REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 34 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

NAFTALI CHEGE.....1ST ACCUSED

CHARLES WANGOMBE MUNYIRI.....2ND ACCUSED

ISHMAEL BARAKA BULIMA.....3RD ACCUSED

JOHN PAMBA.....4TH ACCUSED

RULING ON CASE TO ANSWER

The Charge

1. The four accused persons herein were together charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.

2. Particulars of the charges were as follows:

> (1) Naftali Chege (2) Charles Wangombe Munyiri (3) Ishmael Baraka Bulima and (4) John Pamba were on 19/5/2012 at Diani Location, Msambweni Sub-county within Kwale County jointly with others not before court, murdered Alexander John Runan Monson.

3. The summary of facts underlying the charge are that the deceased person, Alexander Monson was arrested by officers from Diani Police Station on the evening of 18th May 2012 at Tanduri Bar and Restaurant Parking Bay. At the time of his arrest, the deceased was in the company of his friend Andrew Simiyu Bowy. The duo was arrested while sitting in the deceased's car as Mr. Bowy was waking up from a nap and the deceased was on the phone. The 1st accused and the third accused were the officers that searched the vehicle. The officers allegedly retrieved a brown paper bag and proceeded to ask the deceased of the contents of the paper bag. The deceased opted not to answer the question. The duo was bundled into a waiting police car and driven to the police station. Mr. Andrew Simiyu Bowy's father arrived at the police station soon after the duo arrived. Consequently, after Mr. Bowy recorded a statement he was released from custody. Neither Mr. Bowy nor the deceased had been booked in the OB book. When Mr. Erico Mandela Amadei (Kiko) asked for the Occurrence book to see if the deceased was registered in the OB book, the police refused to show him the book. Mr. Bowy last spoke to the deceased when he (Mr. Bowy) was being released. The deceased informed him that he had spoken to his people. When Mr. Bowy was released from police custody, the deceased was in good shape and had no physical injuries. Neither did he have any complaint, a fact confirmed by a number of witnesses. Although Andrew Bowy was granted bail by the police, attempts to secure bail for the deceased by PW2 William Anthony Lindsay Kennaway bore no fruit and the deceased spent the night in the police cells.

4. On the next day at 9:00 AM, Mr. Bowy called the deceased's phone but the call did not go through. Mr. Bowy then proceeded to the deceased's house which was empty. Soon after leaving the deceased's house, Mr. Bowy got a phone call from a friend by the name Jerri Oakley informing him that the deceased had passed on.

5. Notably, all the senior officers available that night were not informed by any of the accused persons of the deteriorating condition of the deceased during the night and in the early morning. The officers manning the report desk did not book any incident report regarding the status of the deceased until he was discovered by officers from the DCI in a critical condition alone in the cells. The DCI officer who discovered the deceased unwell in the cells categorically denied that there was an incident report but the OB record indicates that there was such a report thereby raising the question, as correctly observed Mr. Muteti, learned prosecutor, who recorded it? When? And why?

6. Although this is a contested issue, medical evidence from the pathologist appear to dispute the possibility of death arising from a fall as

the injuries were inconsistent with such a theory. The body was also bruised on the left arm, and another unexplained injury on the scrotum.

7. The State's legal team led by learned Counsel Alexander Muteti included Mr. Owiti; Ms. Mwinzi, learned Counsel appeared for IPOA; Mr. Oloba and Mr. Aboubakar, learned Counsel appeared for the Victim's family; the 1st Accused was represented by Mr. Magolo, the 2nd Accused by Mr. Wamotsa, the 3rd Accused by Mr. Aminga while the 4th Accused was represented by Mr. Wangalwa, learned Counsel.

8. The State called 32 witnesses in an attempt to prove the charge against the four accused persons. As submitted by Mr. Magolo the State, through the Office of the DPP and the police were expected to provide evidence showing the following:

(a) That the accused persons committed or omitted an act which act caused the death of the deceased.

(b) That the accused persons in committing that act were intending to cause the death or injury to the deceased or some other persons.

(c) That the act or omission committed as in (a) above was unlawful.

9. I have carefully considered the charge, the evidence produced by prosecution witnesses and submissions filed herein on case to answer. Murder is committed through acts or omissions by individuals who bear the necessary criminal intent to commit the felony. The infliction of grievous bodily harm by itself may constitute the necessary *mens rea* and so is the omission to take action that may avoid one from suffering grievous harm leading to their death. The Penal Code under Section 203 provides; -

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

12. The provision makes it mandatory that malice aforethought must be established before a conviction for murder can be arrived at. Section 206 of the Penal Code gives guidance as to what constitutes malice aforethought. It states: -

"Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

11. Mr. Muteti submitted that in the present case, the prosecution's entry point is Section 20 6(a) and (b) considering the evidence tendered by the prosecution. Although there were no eye witness account of assault being visited on the deceased by any of the accused persons on the date of arrest, medical evidence adduced by the doctors who performed the post mortem demonstrates that the deceased was assaulted in the head, the scrotum and the upper limbs. The witness account of the persons who were with the deceased on the material day of arrest and those that saw him at the police station leaves no doubt that the deceased was in good health and did not show any signs of illness. The mystery which is left to this Court to unravel is what may have happened to the deceased between the time that he was booked in at the police station and the morning when he was found sick in the cells. The deceased cellmates deny witnessing him being assaulted in the cell either by fellow inmates or by the police. The only reasonable presumption therefore is that this assault must have happened somewhere within the police station but away from the persons who were in custody. Doctor John Jesse Payne in his evidence indicated that the nature of injury to the head would not be the kind of injury that one would be walking around with without any complaint. The witness testified that the injuries were not consistent with a fall as the defense attempted in close examination to suggest to the witnesses.

12. Mr. Wamotsa, learned Counsel for the 2nd Accused submitted that the prosecution has not established a case for the 2nd accused to answer to the charge; that the prosecution is required to prove their case beyond reasonable doubt at any stage of the case. In my view, if the prosecution is required to prove their case beyond reasonable doubt at every stage, then there would be no need to make a ruling on a case to answer, and there would be no need to hear accused on their defence, because the prosecution's case is already proved beyond reasonable doubt upon only hearing the prosecution's case. Further, this would be contrary to the law on *prima facie* case. Mr. Wamotsa submitted that the prosecution should at every stage prove their case beyond reasonable doubt because once the accused is placed on his defence based on evidence tendered by the prosecution at the close of their case the Court may convict the accused if he elects to remain silent. The simple answer to this concern is that a *prima facie* case, which is not rebutted either by the defence evidence or by the silence of an accused is good enough, to found a conviction: It may be a weak *prima facie* case; it may be a strong prima facie case. If it is not rebutted, both have equal force to convict.

Mr. Wamotsa also submitted at length on the charge, and made allegations that the charge as drawn is fatally defective. Counsel submitted that under Section 203 of the Penal Code one can commit murder by either an unlawful act of commission or an unlawful act of omission. One cannot be charged in the same count with both acts of commission and omission. The two are mutually exclusive to prevent prejudice or embarrassment being occasioned to the accused. What the prosecution charges the accused with must be borne out of the particulars in the

information. If it is an act of commission the particulars must show the unlawful actions that led to the death. If prosecution is pursuing acts of omissions the particular acts of unlawful omissions must be stated in the information. Mr. Wamotsa submitted that the current information is silent on whether they are pursuing an act of commission or omission on the part of the 2nd accused. Mr. Wamotsa submitted that the 2nd accused is wondering and asking himself "*Are they prosecuting me for inflicting the fatal hit on the deceased or is it for negligence, or for both? He doesn't understand the charge and its particulars. To what and how do I respond?"* How do I respond or prepare to respond to the charge that is ambiguous?" Counsel submitted that such a charge has greatly embarrassed and prejudiced 2nd accused to an extent that he cannot mount a defence against the charge.

13. The evidence herein points strongly to the doctrine of circumstantial evidence.

In **Sawe v Republic [2003] eKLR** the Court of Appeal had this to say

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of his guilt. There must be no other coexisting circumstances weakening the chain of circumstances relied upon."***

14. The analysis of evidence before this Court makes it clear that the deceased was arrested while in good health and had no complaints to make about his health up until the last person who knew him went to see him at the station. It is also clear from the evidence of those who were in the cells with him that he did not speak to them about any injuries or ill health.

15. It follows therefore that the circumstances only point to the accused person as the persons who handled the deceased the night in question. Then, if, as medical evidence shows, the deceased suffered any injuries, the accused persons either were personally responsible for the inflictions of such injuries, or they know who inflicted those injuries, or they can explain the possible causes of the same. The accused persons therefore have the responsibility to tell this Court what actually took place on that fateful night or morning.

16. In this case, the accused persons throughout the cross examination have attempted to defer to theories such as the deceased having died out of excessive ingestion of drugs. On the other hand, they indicate that the deceased had fallen while he was being lifted from the cell where he lay ill the fateful morning. These are two conflicting theories, that the accused persons should not just bring out from cross examination. The prosecution has laid out a *prima facie* arguable case, and the accused persons should take to the dock to explain their innocence, if any. What constitutes *prima facie* case and the standard of proof thereon is now well settled in Kenya. See **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR 85.**

> ***"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, if yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion."***

17. From the foregoing, this Court finds and holds that the four accused persons herein, have a case to answer for the death of Alexander John Runan Monson. The accused persons are accordingly hereby put on their defence herein.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 22ND DAY OF MARCH, 2021.

E. K. O. OGOLA

JUDGE

Ruling delivered in Open Court in the presence of:

Mr. Muteti for State

Mr. Aboubakar for Family

Mr. Olaba for Family

Mr. Otieno holding brief Mr. Aminga for 1st Accused

Mr. Wamotsa for 2nd accused person

Mr. Magolo for 3rd Accused

Mr. Wangalwa for 4th Accused

Ms. Peris Court Assistant