



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCR NO.28 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

LUIS MWAI WACHIRA.....ACCUSED

R U L I N G

1. The accused person LUIS MWAI WACHIRA faces the charge of murder contrary to s.203 as read with s. 204 of the Penal Code Cap 63 laws of Kenya. The Information dated 6<sup>th</sup> September 2010 alleged that on the 22<sup>nd</sup> day of August 2010 at Muyu Sub location in Mukurweini District within Central Province he murdered JOHN MAIN MUTAHI.

2. The prosecution called eight witnesses and this court is expected to determine whether on the basis of that evidence the prosecution has established a prima facie case to warrant the accused to be put on the defence. This case has been in the court system for now eight years. The accused person has been in custody all this time. He has even lost his hearing. The family of the deceased too has been waiting for closure.

3. The accused person took plea before Serگون J on the 30<sup>th</sup> September 2010 where he pleaded not guilty. The matter was then allocated to Wakiaga J for hearing. By 27<sup>th</sup> January 2014 the accused was 72 years old and the matter had never taken off. Bond had now become a constitutional right for all offences by virtue of Katiba Mpya. He applied for bond and was granted bond of ksh 2,000,000 with one surety of the same amount. This was revised to Ksh 500,000 with two sureties of the same amount on 26<sup>th</sup> March 2014, when the only hearing date available was 14<sup>th</sup> October 2014, and the court took into consideration the accused person’s age.

4. The matter only took off for hearing on the 4<sup>th</sup> March 2016 before Mativo J, who heard four of the prosecution witnesses before going on transfer. I took over 20<sup>th</sup> February 2017. The prosecution closed its case on 18<sup>th</sup> September 2018.

5. Kenyan courts have relied on the holding in Bhatt v Republic (1957) EA 332 as the leading case in the principles applicable in the determination of what amounts to a prima facie case to warrant an accused person to be called upon to answer to charges in his defence. My understanding is that it is prima facie because the court was not there to witness what happened to make its decision on that. The court has no choice but to rely on what those who perceived the evidence make and tell of it. That is why we have ingredients of the offence, to set the parameters of what needs to be established, and rules of evidence to set the standard as to what the court ought to consider.

6. The leading principle is of course the right of the accused person to be presumed innocent until proven guilty, and its twin that it is the onus of the prosecution to establish their case as supported by s.107 (1) of the Evidence Act which states that *whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

7. These two are to be found in the opt quoted passage from **Bhatt v Republic** “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 case, the case is merely one which on fully 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.”

8. Fact is, there must be evidence. Not a mere scintilla, not worthless discredited evidence, but evidence, which considered, would support a conviction.

9. The prosecution ought to have evidence that establishes:

- i. Death of a person (the deceased)

- ii. *By unlawful means (actus reus)*
- iii. *By a person (the accused)*
- iv. *With malice aforethought (mens rea) as defined*

The evidence

10. **PW1 Fabian Munga Kairigi** a bar operator was working on 22<sup>nd</sup> August 2010 when the deceased went to the bar at 8:00pm carrying his own drink a bottle of 'Kenya King'. He immediately began to quarrel the accused who he found drinking with 2 others Wachira and Njaria. PW1 went for a short call. Upon return other persons told him to remove deceased from the bar because he had slapped the accused. He removed him. Accused left 15 minutes later. 30 minutes after accused left, he heard from some people he did not name that accused had hit the deceased with a stone. He went to the scene but did not find either the accused/deceased whom he learnt had been taken to hospital. On cross-examination he said he just heard rumors about what had happened.

11. **PW2 Jackson Njaria Mathenge** was with the accused and one Wachira Mugo at Kamuche Bar on 22<sup>nd</sup> August 2010 when the deceased walked in carrying his drink 'Kenya King' and slapped the accused. He restrained the accused from getting up, while Wachira called the Bar owner who came and threw the deceased out. He later went home only to hear the following day that Mwai had killed Maina. On cross-examination he said while at the bar he did not see anyone beat anyone. That he left the bar at 9:30PM. He did not see anyone slap anyone, he only heard the slap.

12. **PW3 Peter Wachira wa Mugo** told the court that he was from the shamba on 22<sup>nd</sup> August 2010 when he found PW2 taking beer at Kamuche Bar. PW2 ordered a drink for him half Kenya King. They continued to drink. The accused joined them. PW2 bought him a drink as well. Then Maina the deceased joined them but immediately began a quarrel with Mwai telling him and I quote "you will cry". The next thing he 'heard' Maina slap Mwai. PW2 held Mwai who calmed down. The quarrel continued however. PW3 went to look for the bar owner who happened to be outside the bar telling him there was fight in the bar between Maina and Mwai. The Bar owner told Maina to leave. Maina left. They continued to drink until after 9:00PM when they left. He too only heard the next day that Mwai had killed Maina. On cross-examination he said he saw Maina slap Mwai. He did not know the reason neither did he find out.

13. **PW4 Anthony Mutahi Maina**, a son of the deceased received a call from his brother one James Kimanj Maina that their father John Maina Mungai had been hit near the Kaheti Catholic Church and was in bad condition. He proceeded to Mukurweini Hospital where he found him. He had injury on head and was bleeding. He died shortly. PW4 attended the postmortem- the deceased's face was swollen, and he had head injuries. On cross-examination he told the court that the accused was not only a member of their church but was also from the same village. He said there was no grudge between his father and the deceased. He also said the two had family relations.

14. **PW5 Julius Wambugu** told the court he was a taxi driver from Mukurweini. On 22<sup>nd</sup> August 2010 he left Mukurweini for his home driving Motor vehicle Reg. No. KAS 981L when he reached Kaheti High School he saw a person lying on the road. He thought if it was a drunk person he would move him off to the side of the road. When he came out he saw an old man with an injury on the head. As he was looking at the old man on the ground, he saw the accused coming from the direction of his (accused's) home. He PW5 asked him who could have done that to the deceased. He said the accused told him he was the one. He told the accused to stay there with him. They stayed. A crowd formed. PW5 took deceased to hospital but he was pronounced dead on arrival. He was referred to the police station where he was given a note to take the body to the mortuary. He then went to record a report the following day. He said when the accused came from the direction of his home he had a stone in his hand, and he said he was the one who had hit the deceased. He said he left the accused with the crowd. The stone was not in court. On cross-examination he said he knew the deceased and the accused person. Both were old men. He knew that they both took alcohol and that the accused was also drunk when he saw him. He said he recorded his statement soon after the incident. He said the stone the accused held was bigger than the accused's hand. When it was put to him that that statement about the accused having the stone was not in the statement he had recorded at the police station a day after the incident, he told the court that it was the police officer who recorded the statement who omitted it from the statement. He further stated that when the accused came to the scene, a struggle ensued between them whereby the accused overpowered him and violently threw him on the ground, causing him to sustain injury which could be evidenced by a scar. Asked whether this tale about a fight with the accused was in his statement with the police he said no. He made no complaint to the police that the accused had also attacked and injured him. He said about 50m from where he found the deceased, he met 2 people who appeared to have seen the deceased but had not bothered with him. He said the crowd just formed as nobody called them.

15. **PW6 Michael Kahihia Githaiga** was testified he a watchman at the material time. He was going home at 9:00pm when he heard noises in front of him. He switched on his torch and saw Maina lying on the ground with his arm on his chest. Then he saw the accused whom he did not know but who he was familiar with going round the deceased. He was holding a stone. He dropped the first stone. He identified a stone in court. Then he asked Mwai why he wanted to finish his colleague. Both Mwai and Maina were drunk. Mwai kept saying "money! money!" He said he separated them and saw blood on Maina's head. He spoke to Mwai to leave. He was about to ring to the 'afande' at Kaheti police post when he saw 'Kagucia' come with a motor vehicle. He stopped because he could not pass. The witness further stated that after separating the 2 he went looking for help and that is when he saw Kagucia coming. He also saw another woman coming. He heard Kagucia asking the accused who had hurt Maina, and accused twice said he was the one. It was then that Kagucia produced a rope and tied up the accused person. It was then that a crowd formed. He said he only knew Kagucia as 'driver'. He said that the 2 were not strangers to him. On cross-examination he said he had come from work at Kaheti Girls' where he was a watchman. He alleged it was 40m from the school gate to the place where the deceased was but when he described it, it was further. He said it took him half an hour from the school gate to the scene. When his statement to the police was read, it turned out that he told the police he heard people talking loudly on the road while he was at his place of work. He also said that on the road there were many stones, and he saw one on the ground near the body of the deceased. He said that that the stone the accused dropped was the stone that the 'afande' collected from the scene. He said the accused was drunk. On cross-examination he changed his story. He said he heard drunks talking on the road when he was at school and did not know what was happening outside. He said when he lit his torch he saw the accused holding a stone.

16. **PW7 CPL Alfred Timbwa No.53752** was on duty on 22<sup>nd</sup> August 2010 at 8:30PM when he received a call from the Deputy OCS that there was an assault case at Kaheti. He proceeded there with a colleague. On the way met PW5 who told them that he had taken a victim of assault to hospital in serious condition. They then proceeded to the scene where they found the accused surrounded by members of the public. He arrested the accused, marked the scene, then left for hospital. Upon arrival they were told he had passed away. According to him, the deceased had slapped the accused in the bar- when the accused had left, went to the road heading to home of the deceased, way laid him, ambushed him, attacked him with a stone, causing him multiple injuries on the head and side of the ribs. He recorded statement from witnesses. He said the scene was near a primary school. That he was shown the stone by three members of the public and that it was the only stone there. He said there were lights from the school, the market, and the nearby teacher's quarters. The witness did not have the stone in court to produce as evidence.

17. The lack of the stone as exhibit in court led the state to attempt a withdrawal under s.87(a) of the CPC. The application was strenuously opposed, and was declined by this court for lack of merit.

18. The witness continued to testify that the stone had no blood stains- that it had also rained. He said there were other smaller stones at the scene but not as big as the alleged exhibit. He said other witnesses had also mentioned the stone. He said Anthony, Micah all saw the stone but Anthony saw it before the deceased was attacked. That Jackson Njaria Mathenge told him he saw the accused person hit the deceased with the stone. He was asked to read Jackson's statement which he did and confirmed that Jackson never told him he saw the stone being used to attack the deceased. Asked whether he found out where the accused lived, he said he did not. When it was put to him that accused was actually going home he said no, the accused had way laid the deceased. Asked how far the gate was from the scene, he said 3 to 4m not 300m to 400m.

19. **PW8 Dr. Kimathi Paul** produced the postmortem report. The doctor's name was illegible, it bore the stamp for Mukurweini hospital and no one at Mukurweini hospital could ascertain the signature. The body had multiple deep cuts on the forehead, 2 fractured ribs 2<sup>nd</sup> and 6<sup>th</sup> on right side causing collapse of lungs, linear fracture of the frontal bone. Cause of death was pneumothorax with fractured ribs and subdural hematoma secondary to blunt chest trauma, severe head injury.

20. The prosecution then closed its case.

21. The issue then is whether on the basis of the foregoing evidence this court has enough material to place the accused person on his defence.

22. Mr. Muhoho put in written submissions. The state did not wish to put in any submissions at that point.

23. I reiterate here that it is the prosecution's legal and evidential burden to establish a prima facie case upon which accused can be said to have a case to answer.

24. It was submitted by the defence that except for PW5 and PW6 none of the other witnesses gave any evidence to connect the accused with the offence.

However, that is not the correct position because through the testimony of PW1, PW2 and PW3 the prosecution made an effort to establish motive/mens rea on the part of the accused. It was alleged that accused was in a bar drinking with others when the deceased for no apparent reason came in, and headed straight to the accused, began a baseless quarrel and slapped him. The police picked this to be the motive, revenge. The investigating office testified that according to him, the accused waylaid the deceased and assaulted him.

25. This effort begins to fall apart when it the persons who were the source of this incriminating evidence give contradictory and inconsistent evidence. Two of them deny seeing the deceased slap the accused. None of them could give any details of the alleged quarrel/fight. What was the deceased saying to the accused when he allegedly attacked him? What was he accusing the accused of anything? Why would he threaten him with 'tears' yet the son told the court there was no grudge between them? These witnesses, is it possible that they were not there or there was nothing like a quarrel in the first place. It is hard to believe that the accused would have quarreled silently while drunk?

26. It is noteworthy that PW1 denied seeing the deceased slap the accused person. He said he was told by PW2 and PW3. PW2 changed his story under cross-examination and said he did not witness anyone slapping/beating anyone yet in examination in chief he said he had witnessed the deceased slap the accused. PW3's testimony was even more detailed. He heard the deceased threaten the accused. He heard the slap. He did not see it. Yet the quarrel became so intense that he went to call the bar owner to come and remove the deceased from the bar and in his own words he alleged that the two were fighting inside the bar. Clearly the testimonies of these three witnesses are inconsistent and do not corroborate each other on what could have been the prosecutions attempt at selling up a motive. It is clear from the evidence of the investigating officer that he lay all the basis for the charge against the accused on the alleged fight in the bar. He said that after the accused was slapped/beaten by the deceased, he followed him, and attacked him on his way home. Hence if there was no quarrel/fight in the bar, then the case for the prosecution in as far as motive is concerned crumbles.

27. Each of the three witnesses who were allegedly with the accused and the deceased denied seeing the deceased slap the accused contradicting each himself in one way on the other. Each states that the deceased had to be removed from the bar. It would appear that the deceased was so aggressive that the rest of the patrons could not stand his presence and he had to be removed from the bar. After he left the accused and the others continued drinking for another about 30 minutes. How then could the police determine that the accused had gone to waylay the deceased?

28. I found it strange that neither PW1, PW2, PW3 spoke about leaving the bar but nothing about where they went, who they were with, and whether they lived on the same route as the accused/deceased. How come their statements ended abruptly at the point of 'hearing' the slap and 'hearing' the following day that accused had killed the deceased? It gives the impression that some information was being cut off

deliberately.

29. PW5 and PW6 gave testimony that was very interesting. Each one of them was at the scene at the same time but their testimony was a different as day and night. Who came first? According to PW6, when he arrived at the scene there was nobody else. He found the accused going around the deceased who was lying on the ground, while holding a stone while saying money! money!. He spoke to the accused to leave while he left to go get help while at the same time trying to call the police. He never got any help neither did he call the police as PW5 arrived at the scene and because he could not pass because of where the deceased was lying, he came out, asked accused who had done that to the deceased, and upon accused confessing twice, tied him up with a rope. Then took the deceased to hospital. According to PW5 he was alone all the time he allegedly spoke to the accused, and was uncertain whether anyone else heard the accused's alleged confession. He never mentioned the PW6, yet from the evidence of PW6 it appears they were together at the scene particularly when the accused allegedly confessed. PW5 never mentioned speaking to anyone let alone PW6, he never mentioned that he tied up the accused with a rope and he never found the PW6 at the scene, he never found accused at the scene. His testimony was that he saw the accused coming from the direction of his (accused's home) when he arrived at the scene.

30. PW5's testimony and that of the police also do not agree. PW5 said he took deceased to hospital he was pronounced dead on arrival and he was given a note to take the body to the mortuary. The Investigating Officer PW7, told the court that they met the PW5 on the way as they went to respond to a call of an assault who told them that he had already taken the assault victim to hospital in a critical condition. They arrested the accused then went to the hospital to check on the victim whom they were told had died and was taken to the mortuary. Strange because PW5 is the same person who told the court that when he took deceased to hospital he was pronounced dead on arrival, and that he was the one who took the body to the mortuary. At what point did he meet with the police between the time he decided to take deceased to hospital, and the time he took the body to the mortuary?

31. Is it not suspect that he claims there were other people at the scene yet he took the deceased to hospital alone? Who assisted him to put the deceased in the motor vehicle? How did the deceased get into the car? Why was he not accompanied by anyone else from the crowd that had formed? Why did PW6 not accompany him to hospital – yet they all knew the deceased and the accused who told the children of the deceased about the incident? Clearly there are so many questions that the police did not address in their investigations. Is it possible that the deceased could have been hit by the PW5 with his car? PW5 said the road where he found the deceased was busy. He actually met 2 people walking away from the scene but PW6 was not one of them. PW6 saw a woman pass by. This story does not add up.

32. He was drunk and in the middle of the road? The injuries, deep cut wounds on the face with a fracture, fractured ribs could they have been caused by the stone we saw in this court? Could the deceased have been injured while he was being thrown out of the bar while he was being unruly? These are questions that nobody bothered to ask.

33. That takes us to the alleged murder weapon: a stone. How was it identified? The Investigating Officer said it was identified to him by three members of the public including PW2. He could not explain why the statement by this witness did not contain such crucial evidence. The introducers of the murder weapon PW5 and PW6 did not mention it in their statements. There was nothing on the stone, not even blood stains. The I.O tried to explain it away by saying that it had rained. All the persons he mentioned as having told him about the stone did not mention it in their statements, and one of them was not even at the scene, making it look like the story of the stone was an afterthought.

34. It is surprising that the prosecution allowed these charges to be laid against the accused in the first place. It is sad that a person lost his life, and everyone would like to know who killed him and why, and the laws of land, would like to punish that person. However, suspicion alone is not enough See **Sawe vs Republic**, and contradictory, inconsistent and discredited evidence lacks the credibility necessary to support a conviction.

35. In the foregoing circumstances, it is my view that the prosecution has not established a prima facie case to warrant the accused being put on the defence.

36. The consequent to that is that I make a finding of not guilty as provided for under s. 306 (1) of the Criminal Procedure Code. That means that the accused herein is to be set at liberty unless otherwise legally held.

**Dated, delivered and signed in open court at Nyeri this 22<sup>nd</sup> Day of November 2018.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant

Accused Person

Mr. Magoma for the state

Mr. Muhoho for accused person