

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 44 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTHII WANJIKU.....ACCUSED

RULING

The accused, James Muthii Wanjiku, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this offence are that on the 2nd day of March 2013 at Kiandutu Slums within Kiambu County, he murdered Martin Irungu Mungai. The accused has denied committing this offence. The trial took some time to commence as the file changed hands from one judge to another until 29th February 2016 when the file was placed before me for the first time. However the trial did not commence until the following day, 1st March 2016 when the trial commenced. The case for the prosecution started on a limping note due to challenges in summoning witnesses.

Four witnesses have testified. The first on the witness stand is Stephen Ndirangu Nga'ang'a, PW1. Ndirangu told the court that he knew the deceased. He said that they used to contract the deceased to ferry market goods for them. Ndirangu came to know about the death of the deceased from a brother to deceased. He did not give the name of the brother to the deceased he was referring to. Ndirangu further testified to arresting the accused who he found in the farm belonging to the deceased. He did not witness the crime taking place.

James Irungu Waitwika, PW2, told the court that he knew the deceased after the deceased asked him to give him a piece of land to plant vegetables. He learned of the deceased's death from one Peter. PW2 assisted PW1 to arrest the accused whom they found him in the piece of land allegedly owned by the deceased. PW2 was not at the scene of the crime and did not testify to how it was committed.

PW4, Jane Muthoni Ngige testified that while at Thika Level 5 Hospital on 2nd March 2013 the deceased was taken to the Hospital with stab wounds on the abdomen. He was pronounced dead at the Hospital. PW4 and one Mwikali assisted in tracing the relatives of the deceased. PW4 did not witness the crime.

PW3 Dr. Eunice Mugweru examined the body of the deceased on 12th March 2013. She found a stab wound on the left iliac region measuring 5cm in diameter and perforated left femoral vessels. The cause of death, in her opinion, was cardio-pulmonary arrest due to severe haemorrhage due to stab wound.

Other than the four witnesses, no other witness testified as the case for the prosecution was closed after the prosecution unsuccessfully applied for further adjournment. There is therefore no other evidence on how the crime was committed. The law and procedure dictate that at the conclusion of the prosecution case the court must analyze the evidence so far adduced and make a determination as to whether it is sufficient to establish a case against the accused in order to call upon him to make a defence. The case made out at this stage of the trial is not proved beyond reasonable doubt but it must be 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 (see **Ramanlal Trambklal Bhatt V. R. (1957) EA 332** and **Wibiro alias Musa v. R. (1960) E.A. 184**).

Is the case before me such a case as defined in the cases I have cited above?

This is what Ndirangu told the court on the identity of the person who is alleged to have killed the deceased:

“On 3rd March 2013 I was at Makongeni Thika where I operate business. One Tamaa who used to work at the same market was said to have died. He used to carry market goods for us. On that day I was informed that he had died. That evening I met his brother who told me Tamaa had been killed by the person he used to work with. That person is the accused in the dock.”

On cross examination Ndirangu said that he later, with the help of PW2 James Irungu, arrested the accused whom he found in the farm said to belong to the deceased. Ndirangu admitted on cross-examination that Tamaa’s brother, who had informed him of deceased’s death, was not at the said farm when the accused was arrested.

The identification of an accused person is one of the major ingredients of the crime of murder. In this case no one witnessed the crime. The brother of the deceased, whose name this court was not given did not come to court to testify as to how he was able to identify the accused as the person who had killed his brother. No other witness came to testify on the same issue. Ndirangu’s evidence on that issue remains hearsay. This evidence is indeed shaky and unsafe to rely on. Further, Ndirangu did not clarify whether Tamaa is the same as the deceased Martin Irungu Mungai. The prosecution did not lead evidence to clarify that Tamaa is the same person referred to as Martin Irungu Mungai, the deceased.

While this court does not doubt that the deceased died as testified by Dr. Mugweru, PW3, the identity of the person who caused that death has not been proved. The crime of murder has three main ingredients: that death occurred, the identity of the person causing that death and the intention to cause that death. In the absence of evidence to prove this, even at this stage of the trial, this court will be taking part in a wild goose chase. The accused person does not bear the burden of proving his innocence and shot of confessing the crime, he is not expected to fill the gaps left by the prosecution case.

After giving this matter serious thought and consideration, it is my finding that the evidence tendered does not make out a case on which this court, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence. Placing the accused on his defence will not cure the gaps left by the prosecution. The prosecutor faced challenges of summoning witnesses and it seemed that the challenges were beyond her control. For a successful prosecution of a criminal case, there must be strong support from the investigating agencies. This was not available and due to this failure of the investigating agencies, this case has been lost and justice for the victim has not been served. This court can do no more than what the law dictates, to acquit the accused person for the offence of murder, which I hereby do. He has been in custody since March 2013 over three years. Consequently, I hereby order immediate release from custody of James Muthii Wankiku, unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 6th day of December 2016.

S. N. Mutuku

Judge