



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 3 OF 2017

(consolidated with HCCR.NO.9/17)

REPUBLICPROSECUTION

VERSUS

JOSPHAT MAINA MUTAHI

LABAN GACHENGA NGATIA

JOSEPH KAHIHU WAGITUI

DAVID NDERITU MURIITHI.....ACCUSED

RULING

The four accused persons **JOSPHAT MAINA MUTAHI, LABAN GACHENGA NGATIA, JOSEPH KAHIHU WAGITUI** and **DAVID NDERITU MURIITHI** are jointly charged with Murder contrary to section 203 as read with section 204 of the Penal Code.

According to the consolidated information dated 3rd January 2018 on the night of 14th and 15th May 2017 at Gachuiro in Mathira West Sub County, Nyeri County within the Republic of Kenya jointly with others not before the court they murdered **MARTIN IRUNGU GATHONI alias WAGATHONI**.

The prosecution called 10 witnesses who included 2 police officers, PW8 who visited and secured the scene, and PW9 who was the Investigating Officer.

At this stage the court is expected to determine whether the prosecution has established a *prima facie case* to warrant the accused person to be put on their defence. What amounts to a prima facie case was stated in the case of **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** which was cited with approval in by the Court of Appeal in **Anthony Njue Njeru -Vs- Republic [[2006] eKLR**. *The court stated:*

“It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction” ...

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.” (emphasis mine)

The Evidence

The case for the prosecution is that on the 13th May 2017, A4 David Nderitu Muriithi who is a cousin to PW1 **Patrick Muriithi Maina** and PW2 **Benson Wahome Maina**, and nephew to PW7 (mother to PW1 and PW2) **Anne Kagure Maina**, alleged that his sheep or goats had been stolen. He rang PW2 and told him as much. He also told him that he suspected PW1, and wanted to ask him about it. PW1 is the elder brother of PW2.

PW2 aware of the bad blood that existed between A4 and PW1 told A4 to wait until the following day 14th May 2017 so that they would discuss the issue in his presence.

The following day PW2 met A4 at the local shopping Centre and told him he was going home and they could meet there to discuss the issue. PW2 went home and informed his father one Richard Maina about the impending discussion. He did not find his brother PW1 at home. His father told him to call him as soon as A4 arrived. Later PW2 in the company of his wife proceeded to the home of A4 to confirm that the meeting to discuss the issue of the stolen animals was still on. According to PW2, A4 told him that the meeting would not be necessary as he was no longer pursuing the issue. PW2 went back home and reported to his father and left for Nyeri. When he reached Nyeri he asked his son to call his grandmother (PW7) to tell her they had arrived. The boy told him that his *Cucu* was crying. He called her himself. She was crying. He dropped his wife and child and turned back picking his uncle one Jeremiah Wanjohi on the way. They tried to call his mother and brother PW1 as he drove back in vain.

On arrival he parked in A4's compound as he saw people at gate leading to his home. He walked to the home met his father who told him that A4 had come with a group of people and they were trying to eject PW1 from his house. He saw his mother standing at PW1's door. He saw A4, A3, one Nderitu and others who are at large. He asked A4 what had happened yet he had told him the matter was over? A4 told him that he had come for PW1 so that he could show him the other thieves, including one Wambugu PW10. There was a lot of tension as evidenced in the testimonies of PW1 and his mother PW7.

According to PW1, that evening he bought some meat and went to pick his wife from the salon at General China Shopping Centre. When he arrived at the *boda boda* parking at the shopping centre, he saw A3 get up to make a call, he heard what A3 said in the call that “*jamaa amekuja na ile mbuzi walikuwa wakichinja*” (*that guy has arrived with the goat they were slaughtering*).

He went, collected his wife, they went home, where she cooked supper and they ate with their children and went to bed. Around 9:00pm he heard the sound of motor bikes, three of them in the compound and thought they were his visitors. Then he heard a voice asking at his mother's house “where is Muriithi?” It was the voice of David Nderitu his cousin, A4. He heard his mother's voice ask what the problem was and the response from David was – “we must kill him today” and with that the group headed for PW1's door and began to knock. That prompted PW1's mother, PW7 to go to his house and stand at the door obstructing their entry. A4 told her twice they had come to kill her son. PW1 stood behind her asking what this was all about. PW7 telling them trying to stop them from entering her son's house. The two identified A4, and 2 others who were at large Kibuchu and Kabao and A3, Joseph Kahihu. Those people were saying they wanted to kill PW1, Benson Wambugu PW10 and Irungu Gatheru.

To reduce the tension from the homestead PW2 told his brother PW1 to leave with his uncle. The rest of the group went in search for Wambugu PW10. PW1 testified he followed them at a distance and watched them enter the home and demand for him to come out only for his mother to scream he was not in. At some point someone said that Wambugu and Irungu were at Ruthagati shopping Centre. The group went there and called them from the bar where they were drinking and everyone was told by A4 to go to General China Shopping Centre.

According to PW2 when he arrived at General China, he found when the others Wambugu and Irungu had been traced. A brother to Nderitu Kabao told A4 to go and report the issue of his stolen goats at the police station and abandon the rest of the issue there. The talk about reporting to the police appeared to tone down the group. PW2 testified that his uncle told him it appeared they had agreed to solve the problem. That is when he decided to leave having told them to report to the police the following day.

According to PW1 when everyone arrived at General China, that is where a fight broke out. According to PW10 it was PW2 who was leading the interrogation asking about the stolen goat and who else had participated in the theft apart from PW1.

Irungu the deceased was complaining that he had been made to come to General China for nothing, he had burnt his fuel as he had to ride his *boda boda* there and who was going to pay? It was then that A4 hit him on the back with a piece of wood. A2 tried to separate the two but A4, Kabao and Kibuchi began to beat A2 he was seriously injured. He collapsed prompting A1 to call an ambulance.

Irungu the deceased had tried to intervene when A2 was being beaten. and he too was attacked by A4, A3, Kabao, Kibuchi. Deceased ran away and was followed by A3, A4, Kabao and Kibuchi. PW1 alleged that A3, A4 and Kabao hit deceased with sticks and metal bars. However, it turned out from his statement that when deceased ran away from the scene at General China, he, and PW10 also ran away for fear of their lives. In fact PW1 told the police that Irungu, upon sensing that his life was in danger, took to his heels. That after some time those who had chased him came back to where the rest of the group was. PW1 learnt the following day the Irungu was dead.

PW6 **Esther Mumbi Wandeto**, testified how she received a call from one Joseph Muthee (identified as 1st accused) at 12:36am on 15th May 2017 warning her not to leave her house as they were chasing goat thieves.

PW5 **Joseph Mwangi Wandeto**, a brother to PW6 and sister to mother of the deceased learnt of the deceased's death on 15th May 2017 at 7:00am from PW6. He went to the scene and found the deceased lying dead in a banana plantation in the shamba of Muthee Kibebe.

Around midnight of 14th May 2017 the in charge Tumutumu Plice Post rang PW8 **CPL David Omudeki** informing him that one victim of assault by the name Laban Mwangi A2 had been escorted to PCEA Tumutumu hospital by members of the public. At 4:00am on the morning of 15th May 2017 he visited the A2 at the hospital. He had a head injury and was not talking.

At 7:05am 15th May 2017 a report was made by three members of the public that there was the body of Martin Irungu Wa Gathoni lying in the shamba of Esther Mumbi at General China Trading Centre.

He informed the OCPD Mathira West. They met at the scene with him and other officers. The body was lying in a lot of blood. They removed it to Karatina District Hospital mortuary. There were no weapons at the scene.

The matter was taken over by the CID in the form of PW9 the Investigating Officer. He testified that he visited the scene of murder on 15th May 2017 at 18:20pm. Upon inquiries from unnamed members of the public he found there, he learnt that A1 and A2 were suspects. On 18th May 2017 he arrested A2 upon his discharge from Tumutumu Hospital. He testified that other witnesses told him that the deceased was attacked by A4 and others on allegations that he (deceased) and others were responsible for stock theft cases in the area, that an officer at Kiamacibi police station denied any report of stock theft from that area. He said A1 was identified by PW1. That motive was that 4th accused had lost his sheep and he chose to engage members of the public to assist him to investigate the case. That A2 was arrested as among those who were hitting the deceased. He proceeded to charge the 4 accused persons.

The Law:

The Penal code provides:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

206. Malice aforethought

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.*

Analysis

From the testimonies on record, and the evidence of PW1, and the investigating officer it is evident that the 2nd accused came to the scene at General China when a crowd had formed. His participation in the whole scenario was to try and stop the fight that erupted when Irungu the deceased was being beaten. A person who intended to hit the deceased actually missed and hit him causing him serious injuries. There is no evidence that he was in the group of boda boda riders who went looking for the goat thieves at Ruthagati Shopping centre. He was not seen at the home of PW1 or that of PW10. Hence there is no scintilla of evidence to tie him to any of the ingredients of the offence to warrant his being put on the defence.

For A1, PW6 introduced testified that he called her on the material night to tell her not to leave the house because 'they' were chasing thieves. On the other hand, it is not clear why he would call PW6 and not any other person.

PW6 made a lot of capital out of the alleged call in her evidence in chief. She alleged that A1 told her that they were 'chasing goat thieves to kill them' only to deny the statement in cross-examination. She does not say whether A1 told her he was among those chasing the thieves, on whether he had witnessed the chasing of the thieves. It is evident from PW1 that A1 was at General China Trading centre where a crowd of over 40 people had formed. It was the testimony of PW1 that A1 is the one who called the ambulance to when he noticed how seriously injured A2 was. The ambulance came and picked A2 and took him to Tumutumu PCEA hospital where the police found him. There is however no evidence that A1 and A2 were in the group that went to PW1 and PW10's homes or to Ruthagati in the search for Irungu(deceased) and Wambugu PW10.

The investigating officer charged A1 because of the alleged conversation with PW6 and the evidence that he called the ambulance that picked A2 because that was proof of his was present at General China shopping centre. Clearly those two facts alone do are insufficient to

tie the A1 to the offence.

Similarly, by the time A4 and A3 and others are said to have chased Irungu (deceased) A2 had left the scene in the ambulance. A2 is not mentioned as any of the persons who chased the deceased or hit him with anything. The Investigating officer's assertion that the fact the he sustained injury was evidence of not only his presence at the scene but also participation in the committing of the offence is not borne by evidence.

The A3 and A4 were mentioned as having been in the group that went searching for the suspects of the alleged theft of goats, they were mentioned as being among those who chased the deceased from General China shopping Centre, only for him to be found dead later. A4 is mentioned as the person who alleged that his goats or sheep were stolen by PW1, PW10 and Irungu (deceased).

Submissions.

I have carefully considered the rival submissions by counsel for each accused person and for the state.

Determination

From the foregoing consideration of the evidence and the law it is evident that the prosecution has not established a prima facie case to warrant the A1 and A2 to be put on their defence. With regard to each one of them I make a finding of not guilty as provided for under s. 306 (1) of the Criminal Procedure Code.

With regard to A3 and A4 I find that the prosecution has established a prima facie case to warrant each be placed on his defence and each will be placed on his defence in compliance with s. 306(2) of the same code.

Dated, delivered and signed in open court at Nyeri this 8th Day of February 2019

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Court Prosecutor: Ms.Kui

Accused Persons: present

Counsel for accused persons:

Waweru Macharia for Accused 1, holding brief for Maina Karingithi for Accused 2.

Gathiga Mwangi for Accused 3

Ombongi for Accused 4.

Mumbua T Matheka

Judge

8/2/19