



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**HCCR NO.7 OF 2010**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MOSES WACHIRA WANJERU.....ACCUSED**

**RULING**

1. The accused person **Moses Wachira Wanjeru** was charged with the offence of murder contrary to section 203 as read with s.204 of the Penal Code. It was alleged that on the night of 16/17 February, 2010 at Gituiga Village Nyeri South within Central Province jointly with others not before court murdered Peter Wanjeru Wachira.
2. At the close of the case for the prosecution the state had called 16 witnesses.
3. The defence through Gathiga Mwangi Advocate submitted that the prosecution had not established a prima facie case against the accused person to be called to respond to the charge as required by s.306(2) of the CPC.
4. The state on its part through Mr. Magoma, prosecution counsel, submitted that they had laid sufficient ground to warrant the accused being put on the defence.
5. To determine the issue, I find it necessary to set out the background to the charge.
6. The case for the prosecution is that the accused person Moses Wachira Wanjeru and PW8 Ronald Gakuo Wanjeru are sons of the deceased. It is alleged that both Ronald and Moses were living on the same compound as their father but each of them had his own house. In addition, the deceased's wife, the mother to the accused pre-deceased him. It was not clear from the evidence of other witnesses whether anyone else lived on the compound. What came out however was that the deceased's house had an attached kitchen where cooking was done on the traditional three stones.
7. The deceased kept some milk cows and neighbours would buy milk from him. While he was away he would leave David Mwangi Wambugu PW1 to take care of them.
8. On the morning of 18<sup>th</sup> February 2010 about 11:00am one Zipporah Wairimu went to buy milk as usual. She did not find the deceased in the home. She went to call David to go and milk the cows and give her supply of milk. Together they went to the home. David went to the kitchen to collect the milking can. He found the door unlocked though it was not unusual. As he entered what was in the kitchen, he noticed blood at the door. He also noticed that the fire place was disturbed as the ashes there appeared to have been pushed aside. He did not enter the other rooms but picked the can, milked the cows, gave Zipporah her milk and went in search of Ronald at his place of work, so as to tell him what he had found in the home.
9. He rang Ronald severally but he was not also being found on phone. He left for Nyeri to run some errands. On his way he met John Maina PW5 whom he told what he had seen, and told him, if he found Ronald to tell him the same. Later John Maina came back with Ronald. They asked him when he had last seen his father, he said on 14<sup>th</sup> February 2010. They accompanied him to the house, opened the door and saw the blood. They told Ronald to report to the assistant chief.
10. On 19<sup>th</sup> February 2010, the body of the deceased was found in 2 pieces in the swamp not very far away from the home.
11. **PW2 Charles Maina Wambugu** was among the first people to learn from PW1 that the deceased was missing on the morning of 18<sup>th</sup> February 2010. While grazing his cows in a nearby forest, he saw his cows *"behaving funny after smelling blood at a certain spot and made noise"*. On checking he saw that the ground was disturbed. He called other people who also saw the blood and they sent for the assistant chief PW3 Benjamin Wanjiri Ndiritu who called the police.

12. On his part PW3 said on 18<sup>th</sup> February 2010 at 7.00pm Ronald Gakuo found him at Munyange shopping Centre and informed him that his father was missing. He told him he had last seen him on 16<sup>th</sup> August 2010. He told him if he did not find him the following day to report to him. On 19<sup>th</sup> February 2010, he reported to him he had not found his father but he had seen blood near the door of his father's house. PW3 rang the chief PW4 and they proceeded to where PW2 was grazing cattle and members of the public volunteered to dig where there were signs of blood. PW12 David Gichuki Wachira was among those who dug up the body. He testified how on 19<sup>th</sup> February 2010 he assisted in searching for the deceased body. He said when the spot where the body was suspected to be buried was identified, the young men refused to dig when the police asked for assistance. After finding the lower part of the body he could not go on, other people found the other part and dig it up. The lower part of the body was found first and a search up stream led to the recovery of the torso. The body was taken to the mortuary.

13. PW3 is the one who under cross examination introduced the idea that the deceased's death resulted from "revenge". That he had received a tip off that the accused may have killed his father to revenge the fact that his father had chased away his wife. However, the assistant chief conceded that he had not informed the police of the same when he recorded his statement.

14. **PW4 Simon Mathenge Nderitu** was the chief. He learnt from the Assistant chief PW3 that the deceased was missing on 18<sup>th</sup> November 2009(sic). When he was later told that blood stains were found in the deceased house, he went there and upon seeing the same and another spot on the ground that appeared to have been disturbed, he rang the OCS who upon arrival and seeing the scene called for crime scene. He was present when the 2 parts of the deceased's body were dug out. Apart from the body having been cut into 2 separate pieces, he noticed that the neck also had a deep cut. He spoke about a family dispute which the deceased had reported to him and which he had detailed the PW3 to settle. However he told the court that there were no minutes of the alleged discussions. He also could not recall hearing of any fights/quarrels between the deceased and the accused. He did not know whether any of the deceased sons was at home at the time of the murder. He said that the motive of revenge that he had mentioned in his statement had come from the assistant chief. He said it was upon the victim of the threat to report to the police. He however stated he had nothing to connect the accused to the murder offence.

15. **PW6 Caroline Wahito**, testified that Ronald Gakuo PW8 was her employee. When PW5 went looking for him in her home, she spoke to him on phone and he confirmed that his father was missing. She said Ronald had been working for her since 2008 that he had a house on his father's compound but he was not married. She said he stayed mostly in her homestead and never went home though his home was close. On cross examination she did not know who killed the deceased.

16. PW7 Richard Kiminda Mutero was the husband of PW6. At the material time he was in Nairobi and it was PW6 who rang him and told her that Ronald's father was missing. He confirmed that Ronald had sleeping at quarters in his compound and also had house in his father's homestead. He had no idea who killed the deceased though he knew him and also the accused person.

17. **PW8 was Ronald Gakuo** he told the court he was last with his father on 16<sup>th</sup> February 2010 when he was cutting grass for the cattle. On 16<sup>th</sup> February 2010 he went home later after 9.00pm. He went to his house and slept. He did not see his father. The following day 17<sup>th</sup> February 2010 he just woke up and went to work. In the evening he went to the market. On 18<sup>th</sup> February 2010, he went to work and ran errands and meetings. About 3.00pm is when he received a call from PW6 that PW5 was looking for him because of what PW1 had told him. He went, found PW5, and together with PW1 they went home. That is when he saw the blood and drag marks. He rang his brothers Charles Kamau and John Mwarari. They told him to report to PW3 who asked him whether he knew anyone who had grudges with his father. He told PW3 that his father the deceased had told him he had had a disagreement with Moses Wachira his elder son whereby he claimed that Moses had poisoned his cow and he knew that there before this day, there had been a quarrel between the 2 over cattle.

18. On 19<sup>th</sup> February 2010, he went home to check with his elder brother, the accused whether their father had been found. They went together to their father's house where Ronald showed the accused the blood stains. The accused left while Ronald remained at home. Later the police came, they arrested him and the accused. They went to house of the accused where they found a jembe, spade, panga, blue overall and stripped shirt which they took away. It is while the police were doing all this that they heard screams that their father's body had been found. They were taken to Othaya Police Station where they stayed till 23<sup>rd</sup> February 2010. He testified that his brother told him that Zakary and Joseph Mwangi were not connected to the case. He introduced a twist to the case that no one had raised before about two persons who were claiming land from his father, claiming that they were his father's brothers. He named them as John Wanjeru Macharia and James Macharia Keriri. It turned out that Gathuthi Tea Factory had a project which resulted in some compensation for the deceased amounting to Kshs.335,332/-. These 2 wazees in the words of Ronald "*were following my father saying that they were entitled to a share of his money*". By the time of his death, he had not agreed with them on the issue of sharing the money. After his death, it was these 2 wazees who were paid the money and gave the deceased's family Kshs. 78,000/- which was received by Ronald by order of the chief. He said he had no idea where these 2 came from to claim the money. He confirmed that the disagreements between his father and the accused had been settled through elders Zakary Warungongo and Joseph Mwangi.

19. **PW9, John Mwarari** a brother to PW8 and son to the deceased received the call from PW1 and told PW8 to report to the assistant chief. He said PW8 told him Moses the accused had said he did not know the whereabouts of their father. On 19<sup>th</sup> February 2010 he, his wife Anna Nyambura, his other brother Charles Kamau, their sister Winnie Wangari and her husband and left for home from Nairobi. On their way they learnt that their father's body had been found. The following day he visited the scene. He also visited PW8 and the accused at the police station. He attended the post mortem. He confirmed that his father's body had been cut into 2 pieces the upper and lower body and the neck had been cut but not completely severed. His view was that the quarrels between his father and the accused were normal ones between a parent and his child. He said in addition to his brothers, 3 other suspects had been arrested. He was also aware of 2 wazees who had land dispute with his father and although they were complete strangers to the family they had been paid his father's money from Gathuthi Tea Factory. He said they never told the police about these wazees because the money was paid 4 years after their father's death. These same wazees were demanding a share of their father's land claiming they were sons of their father's brother.

20. **PW10 Charles Kamau** accompanied his sibling on 19<sup>th</sup> February to the village. He confirmed that the accused did not have any land dispute with their father except the 2 strangers who came to claim a share of their father's land.

21. **PW11 Charles Kamau Wachira**, a brother to the deceased who lived in Nakuru also received a call from his nephew on 18<sup>th</sup> February

2010 seeking to know whether the deceased had visited him. He later learnt that his brother had been found killed and his body chopped into 2 parts. He was aware that the 2 strangers had come from Tetu to claim land from his brother. Asked about the relationship between the accused and the deceased, he said he was only aware of one instance where the deceased told him that the accused was not listening to him. He said he was aware that the 2 strangers had also received a share of his brother's compensation from Gathuthi Tea Factory.

22. **PW16 Lawrence Kariuki Kabiru** brother to the accused's mother, brother in law to the deceased. He could recall that his brother in law died and his nephew Moses was arrested. He knew nothing about the relationship between the accused and his father.

23. **PW13 Stephen Matinde Joel Waibe** was an assistant government chemist. He examined the items that were prescribed to him in relation to this case.

Blood sample from the accused

Blood sample from the deceased.

Jembe, spade, panga, blue apron, white/black stripped short sleeved shirt.

These were delivered by PC Jacob Obiero No.73629 on 20<sup>th</sup> February 2010 together with an exhibit memo. Upon examination he found that the items, panga, jembe, spade and clothes did not have any blood stains. He produced his report and the exhibit as evidence.

24. **PW14 Dr. Beatrice Maina** produced the post mortem report made by a Dr. Githinji I.N which the prosecution introduced under s.77 and 33 of the Evidence Act.

She testified that the head was only held on the neck by muscle and skin as it had been almost severed. The body was completely severed at the waist exposing internal organs. Cause of death was beheading and severe body mutilation by sharp object.

25. The same doctor produced the accused's psychiatric report which confirmed he was mentally fit at the time of the alleged offence. She also produced the accused person's P3 dated 26<sup>th</sup> February 2010 which indicated that the accused had been assaulted and injured by askaris.

26. **PW 15 No.236568 IP Francis Wambua** was the Investigating officer. The police received the report from the chief Mathenge from Mahiga location that the person who had been reported missing on 16<sup>th</sup> February 2010 was suspected to have been killed near his house. That there was a place which was found to be 'effusing' with blood. The police went to the scene and the body was retrieved. Upon visiting the deceased home they found the house was locked from inside and they did not know how anyone had accessed the inside. Someone was put through the window, the door was opened, the bed was 'unattended' and there were blood stains on the floor. There were drag marks from the kitchen to the door. There was another house about 15m from that house. It was said to belong to the accused. He was not around and was said to be at his grandmother's. Both the accused and Lawrence (sic) (Ronald) were arrested. That upon arrest the accused "appeared to be confessing". He recorded a statement under inquiry before IP Kiema. He produced the exhibits. He confirmed that when accused was escorted for psychiatric examination he was bleeding from the ear and told the doctor he had been assaulted by the officers. He denied that the assault was intended to entail a compensation from the accused.

27. On 20<sup>th</sup> September 2018 the prosecution closed its case. It is from this evidence that the court must determine whether the accused has a case to answer or not.

28. Counsel for the accused submitted that the state had failed to do so for various reasons:-They had failed to demonstrate that accused caused the death of the deceased. That he had any motive/malice aforethought to cause the death of his father. No witness connected the accused with the death of his father.

Investigations left gaps, inconsistency and contradictions which should be resolved in favour of the accused. The allegation that accused committed the offence with others not before court was not established. That the Government analyst absolved the accused and that even the circumstantial evidence did not implicate the accused person. He relied on **Bhatt Vs Republic (1957)EA 332** **Musoke Vs Republic (1958)EACA** **Kosgei Vs Republic (1949) 16 EACA**. He urged the court to acquit the accused.

29. The state through Mr. Magoma prosecuting counsel submitted that the state was relying on circumstantial evidence that the accused was nowhere to be found when the incident happened as he had gone to his grandfather's place that PW5 indicated that the accused and the deceased were not in good terms.

30. The prosecution was expected to establish that;

1. The deceased was murdered
2. by the accused person
3. Jointly with others not before court
4. Murder being defined as the unlawful killing (actus reus) of another with malice aforethought (mens rea)
5. Malice aforethought being defined as the intention to kill

A prima facie case has been defined in the case of **Bhatt -Vs-Republic [1957] 332** to be one where a reasonable tribunal applying its mind on the evidence and the law would convict if the accused person chose to remain silent. The burden to establish this is always on the prosecution as the presumption of innocence prevails until the pronouncement of guilt by the court.

It is noteworthy to analyze how the accused person came into the picture. He is the eldest son of the deceased. It is strange that when PW1 found the blood and other strange things in the home, he did not look for the accused, he did not call the accused. Even when Ronald got the information he did not look for the accused first but rang his other brothers who were in Nairobi PW9, PW10. They too did not ask their brother but rang their uncle PW11 who was in Nakuru. It is the Investigating Officer PW15 who attempted to say that the accused had 'relocated' to his grandmother's place.

Is it possible that the accused was not within when this was happening? It is not clear to this court what the explanation for this was yet it was being alleged that the accused's house was 15m from that of the deceased.

It also noteworthy that it is the assistant chief who introduced the angle of revenge as a motive by the accused person. Interestingly none of the family members had any of this. In fact their view was that whatever disagreements the accused had with their father were the usual ones that any child and his parent could have. There was no dispute over land between the deceased and the sons as he had already shown each one of them the place to put up his house and to till. The deceased lived an independent life and did not depend on his sons for anything to the extent that when he was not home he did not leave them in charge of his cows but left PW1 in charge. None of the witnesses was aware of any major quarrels between them. So what is this circumstantial evidence that the state was relying on?

In **R vs Kipkering arap Kipkoske and Anor (1949) EACA**, the court set the standard for circumstantial evidence. It must be such that no other inference could be drawn except the guilt of the accused. The state established no motive. The government analysts report did not place him anywhere near the scene, the police did not establish whether deceased was killed in his home or elsewhere, and where the accused was at the material time. It was also not established when the deceased was killed. The evidence in this case falls short of that standard considering the numerous gaps in the case for the prosecution.

In fact the persons with a real motive are known. The two strangers who benefited from the deceased's compensation from Gathuthi Tea Factory after his death, and who are said to be claiming part of the deceased's land had real motive to kill the deceased. Why they were not investigated? The police left a big gap in their case when they left the trail that without seeing it to the end. They cannot expect the accused person to now fill in the gaps for them.

The deceased herein was killed in a very horrendous manner. What human being will cut off the head of another and then cut his body into two halves and bury them separately? Was it just a murder or a message being sent out by a person or people prepared to do anything for whatever they were out to gain?

These people are still out there!

There was no evidence that the accused knew the people who killed his father or would gain in any way from his death.

The prosecution went after the soft target out of rumors that did not even amount to strong suspicion to warrant the arrest and arraignment of the accused for this offence. I find that from the evidence before me, there is no circumstantial evidence to warrant the accused being put on his defence.

In the words of judges in Bhatt v R

**"(i) 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 the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.**

**(ii) The question whether there is a case to answer cannot depend 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."**

I need not say more except to enter a plea of not guilty as per s. 306(1) of the CPC.

**Dated Delivered and signed at Nyeri in open court this 16<sup>th</sup> Day of November 2018.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Accused person

Court Assistant: Esther

Ms.Macharia holding brief for Gathiga Mwangi for accused

Ms.Owour for state.

**Mumbua T. Matheka**

**Judge**

**16/11/18**