



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 15 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN GACHATHI GITAU.....ACCUSED**

**RULING**

John Gachathi Gitau is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the offence are that on the 22<sup>nd</sup> day of November 2009 at Mirano Village in Kiambururu Sub-location in Githunguri District within Kiambu County murdered John Gachathi.

On 8<sup>th</sup> July 2015 the prosecution counsel applied to have the investigating officer produce statements of Michael Mbugua, a witness who has not been traced and of Eric Tibe Ndichu who is said to have passed on 1<sup>st</sup> July 2015. Counsel told the court that she had the burial permit to support that Eric died. She relied on section 33 of the Evidence Act to support her application. Counsel told the court that the case is an old one and the investigating officer has done all in his power to trace this witness without success.

The application to have the investigating officer produce the statement of Michael Mbugua the witness who cannot be traced was opposed by the defence counsel Mrs. Kinyori. She did not however oppose the production of the deceased witness as long as a death certificate is produced as proof of death.

This is an old case which was presented in court on 31<sup>st</sup> January 2011. It has changed hands between judicial officers. One common factor is the number of adjournments granted the prosecution for lack of witnesses. When I took over the proceedings in this case on 13<sup>th</sup> November 2014, only one witness had testified. Despite the challenges in procuring attendance of witnesses I have managed to take evidence of three witnesses from November 2014 to date. On 24<sup>th</sup> March 2015 this court allowed the prosecution an adjournment and cautioned that it would not entertain further adjournment to the prosecution on account of non-attendance of witnesses or lack of exhibits. The case was adjourned to 13<sup>th</sup> and 14<sup>th</sup> May 2015 but the court was not sitting on those days for reasons on record. Prosecution counsel submitted from the bar without calling for evidence to prove the efforts put in place to trace and summon the witness. She relied on section 33 of the Evidence Act which gives an exception to the general rule that all facts may be proved by direct evidence, which is evidence that the witness saw, heard or perceived by any other sense or in any other manner as per Sections 62 and 63 of the Evidence Act. Section 33 allows admissibility of oral or written statements made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

The wording of that section gives the court the discretion to determine whether the attendance of the witness in question cannot be procured without unreasonable delay or expense. It is not for any party or their respective counsels to determine this. It is the duty of the applicant to satisfy the court in this respect. It would have been prudent to call evidence on oath to establish that the witness cannot be traced and give details of the effort put in to trace the witness. Without doing this and given that the court had cautioned on further adjournment on the issue of lack of witnesses or lack of exhibits this court reads bad faith in this application and an attempt to circumvent the order of the court dated 24<sup>th</sup> May 2014.

My considered view is that prosecution counsel has not satisfied this court that any efforts have been put in place to procure the attendance of Michael Mbugua. I will and do hereby decline to allow the investigating officer to produce the statement of Michael Mbugua. He is however allowed to produce the statement of the deceased witness but he must table evidence as proof of his death. In the absence of a death certificate this court requires evidence to show that the witness died and perhaps the death certificate has not been issued. I wish also to state that the prosecution counsel did not produce the burial permit although she mentioned that she had it. I make orders accordingly.

**Dated, signed and delivered this 13<sup>th</sup> day of July 2015.**

**S.N. MUTUKU**

**JUDGE**