



**REPUBLIC OF KENYA**

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

**HCCR (MURDER) NO. 11 OF 2015**

**(FORMERLY MERU HCCR. NO. 61 OF 2013)**

REPUBLIC.....PROSECUTOR

-VERSUS -

MUTHOMI KIRIKWE MUTEA .....ACCUSED

**RULING**

1. **MUTHOMI KIRIKWE MUTEA**, the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63** (Laws of Kenya). The particulars of the offence as per the information supplied to this court are that on 16<sup>th</sup> June, 2013 the Accused murdered Jackson Mwangi Murani (the deceased herein) at a place known as Mataranga village Chiakariga Location, Tharaka South District within Tharaka Nithi County. The Accused denied committing the offence when brought to court to face the charge, and the state called four (4) witnesses in support of their case. At the close of the prosecution's case this court is called upon to determine whether based on the evidence tendered by the prosecution, the accused has a case to answer.

2. Both the defence counsel and the prosecuting counsel chose not to make any submissions about the case and left the matter to be determined by this court. It is the duty of the prosecution in criminal cases to place evidence before court that prima facie connects the person charged or an Accused person with the offence for which he is charged with. The state is therefore required to establish a prima facie case at this stage of the proceedings. So what is a "*prima facie case*"? A prima facie case is defined by Black's Law Dictionary as "*The establishment of a legally required rebuttable presumption .*" A prima facie case is therefore deemed established when the state (Prosecution) places sufficient evidence to establish a fact or raise a presumption unless disproved or rebutted that the accused is connected with the offence he is facing.

3. This court has considered carefully the evidence tendered by all the prosecution witnesses and sadly the only evidence linking the accused with the murder of the deceased herein is the evidence of the investigating officer **JOHN MBARE** (PW3) and a fellow officer Sgt **JOHN GICHOHI** (PW4) who told this court that upon speaking with witnesses they learnt that the Accused was responsible for the murder of the deceased herein. However, the alleged witnesses who included one **DANIEL MUTEGI** where inexplicably not called to testify in this case. The allegations made by PW3 and PW4 cannot form any basis in law because that evidence in the absence of witnesses is rendered hearsay and inadmissible in law. The prosecution did not offer an explanation as to why the eye witnesses were not called to testify yet the police officers (PW3 & PW4) confirmed that there were eye witnesses.

4. I have considered the evidence tendered by **JOSPAT GITONGA MUTEA** (PW1) and find that apart from seeing the deceased and accused person dancing at his place of business which described as a hotel selling tea he never witnessed the incident that led to killing of the deceased. He told the court that the Accused and the deceased were friendly when they appeared in his business premises and that they left together in that mood. He later heard screams outside after the two had left the premises and that he sent his son **DANIEL MUTEGI** to find out. This is the same Daniel Mutegi whom the investigating officer (PW3) described as a witness but was not called. Another important witness not called was **WILSON MAINA**, who was described by PW4 as having allegedly quarreled with the Accused and fought with him before the deceased allegedly intervened and in the process ended up being stabbed himself. These two important witnesses were not called. This court finds but ought to have been called.

This court finds that failure by the prosecution to call them can only lead to an inference being made that the evidence by the witnesses was adverse to their case.

5. I have also noted from the evidence of the investigating officer that he mentioned that Gilbert Mutwiri (PW2) was an eye witness to the incident that led to the deceased herein being fatally stabbed with a knife. However, there is a significant contradiction by the evidence tendered by Gilbert Mutwiri Gitonga (PW2) who told this court that he was not present. He testified to court that at the material time "**he was asleep**" and that he was called by his mother one Lucy Gitonga to help carry the deceased to Hospital in his motorcycle. He clearly stated that apart from carrying the deceased to Hospital where he was pronounced dead upon arrival, "**he did not know who had stabbed the deceased**" as "**he never witnessed the deceased being stabbed**". So the question is if the investigating officer is saying he relied on evidence of Mr. Mutwiri and other eye witnesses not called as witnesses, where is the evidence connecting the Accused person with the murder of the deceased herein? This court find that the answer to that question is in the negative. There is no case made out by the prosecution sufficient enough to require the Accused in this case to rebut. A case is normally made out under **Section 211** of the **Criminal Procedure Code**, when a court finds that the evidence adduced is such that if the Accused was to elect to remain silent as an option in his defence, the evidence should be sufficient enough to render a conviction. In this instant case the prosecution has failed to establish such a case.

The upshot of this is that this court finds that based on the evidence tendered the Accused has no case to answer. The prosecution's case is dismissed and the Accused is acquitted under **Section 210** of the **Criminal Procedure Code**. He shall be set free forthwith unless lawfully held.

**Dated and delivered at Chuka this 20<sup>th</sup> day of July, 2017.**

**R.K. LIMO**

**JUDGE**

20/7/2017

Ruling signed, dated and delivered in open court in the presence of Mutani holding brief for Murithi for accused and Machirah for state.

**R.K. LIMO**

**JUDGE**

20/7/2017