



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 66 OF 2009

REPUBLIC
PROSECUTOR
-VERSUS-
RICHARD MWITA GITHINJI.....
....1ST ACCUSED
ZAKAYO GITIYE MWIRARIA.....
.....2ND ACCUSED

R U L I N G

The accused persons herein, **Richard Mwita Githinji**, and **Zakayo Gitiye Mwiraria**, are charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars are that on the 13th day of July, 2009 at 11.00 p.m at Dandora phase one estate in Nairobi, within the Nairobi Province jointly with others not before the Court, murdered **Henry Irungu Gechai**.

The prosecution called two witnesses in support of its case and then closed its case.

Dr. Peter Ndegwa (PW 1), employed in the Medical Services Department of Diagnostic Services, Medical Legal Section, as a pathologist testified that on the 24th day of July 2009 at the City Mortuary he performed a post mortem on the body of Henry Irungu Gechai after identification by the relatives, Simon Waithaka and Hellen Wangechi Irungu.

At the end of the day the good doctor opined that death was occasioned by a blunt force trauma. He signed and dated the Post Mortem report which he produced as Exhibit 1.

Risper Njoki Irungu (PW 2), recalled that on 13th July, 2009 at 5.30 pm, he received communication that his brother had been assaulted at Cool-in-bar by unknown assailants. On 15th July, 2009 he went to visit her brother at the said hospital but found when he had passed on.

After the two witnesses testimony the prosecution closed its case. The Court was then left to make a ruling on whether the prosecution has made out a **prima-facie** case warranting the putting of the accused on their defence.

Section 210 of the Criminal Procedure Code 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.”

What amounts to a prima facie case under the equivalent of the Tanzanian provisions was considered by the Court of Appeal for Eastern Africa in ***RAMANLAL BHATT V R (1957) EA 332 at page 334*** thus:

“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 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 would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

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”.

Applying those principles to the fact of the case, it is clear to me that the prosecution set out to prove that it is the accused persons who murdered the deceased. However, no evidence was led linking the two accused with the murder. True, the accused died but the issue at hand was who killed him and under what circumstances?

In the premises, I find that there is no ***prima-facie*** case warranting the accused persons being put on their respective defence.

Accordingly, I enter a verdict of **NOT GUILTY** under section 306(1) of the Criminal Procedure Code.

In the result, I acquit the two accused persons of the charge of murder. They are set free unless lawfully held for some other lawful reasons.

Dated and delivered at Nairobi this 6th day of October, 2011.

N.R.O OMBIJA

JUDGE.

Mr. Kamau for State

Mr. Swaka for 1st Accused

Mr. Makokha for 2nd Accused