REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 11 OF 2014

REPUBLIC.....ROSECUTOR

VERSUS

GIDEON WACHIRA WAMWANGI.....1ST ACCUSED

JOHN MAINA KIMERE.....2ND ACCUSED

RULING

1. The accused are charged with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.

2. The particulars are that on 4th February 2014 at an *unknown time* in Kirima village, Rurii Sub-location, Kimathi Location within Murang'a County, jointly with others not before the court, he murdered *Peter Chomba Kimondo.*

3. They both pleaded *not* guilty. The prosecution lined up *four* witnesses. The prosecution's case is built entirely on *circumstantial* evidence.

4. The body of the deceased was found floating in River Sagana on 5th February 2014. According to Christopher Mwangi (PW1), the father of the deceased, they had parted ways with the deceased on the morning of 4th February 2014. He had instructed him to take care of his livestock. PW1 then went to Sagana Town. He returned home at about 6:00 p.m. He later learnt that the deceased was assaulted by a mob and the body thrown into the river. He went to the scene but by that time, the body had been removed from the river and taken away by the police. He said he did not know the accused or who killed his son.

5. PW2 was Dr. Elijah Njoroge. He produced a post mortem report prepared by his colleague, Dr. Mogere, dated 10th February 2014. The defence had no objection. He said the deceased was aged about 29 years. He had suffered extensive deep cuts on the head exposing the brain tissue. From the post-mortem report (exhibit 1), the cause of death was *"severe head injury by a blunt object and drowning"*. PW2 testified that the injuries to the head *preceded* drowning.

6. PW3, Police Corporal Bii, was the former investigating officer. He was informed by members of the public that on 4th February 2014, the 1st accused was seen armed with a panga; and, chasing the deceased towards the river. The 1st accused was arrested by the public at the *locus in quo* and handed over to the police. The 2nd accused was arrested later by Admimistration Police officers.

7. No other material witness testified. Due to persistent adjournments by the State, the prosecutor had been granted a last adjournment on 16th May 2019. PW2 and PW3 then testified on 11th July 2019. The prosecution then called the current investigating officer, Corporal Cherono (PW4), who confirmed on oath that he could not procure the attendance of any more witnesses. From the *Investigation Diary* (exhibit 2) there were underlying family feuds that sent the witnesses underground. That marked the close of the prosecution's case.

8. Learned counsel for the accused filed submissions on 15th July 2019. The Republic opted *not* to file any submissions.

9. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

10. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

11. There is absolutely *no* doubt about the *death* of the deceased. The deceased suffered extensive *deep cuts* on the head exposing the *brain tissue*. From the post-mortem report (exhibit 1), the cause of death was *"severe head injury by blunt object and drowning"*. PW2 testified that the injuries to the head *preceded* the drowning in the river.

12. I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, jointly killed the deceased.

13. There was no *eye witness* to the murder. The entire case for the prosecution is built upon *circumstantial evidence*.

14. I am well guided by ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949) where the court held-

> *In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt*

15. There is only one incriminating piece of evidence: According to PW3, Police Corporal Bii, who was the former investigating officer, on 4th February 2014, the 1st accused was seen armed with a panga; and, chasing the deceased towards the river. The 1st accused was arrested by the public at the *locus in quo* and handed over to the police. Unfortunately, PW3 was *not* the arresting officer and *no* witness came forward to support his allegations. His evidence was thus classic *hearsay*.

16. The 2nd accused was arrested later by Admimistration Police officers. The officers never testified. There is absolutely no direct or indirect evidence on the record connecting the 2nd accused with the murder.

17. In the end, the prosecution failed to lead direct or compelling circumstantial evidence *linking* any of the accused to the *murder*. I would then *not* say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the two accused *killed* the deceased with *malice aforethought*.

18. In a synopsis there is no evidence to *convict if the accused opt to keep mum.* I thus find that a *prima facie* case has *not* been established.

19. The law on that subject was succinctly captured in ***Bhatt v Republic*** [1957] E.A. 332 at 334-

> *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.*

20. On the totality of the evidence; and, from my analysis of the legal authorities, I am not persuaded that the Republic has proved a *prima facie* case against the accused *sufficient* to place them on their *defence*.

21. Accordingly, under the provisions of section 306 (1) of the **Criminal Procedure Code**, I enter a finding of *not guilty*.

22. The two accused persons are hereby *acquitted*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 3RD DAY OF OCTOBER 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Ms. R. Kimani for the accused.

Mr. S. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.