



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 18 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

GODFREY GITAU KARIUKI.....ACCUSED

RULING

The accused, Godfrey Gitau Kariuki was charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 15th October, 2001 at Kasuku area in Nyandarua District, the accused murdered George Kobia Gituma (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The accused was first tried before Muga Apondi J, but upon his transfer, the hearing was declared a mistrial and the case started afresh before this court on the 20th February 2006. The prosecution called five witnesses who all testified on the said 20th February 2006.

Since then, this case has been listed for hearing a further six times and each time the prosecution has been unable to avail further witnesses. On each occasion, save for the last occasion, the prosecution sought adjournments which adjournment were reluctantly granted by this court. When the prosecution sought a further adjournment on the 16th May 2007 for the upteenth time, this court refused to grant further adjournment to the prosecution. The prosecution was ordered to proceed with its case. Mr. Mugambi for the State closed the prosecution's case in view of the order by this court that he proceeds with the hearing of the case. This court reserved its ruling on whether on the evidence adduced, the prosecution had adduced sufficient evidence to enable the accused to be put on his defence.

The prosecution's case as can be gleaned from the testimonies of the five witnesses who testified before court is as follows; PW1 Isaac Maina Kanyi was employed by PW4 Kenneth Mburu Chege as a tractor driver. The said tractor was a Massey Ferguson 390 Registration number KAJ 283G. The said tractor used to be hired out to people who wanted their farms to be ploughed. According to PW1, they would occasionally plough farms at night during the season when the tractor was in high demand. PW1 recalled that on the 15th October 2001 at 4.30 p.m., as he was having a meal in a restaurant at Ol'joro-rok Township., he was approached by the accused that was in the company of two other young men. PW1 was known to the accused. The accused told him that he had someone who required to have his parcel of land ploughed. According to PW1, there was an understanding between him and the accused that he would pay him a commission if he introduced customers to him. PW1 readily agreed to go with the accused and the two young men to the said farm. He was informed that the farm was some distance from Kasuku Trading Centre at a place called Kirimangai. PW1 recalled that he instructed his turn boy, the deceased, to board the tractor. He recalled that the accused with the two young men sat on the mudguard of the tractor. The turn boy also sat on the mudguard of the tractor.

PW1 recalled that at about 6.40 p.m., when they had travelled about 1 ½ km into the murram road from Kasuku trading centre, he felt something sting his neck. He thought he had been stung by a wasp. When he looked behind, he realised that he had been stabbed with a knife. He was stabbed severally by one of the young men who were seated on the mudguard. He stopped the tractor and because of heavy bleeding, he became unconscious. When he regained his consciousness, he saw the accused standing next to the tractor with the two young men. He started screaming. One of the young men came to where he was lying on the ground and stabbed him severally all over his body. He hit him on the head with a metal bar. PW1 testified that he realised that he would be killed. He stopped screaming and kept quiet. His assailants assumed that he was unconscious. PW1 saw the three men, who included the accused attempt to drive off the tractor. But he realised that they did not know how to drive the tractor. He again became unconscious. All this time, PW1 was not aware where his turn boy the deceased was.

When he regained his consciousness, he went into a house within the neighbourhood and sought help. PW2 Jane Wanjiku Muturi testified that on the material day at 9.30 p.m., while she was asleep in her house, she heard a voice of a man pleading to be helped. The man cried that he had been injured by people near the gate to the house of PW2. PW2 testified that she was alone with her children in her house at the time. Her husband was not at home. She testified that she was scared to open the doors to her house for to any stranger. It was only after PW3 Josephat Mwai Ngugi, her brother in-law who had a house next to hers arrived at about 10.00 p.m., that she got out of her house and told PW3 of the cry for help that she had earlier heard by a man near her house. PW2 and PW3 testified that they saw a man lying next to the tractor having been injured. The man lying next to the tractor was unconscious. There was another man who was lying behind the house but who was conscious. He narrated to them how they had been attacked by robbers. This man was PW1.

PW3 who at the time was driving a Canter-mini lorry, summoned some of the neighbours to assist him take the two injured persons to hospital. Before PW3 took PW1 and the turn boy to the hospital, he first made a report to the administration police officers based at Kasuku Trading Centre. A report was subsequently made to the police based at Ol'joro-orok. PW3 then took PW1 and the turn boy to Nyahururu District Hospital where they were admitted. PW3 recalled that the turn boy was not talking at the time he was taken to hospital. After the two were admitted at the hospital, PW3 later learnt that the turn boy, (*the deceased in this case*) had died. PW1 testified that he regained his consciousness when he was already admitted at Nyahururu District Hospital. He recalled that he was admitted for a period of a month at the said hospital. He attended as an outpatient at the said hospital for a period of six months thereafter. He told the court that he recorded the statement in respect of the incident in February 2005, which is approximately four years after the occurrence of the robbery incident. He recalled that while he was in hospital, he was informed that his turn boy had died. He denied the suggestion put to him by the defence counsel that the accused was similarly attacked by the two men during the said robbery incident.

PW5 Annah Njoki Gituma is the mother to the deceased. He recalled that she was informed on the 17th October 2001 that her son had been injured by thugs and was admitted at the Nyahururu District Hospital. He went to the hospital on 18th October 2001 only to be informed that her son had succumbed to his injuries and died. On the 22nd October 2001, she identified the body of the deceased at the Nyahururu District Hospital Mortuary before the post-mortem was performed.

As stated earlier in this ruling, the prosecution was constrained to close its case after it failed to avail further witnesses in this case. Is the evidence adduced by the prosecution sufficient to enable this court put the accused on his defence? I do not think so. This being a murder charge, it was imperative that the evidence of death of the deceased be established. It was imperative also for the prosecution to establish how the accused was arrested after four years after the commission of the offence. It was further imperative for the prosecution to establish how the police investigated the case that enabled them arrive at the decision to charge the accused with the offence of murder.

The only evidence that points to the guilt of the accused is that of PW1. It was the prosecution's case that the accused in company of two other persons conspired to lure PW1 to an isolated place where they assaulted him with his turn boy and thereafter robbed them of the tractor. PW1 testified that he was stabbed and beaten by a person who was in the company of accused when his tractor was purportedly

hired to plough land at a place called Kirimangai. He testified that he did not know the identity of the person who stabbed him. He denied that the accused was similarly attacked by the two young men. It was his testimony that although the three robbers intended to rob him of the tractor, they were unable to drive off the tractor after the same had forcefully been taken from his possession. They therefore abandoned the tractor at the scene where he and his turn boy, the deceased were attacked.

This is the evidence that the prosecution adduced in support of its case on the charge of murder against the accused. The testimony of PW1 however leaves certain unanswered questions. Why did PW1 take nearly four years before he recorded the statement with the police? The alleged incident took place on 15th October 2001. PW1 recorded the statement with the police in February 2005. What took the police so long to record the statement of PW1? Was the initial report of the botched robbery followed up by the police? If indeed PW1 knew the identity of the accused, as he claimed, did he tell the police that he had been attacked by the accused in company of others? If so, what effort did the police make to apprehend the accused? When was the accused arrested? And under what circumstances? These questions could only be answered if the prosecution had been diligent in procuring the remaining witnesses to support the charge of murder against the accused. Unfortunately due to its indolence, the prosecution failed to avail the necessary witnesses who could have established the charge of murder against the accused.

This court is conscious of its duty when dealing with serious offences such as murder. Ideally, it should hear and determine such cases based on its merits and not determine it on procedural technicalities. But this court also has a duty to protect the rights of accused persons as enshrined by **Section 77 of the Constitution**. One of those rights enshrined in our constitution is the right of an accused person to be afforded a fair hearing within a reasonable time. In the present case, it is clear that the prosecution has been indolent in the prosecution of this case. Despite the indulgence given by this court to the prosecution on several occasions to avail witnesses in support of its case, they failed to do so thus infringing on the right of the accused as to fair trial as enshrined in our Constitution.

It is clear from the above reasons that the prosecution has failed to establish sufficient evidence that would enable this court put the accused on his defence. He is consequently acquitted of the charge of murder. He is ordered set at liberty and released from remand custody forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 24th day of May, 2007

L. KIMARU

JUDGE