



**Republic v Gichobi (Criminal Case 14 of 2016)
[2024] KEHC 2409 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 14 OF 2016
RM MWONGO, J
MARCH 4, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID WACHIRA GICHOBI ACCUSED

RULING

1. The accused person was charged with murder contrary to Section 203 as read with Section 204 of the Kenyan Penal Code. The particulars were that on 14th July, 2016 at Gathiriku Village Riagiceru Sub-Location, Murinduko Location in within Kirinyaga County he murdered Cecily Wakabo Njaobe.
2. At the hearing the prosecution availed 9 witnesses and closed its case. This ruling concern whether the accused has a case to answer.

Prosecution Case

3. PW-1 Moses Mbugi Njaumbe testified that on 14th July 2016, he arrived home at night at about 7.00pm and found the door locked. He stated that he knocked the window and the deceased who was his mother inquired who it was. He testified that he responded and the deceased recognized him but told him to wait as she was going to open the door.
4. She opened the door and as he was preparing to get in, he was pulled from behind and ordered to sit down. He testified that he saw six men who were wearing face masks with the accused David Wachira who had no mask. They were talking in Kiswahili demanding for money. That they threatened to eliminate him and his mother if money was not given to them. He shouted for his friend, Mwaniki, but was then hit at the back of the head and neck and started bleeding from the mouth and nose.
5. He stated that it was about 7.30pm, when he was hit on the head, and after the beating, he fell down. He said that there was sunlight, and therefore he saw the person who hit him. He identified the person



as the accused. That the accused hit him with a metal bar on the head even as he continued demanding for money.

6. He stated that he was pulled in the house by the accused and lost consciousness. He stated that the accused is his nephew.
7. In cross examination, he stated that his mother's house has no lights outside; that he saw six people, three of whom had masks; that the three with masks are the ones who came near him.
8. He was confronted with his statement which was marked DMFI1, where he had stated that he was surrounded by four, not six, people; and that three were not wearing masks.
9. PW-2 (John Mwaniki Muriuki) testified that on 14th July, 2016 at about 7pm, he was in the company of PW-1 Moses Mbugi as they headed home from Kimbimbi Trading center. He said that after they parted, he heard Moses Mbugi who had diverted to his homestead screaming for help. That he went to the homestead where he heard a voice of a man saying:

“ You woman we were waiting for your son and we will do to him what we have done to you”

10. He testified that he took off to alert the public who responded on time. When they entered the house, they unfortunately found the deceased had been badly injured and was lying in a pool of blood. She was not breathing. PW1 was also lying down bleeding, and was unresponsive, but breathing. He stated that they rushed PW-1 Moses Mbugi to Kimbimbi Hospital before they were referred to Kerugoya Hospital.
11. In cross-examination, he testified that he did not see the accused person.
12. PW-3 Joyce Wawira Mbugi confirmed that she was with the deceased when the thugs struck. She stated that she was in the house at about 7.00pm when three unmasked men entered after her mother-in-law had opened the door. She was not able to identify any of the assailants. They switched off the lamp in the house, and one man came to her and placed something on her stomach and told her to shut up. That her husband Moses Mbugi was brought in from outside and thrown inside near a seat. He was bleeding profusely from cuts on the head.
13. In cross examination, she said the assailants were demanding money; that they stole her Nokia phone; and that she was not able to identify any of the assailants including the accused person. She said she knew the accused in the dock as she was like his mother, being her husband's nephew.
14. PW-4 Edward Waweru Mugo is the deceased's neighbor. He confirmed that he was called while sleeping and informed that the deceased was under attack. He said that he arrived at the scene and found the deceased already killed and PW1 Moses Mbugi had already been taken to hospital.
15. In cross-examination, he stated that he did not know who killed the deceased.
16. PW-5 Jenifer Wangari, testified that she lived with her mother, the deceased. Her mother had informed her in 2016 that David Wachira and Stephen Mwangi had threatened to kill her due to a land dispute. On the night her mother was killed, she did not witness the incident or know her killers. No report of the alleged threats by the accused were made to the police.
17. PW-6 Dr. Karomo is a pathologist. He performed the Post-Mortem on the deceased. He formed the opinion that the cause of death was due to severe head injury by a heavy blunt object.
18. PW-7 Robert Muchira Ngecu is the brother of the deceased. He identified the deceased's body during post-mortem at Kibugi Mortuary on 19th July, 2016.



19. PW-8 PC Bismark Kirui testified that he went to the scene of the crime. He saw the deceased lying on the floor in a pool of blood. At the time, he could not ascertain whether the deceased had died or was unconscious.
20. PW-9 No 102130 Jacob Kapenpus, was the investigating officer. He established that the deceased and PW-1 Moses Mbugi, were assaulted. The witnesses directed him towards the accused person. He confirmed the arrest of the accused after the matter was reported to the police.
21. He stated that he interviewed PW1 who told him he saw one of the people at the scene who was called David Wachira. He also found David Wachira who had been in hospital with a leg fracture, and the deceased's family members also came to the hospital. He was also told that the accused had had a dispute with the deceased over sub-division of land. He added that after David Wachira was discharged, he arrested and arraigned him in court. He was instructed to release three other people who had also been arrested for the killing.
22. In cross-examination, he stated that he was informed by PW1 that the accused killed the deceased. Further, the accused informed him that he was in hospital when the incident happened, as he had been involved in a motor cycle accident along the Makutano - Embu road.
23. In cross examination, he further stated that he learnt from Nyumba Kumi people that the deceased's house had been burnt at some stage; that there had been unresolved disputes concerning the deceased's land, but also that the only person who mentioned the accused's name in connection with the killing was PW1.

Prosecution's Submissions

24. The prosecution submitted that Section 203 of the Penal code places the burden of the Prosecution to prove three issues, that:
 - 1) The death of the deceased occurred.
 - 2) The death was through unlawful acts or omission of the accused.
 - 3) The accused person had malice aforethought
25. The prosecution submits that the evidence tendered so far places the accused person squarely at the scene of the crime, and the death of the deceased was due to the wrongful act of the accused persons.
26. Section 206 of the Penal Code stipulates that malice aforethought shall be deemed to be established by evidence proving:
 - a. An intention to cause the death or grievous harm.
 - b. Knowledge that the act or omission causing death will probably cause death of or grievous harm to the same person,
 - c. An intention to commit a felony.
27. They submit that the accused David Wachira Gichobi was positively identified by PW-1 Moses Mbugi as having been at the scene of crime on the 14th July, 2016.

Accused's Submissions

28. The Accused argued that the prosecution closed its case without calling the key witness who was repeatedly mentioned. That the Nyumba Kumi chairman one Joram Thitu and Jane Wangari, among



others, were not called to testify. It is the accused's submission that the absence of the evidence of the key witnesses to testify in court was crucial. All other witness's evidence was full of hearsay.

29. It is a trite law that where the prosecution fails to call material witnesses, the court would be entitled to infer that had they been called, their evidence would have been adverse. Finally, he submitted that all the prosecution witnesses did not prove that indeed the accused person is the one who hit the deceased.

Issues for Determination

30. The only question is whether the accused has a case to answer.

Analysis and Determination

31. Having considered the testimonies of the nine (9) prosecution witnesses, the question is whether the evidence tendered establishes a prima facie case against the accused, or whether the accused has a case to answer.

Under Section 306 (1) of the Criminal Procedure Code:

“When the evidence of the witnesses for the Prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of the several or any one of the several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

32. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 335, the court stated as follows:

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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person:

The death of the accused. That the death was occasioned by the unlawful action of the accused. The accused's action was occasioned by malice aforethought.

The death of the deceased occurred

33. This was proved by the PW-6 Dr. Ndiragu Karomo who performed the Post-Mortem. He formed the opinion that the cause of death was due to severe head injury by heavy blunt object. This is not disputed.

That the accused person committed the unlawful act which caused the death of the deceased

34. The prosecution submits that the evidence tendered so far places the accused person squarely at the scene of the crime and the death of the deceased was due to the wrongful act of the accused person.
35. PW-1 testified that that he saw four men with only three who were wearing face mask with the accused {David Wachira} who had no mask. They were talking in Kiswahili demanding for money. The accused hit him with a metal bar on the head even as he continued demanding for money.
36. PW3- testified that she was not able to identify the three men that entered the house. They had no masks on their faces. On cross-examination, she stated that she did not identify any of the three men that entered the house. They had masks on their faces. They were demanding money from her mother.



37. PW-9 - testified that he relied on an informer to arrest the accused person. The accused person stated that he was in Naivasha when the incident happened. He did not investigate the veracity of the alibi evidence of the accused.
38. The accused argues that the evidence of PW1 and PW3 is contradictory. PW1 stated that he saw four men and identified the accused person at the scene of crime. His wife testified that she did not recognize any of the men that attacked her. Further, she testified that the men had no masks while PW1 stated that they had masks except the accused.
39. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated with regard to contradictions or inconsistencies in the evidence of the prosecution witness:
- Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
- It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
40. PW1- testified that he was not called for an identification parade. He stated that he had no grudge with the accused but they had a land dispute. He testified that it was not true that they were strangers demanding for money. Nevertheless, he contradicts his evidence by stating that the men were speaking in Kiswahili. He did not recognize any of the voices.

That the accused had malice aforethought

41. The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
42. For the prosecution to establish its case against the accused, it must prove that they committed the offence 'with malice aforethought. Section 206 of the Penal Code sets out what the prosecution needs to place before the court for 'malice aforethought' to be established: This was the position held in *Republic v DKK & Another* [2019] eKLR.

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



43. PW-5 testified that she lived with her mother, the deceased. Her mother had informed her in 2016 that David Wachira and Stephen Mwangi had threatened to kill her due to a land dispute. On the night her mother was killed, she did not witness the incident or know her killers.
44. PW1 - testified that the people that hit him on the head were threatening to kill him. The person that hit him was the accused. He did not recognize the voice of the person who said that they wanted to kill this dog. Further, he stated that he did not know what happened to the deceased as he was hit and became unconscious.
45. The accused person submitted that all the prosecution witnesses did not prove that he hit the deceased person.
46. Under section 211 of the Criminal Procedure Code, a prima facie case is established when the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person.

In Republic v Alex Mwanzia Mutangili [2017] eKLR Nyakundi J held: The standard of proof required at this stage is not that of beyond reasonable doubt as the court has not had the advantage of the defence.

Summary and Conclusions

47. In DMFI1 PW1's statement to the police, he did not indicate that the accused was his nephew. This is strange as it would reasonably be expected to be the first thing, he would tell the police in identifying the perpetrators. His evidence in his statement was that:

“...Four men surrounded me. Three of them were wearing masks. Davis Wachira was musk less (sic)... They demanded money....One of the men who was muskless(sic) (Wachira David) hit me with a metal rod on my head. He kept demanding for money. They pulled me inside the house...”
48. PW4 the wife of PW1 who was also at the scene saw three men pull PW1 into the house and dump him next the seat. Strangely she did not recognize any of them; not even her nephew, David Wachira, who was like a son to her. Thus, either PW1 remained outside, he or was not there at all.
49. PW1 in oral evidence also contradicted himself when he said there were six assailants at the house who attacked them; that they wore masks; and that the one who hit him the was the accused. In cross examination, he said three of the six wore masks which makes his evidence less credible.
50. These discrepancies of the key eyewitness are not simple discrepancies that can be wished away.
51. In addition, there was no identification parade conducted despite there being nothing in the statement of PW1 to suggest that the accused was identified by virtue of being PW1s nephew.
52. Further none of the alleged reports to the Chief or elders concerning the threats to the deceased, or the alleged land dispute were either investigated or availed.
53. Ultimately, I find that there is nothing from the evidence above, which shows that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to answer.
54. Accordingly, I am unable to place the accused on his defence. I find the accused not guilty in terms of section 306 of the CPC and hereby acquit him of the charge herein.
55. The accused shall forthwith be set at liberty unless otherwise lawfully held.



DATED AT KERUGOYA THIS 4TH DAY OF MARCH, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Accused - Present in Court.

Kiragu - holding brief for Magara for Accused

State Counsel - Mamba

Murage, Court Assistant

