



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 41 OF 2011**

**REPUBLIC**

**VERSUS**

**EDWIN WARIUKU GACHAGO**

**GODFREY WACHIRA GACHWIRI.....ACCUSED**

**RULING**

1. The accused were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; they were accused of having murdered Nelson Githithu Ndirangu on the 7<sup>th</sup> day of December, 2011 at Mukuruweini sub-county in Nyeri County;
2. On the 6<sup>th</sup> February, 2012 both accused entered a plea of Not Guilty; and the hearing of the matter commenced on the 20/07/2016 and at the hearings hereof the accused were at all times represented by Learned Counsel Mr Muhoho whereas Ms. Gicheha was the Prosecuting Counsel for the State;
3. The prosecution called a total of twelve (12) witnesses in support of its case; at the close of the prosecution case defence counsel was invited to make submissions as to whether the prosecution had made out a case that required the accused persons to be called upon to defend themselves; counsel for the accused made oral submissions and stated that the prosecution had not made out a prima facie case against the accused persons; that there were no witnesses who were able to identify the people who beat the deceased; **PW1** who was the recipient of the dying declaration was the only prosecution witness who tried to link the accused to the offence but his conduct watered down the veracity of this evidence; and that the evidence on the deceased's dying declaration ought to be treated with extreme caution as it did not meet the threshold for admission;
4. There was contradictory evidence on the alleged recovery of the items recovered from the accused and sent to the Government Chemist for analysis; the subsequent results from the Government Analyst also watered down the evidence of the prosecution;
5. Counsel urged the court to consider the evidence in totality and find that the accused had no case to answer and that they be acquitted;
6. In response Prosecuting Counsel for the State submitted that the prosecution tendered sufficient evidence for the court to put the accused persons on their defence; and counsel relied on the evidence of **PW1** who stated that before the deceased died he gave the names of the two accused as the persons who had assaulted him; that this amounted to a dying declaration;
7. That the accused had visited the deceased's home claiming to have come to recover their fathers stolen shoes and therefore had reasons for having attacked the deceased so as to avenge their father's loss;
8. The analysis of the blood samples conducted on the items recovered from the accused's home in particular a jacket and a hammer, indicate that they positively contain the DNA of the deceased; the Government Chemist report strongly linked accused to the commission of the offence;
9. Counsel prayed that the accused be put on their defence;
10. After hearing the rival oral submissions made by both counsel and after having evaluated all the evidence on record on the four key elements of the offence that needed to be proved by the state as set out in the case of **Antony Ndegwa vs Republic (2014) eKLR**; the key elements being that the deceased died; the cause of death; that the accused committed the unlawful act or their acts of omission led to the death of the deceased; and lastly whether the accused had malice aforethought;

11. This court finds that there is a scintilla of evidence that was adduced by the prosecution witnesses linking the accused to the infliction of the injury to the deceased; refer to the renowned case of **Bhatt vs Republic (1957)**; and is satisfied that the prosecution has established a prima facie case against the accused that warrants them to be placed on their defence to answer to the charges;

12. The accused are found to have a case to answer; their rights and options will be put to them for election before they present their defence.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 14<sup>th</sup> day of November, 2019.**

**HON.A.MSHILA**

**JUDGE**