



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 61 OF 2016

REPUBLIC.....STATE

VS

JAMES MWANIKI GICIRIRI.....ACCUSED

JUDGMENT

1. The Accused Person, James Mwaniki Giciriri (“Accused Person”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of murdering John Kamau Wainaina (“Deceased”) on 23/10/2016 at Kivumbini area in Nakuru East Sub-County within Nakuru County.

2. The Prosecution called six witnesses to prove its case. The theory presented by the Prosecution was that the Accused Person suspected the Deceased of having an affair with his estranged wife. In a murderous rage, he attacked the Deceased with a knife inflicting a fatal stab wound. The Accused Person gave an unsworn statement denying that he stabbed the Deceased but gave a version of his story that included being mobbed by a group of the Deceased and his friends. At the Conclusion of the trial, the Court must determine whether all considered, the Prosecution has established all the elements of murder.

3. The Deceased’s mother, Jane Wanjiru Wainaina, testified as PW1. She received a call from her sister that the Deceased was admitted at PGH Nakuru Hospital in critical condition. She rushed there. She found the Deceased with a stab wound. He could not speak. He could only weep. That that was around 6:00pm on 23/10/2016. She went home. When she came back the following morning, the Deceased had passed on. She was not able to get any information from him about who the assailant was. Needless to say, she did not see the assailant.

4. Geoffrey Irungu Wairimu testified as PW3. It turned out from his narrative that he was the real object of the Accused’s rage. He testified that he was in his house at Flamingo Estate in Nakuru on 23/10/2016 at around 3:00pm when the Accused Person burst in. The Accused Person was accompanied by his daughter – about 2 years old. The Accused Person, PW3 testified, demanded for his wife. It turns out, by his own rendering, that PW3 had established a relationship with the Accused Person’s wife, Jessica. PW3 insisted that the friendship started after Jessica had broken up with the Accused Person. In any event, PW3 testified that the Accused Person was armed with a butcher’s knife. He attempted to attack PW3. PW3, alarmed, met him at the door to his house and they struggled. PW3 testified that he sustained some cuts on his hands (and he showed them to the Court) but that he managed to free himself and fled. He says he fled to the Health Centre. On coming back, he found that his house had been broken into and items stolen. He also learnt that the Deceased had been stabbed. He did not see who stabbed the Deceased. However, he testified that he heard the Accused Person say “*Leo lazima niuwe mtu!*” (“Today, I must kill someone!”).

5. The only witness who claimed to have witnessed the incident was PW2 – Simon Mburu Wainaina. Simon is a brother to the Deceased. His testimony was that at around 6:30pm on 23/10/2016, he heard some shouting from the neighbours in Kimathi Estate. He was outside his house and he rushed to see what was happening. He found his brother had been stabbed in the back. He lay face down bleeding. Many members of the public had crowded by. He did not see who stabbed his brother. However, he testified that though he did not find the Accused Person at the scene, he “saw him running away.” On cross-examination, he said he saw him only from the back; and that he was about 100 metres away. He further testified that he did not give chase because he was more concerned about the welfare of his brother. However, he did not see anyone else giving chase.

6. On his part, the Investigating Officer, PC George Satia, testified that the Deceased was brought to the Bondeni Police Station at around 5:00pm with stab wounds. He made the requisite report and advised the group to rush the Deceased to the PGH Hospital. Next, the following morning, the Accused Person was brought by members of the public who said that he is the one who had stabbed the Deceased. He re-arrested the Accused Person and decided to charge him with murder. When tested on cross-examination, PC Satia insisted that it was Geoffrey Irungu Wainaina (PW3) who had told him that he saw the Accused Person stabbing the Deceased. Of course, as outlined above, PW3 did not testify to any such thing; in fact, PW3 was categorical that he was not there when the Accused Person was stabbed.

7. Based on this evidence, is there sufficient evidence to convict on a charge of murder? There are three ingredients to the crime of murder:

a. That death of the victim occurred (*actus reus*);

b. That the death was caused by an unlawful act or omission by the Accused Person; and

c. The unlawful act or omission was actuated by malice aforethought.

8. There is no question that the victim, John Kamau Wainaina, died here. Dr. Titus Ngulungu performed the autopsy and presented a report to Court. PW4 and PW2 attended the autopsy. There is no contestation that the Deceased died.

9. The question is who caused the death? The Prosecution narrative is that it is the Accused Person who fatally stabbed the Deceased. However, no one saw him doing it. PW1 was told by her sister. PW2 was told by “members of the public”. PW3 was told by the Deceased’s aunt. The Investigating Officer was told by PW3 who denied having witnessed it. Where does that leave things? The closest link we have between the Accused Person and the homicide of the Deceased was the testimony of PW2 that he saw the Accused Person running away. Of course that is not enough to establish that it was the Accused Person who stabbed the Deceased. In any event, it is incredulous that the witness saw and recognized the Accused Person running 100 metres away from the back!

10. The conclusion is inescapable that the Prosecution simply did not present enough evidence to connect the Accused Person with the fatal stabbing of the Deceased. Perhaps more investigations needed to be carried out. The aunt who reported to two people that it was the Accused Person who stabbed the Deceased needed to have been questioned and called as a witness. Other members of the public who were allegedly present when the stabbing happened needed to be called as witnesses. Without more, a verdict of guilty is not sustainable. There is simply no evidence showing beyond reasonable doubt that it was the Accused Person who stabbed the Deceased. There is plenty of suspicion; even strong suspicion – but that that is never sufficient basis of inferring guilt which must be proved beyond reasonable doubt (See *Sawe v Republic* (2003) KLR 354).

11. On the basis of the above analysis, it is my duty to declare that the Prosecution has failed to prove its case against the Accused Person beyond reasonable doubt. Consequently, I find that the Accused Person is not guilty of the offence of murder of John Kamau Wainaina. I, accordingly, acquit him under section 322(1) of the Criminal Procedure Code. The Accused Person shall be set at liberty unless otherwise lawfully held in custody.

12. Orders accordingly.

Dated and delivered at Nakuru this 15th day of January, 2019.

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JOEL NGUGI

JUDGE