cyrus Ndungu Wachira** (P.W.1) testified. The trial resumed on 5th June, 2008 when **Grace Wanjiru Ngigi** (P.W.2) and John **Mirua Wachira**, (P.W.3) gave their testimonies. The latter’s cross-examination was conducted on 4th February, 2009 when **Marika Wachira Kariuki** also testified. Since then no other witness testified and on 15th June, 2011, I declined to grant an adjournment sought by the prosecution whereupon learned counsel for the prosecution closed its case.

P.W.1, narrated the efforts he and his brothers, who were also the deceased’s brothers had made to trace the deceased. He was then informed by CID officers that the accused had admitted killing the deceased. The accused, according to him, had been asked by Police Officers to lead P.W.1 and his brothers to where the deceased had been found in the Gilgil area.

P.W.2, the wife of the deceased narrated how her husband, a taxi driver, left home on 14th May, 2007 for his usual duties but failed to return. She then told the court what she had been informed by her in-laws regarding recovery of the body of the deceased.

P.W.3, another of the brothers of the deceased gave similar testimony as P.W.1. Of significance however, is his statement that when the accused was interrogated by police officers in his presence, he denied knowledge of the offence.

P.W.3 in the course of his testimony, however, stated that the accused led them to where he and others had killed the deceased and explained how the deceased had been killed his role being holding the deceased’s legs.

P.W.4, the deceased’s father, merely identified the body of the deceased at Nakuru Hospital Mortuary. The above in summary is the testimony upon which the prosecution seeks to demonstrate a prima facie case. In **Ramanlal Trambaklal Bhatt –vrs Republic, [1957] E.A 332**, the Court of Appeal stated as follows of a prima facie case:-

“A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true ... 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; 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.”

Applying that definition to the facts established by the evidence in his case, I have found as follows. The prosecution has called the witnesses whose evidence has been outlined above. Of significance is the failure to adduce medical evidence as to the cause of death of the deceased. The doctor who performed the post mortem on the body of the deceased was not called. No other witness was called to produce the post mortem report.

The deceased was not killed in broad-day light in the presence of witnesses to obviate the necessity to adduce medical evidence as to the cause of death.

The investigating officer was not also called as a witness. There is therefore no direct evidence as to how the deceased’s body was recovered. The investigating officer would also have demonstrated how the accused became a suspect.

The arresting officer was also not called to testify. The basis of arresting the accused shall in the absence of his testimony remain a mystery.

The owner of the motor vehicle which the deceased was driving was also not called. His testimony would have established that indeed, the deceased was, at the time of his death, his employee and could have been hired by the accused or anyother person as suggested by P.W.1, P.W.2 and P.W.3.

In the premises, I find and hold that at this stage, if the accused offers no explanation, I cannot convict him on the basis of the testimony presented by the prosecution. There is therefore no prima facie case established against the accused and accordingly, by virtue of section 306 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya), I hereby acquit the accused of the offence of murder. I order that he be set at liberty unless otherwise lawfully held.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 4TH DAY OF AUGUST 2011.**

**F. AZANGALALA
JUDGE
4/8/2011.**

Read in the presence of:-

- (1) **Mr. Kabaka** for the State and
- (2) **Ms Nyamweya** holding brief for **Bichanga** for the accused.

**F. AZANGALALA
JUDGE
4/8/2011.**