



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 14 OF 2015

REPUBLIC

VERSUS

CHIBUNGU SANGA.....ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; he was accused of having murdered **GREGORY KINGORI KANYI** on the 8th day of March, 2015 at Kiriti Village within Mukuruweini South Sub County within Nyeri County;
2. The accused entered a plea of Not Guilty and at the hearing he was at all times represented by Learned Counsel Mr. Mwangambo whereas Ms. Gicheha was the Prosecuting Counsel for the State;
3. A total of fourteen(14) prosecution witnesses were called in support of the prosecution's case and at the close of its case both counsel were invited to make submissions on whether the prosecution had made out a case that would necessitate the accused to be called upon to defend himself; hereunder is a summary of the rival submissions;

DEFENCE SUBMISSIONS

4. Defence counsel relied on the cases of **Republic vs Abdi Ibrahim Owl [2013]eKLR; Ramanlal Trambaklal Bhatt vs R [1957] E.A. 332 at 334 and 335 and Republic vs Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** and submitted that the prosecution must establish a prima facie case against the accused to warrant the honourable court to call upon the accused to give his defence.
5. It is the defence submission that the accused acted in self-defence as his life and that of his fellow officers was in danger. He relied on the case of **Ahmed Mohammed Omar & 5 Others vs Republic [2014] eKLR** where the Judge quoted the cases of **R vs Mc Innes 55 Cr. App. R. 551 and R vs Deana 2 Cr. App R. 75, CCA** and submitted that the accused person could not wait for the deceased to attack him and injure him before striking in self-defence. Further, the prosecution did not disprove the defence's theory of self-defence. This principle was enunciated in the case of **Beckford vs Ford [1987] 3 ALL ER 425**. The prosecution failed to dispute the fact that the deceased came out with a panga and advanced to attack the accused. The accused reiterates that he acted within the law as he first warned the deceased by shooting in the air but the deceased defied the orders, threatened them and charged towards the police officers forcing the accused to shoot at him.
6. The defence further points out the inconsistencies of the witness testimonies in their statements from those noted down in the Independent Policing Oversight Authority (IPOA). Notably, PW14 stated that they took witness statements 10 days after the incident happened and after the police had recorded the witness statements. This gave the family members ample time to change their statements to appear similar with each other yet the initial statements recorded by the police differed. As such, the defence submits that the statements ought to be received with a lot of scepticism and caution.
7. The deceased had threatened the police officers when he was asked to open the door and he came out armed with a panga advancing towards the police officers despite been warned severally to drop the panga. The defence adds that the accused was forced to shoot in the air as a warning sign but when the deceased did not adhere to dropping the panga, the accused shot the deceased in order to disarm him. The defence submits that the accused person acted within the law particularly **Section 61 of the National Police Service Act (No. 11A of 2011) and The Sixth Schedule of the Act** in using his firearm as an act of self-defence and in defence of his fellow officers. As such, the death of the deceased was not occasioned by an act unauthorised by the law. The defence relied on the case of **Republic vs Silas Magongo Onzere alias Fredrick Namema (supra)** to buttress his position.

8. The defence submits that the prosecution has failed to prove that the accused had the intention to kill the deceased. The accused already in

lawful possession of a firearm when he went to effect an arrest on the deceased. The defence submits that the accused only shot at the deceased once before the deceased escaped which indicates that he had no intention of killing the deceased. This evidence is corroborated by the testimonies of PW3, PW9 and PW11. Furthermore, the defence submits that the accused was present at the scene the following day and thus his conduct before and after the shooting shows that he did not have any malice and neither did he pre meditate the deceased's killing.

9. The defence concludes his submissions by stating that the prosecution has failed to prove its case against the accused and as such, the accused ought to be acquitted pursuant to **Section 210 of the Criminal Procedure Code**.

PROSECUTION SUBMISSIONS

10. The prosecution relies on the case of **Bhatt vs Republic (1957) EA 332** and submits that it has proved its case beyond reasonable doubt to warrant the accused to be put on his defence. The prosecution has proved that the deceased was shot dead and this was corroborated by PW1, PW2, and PW13. Further, the post mortem report (Exhibit 15) provides that the cause of death was severe bleeding and lung collapse due to a single gunshot wound to the chest close range and high velocity. Accordingly, there is no evidence to the disprove that the death was unlawful. The prosecution relies on the case of **Uganda vs Lydia Draru alias Atim HCT-00-CR-SC-0404** to support its contention that every homicide is presumed to be unlawful unless circumstances make it excusable.

11. The prosecution submits that the accused was at the scene of the crime and acted with malice aforethought and killed the deceased. Evidence in court showed that when the accused together with two police officers (PW9 and PW10) went to arrest the deceased, only the accused was armed with a firearm. The firearm had a magazine round of thirty (30) rounds but on the day of 8th March 2015, the accused returned with the firearm with 28 rounds.

12. The prosecution disputes the theory of self-defence and submits that no panga was at the scene of the crime and therefore there was no justification to shot the deceased. The Scene of Crime Officer never recovered any panga at the scene and it is only until the OCS claimed that he recovered the panga which he described as having a black handle but the panga that was photographed had a brown handle. The prosecution relies on **Section 17 of the Penal Code** and the case of **Republic vs Simion Owuor Otieno (2017) eKLR** where the court held that the law on self-defence has evolved from an objective approach to a subjective approach. Case law relied on was **Ahmed Mohammed Omar & 5Others vs Republic (2014) eKLR**. As such, the prosecution states that applying the subjective tests and the circumstances of the case do not support the defence's theory of self-defence.

13. On the issue raised by the defence that there were several inconsistencies in the prosecution's case, the prosecution submits that there were no contradictions nor inconsistencies and in the event there were there, they are minor and do not go to the root of the prosecution and hence ought to be ignored by the court.

14. The prosecution submits that it has proved its case against the accused requiring him to be placed on his defence. Moreover, the defence did not discredit the prosecution evidence in any way during cross-examination.

ANALYSIS

15. The question is whether the prosecution has made out a '*prima facie case*' for the accused to answer; the definition of a '*prima facie case*' is well captured in the renowned Court of Appeal case of **Bhatt vs Republic (1957) EA 332** where the court held as follows;

'A prima facie case must mean one where a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.'

16. At this stage, if this court were to find that there is '*a prima facie case*' made out by the prosecution it is not required to give any reasons for reaching such a decision; the reasons would only be requisite if the court were to uphold the submissions on '*no case to answer*';

17. This court has thus evaluated the evidence on record and has directed its mind to the applicable law on the offence; upon applying the same principles as set out in the cited authority **Bhatt (supra)** this court is satisfied that '*the evidence could convict if no explanation is offered by the defence*' and finds that the prosecution has established a '*prima facie*' case against the accused that warrants him being placed on his defence to answer to the charge;

18. For those reasons this court finds that the accused has a case to answer; his rights and options will be put to him for election before he presents his defence.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 23RD DAY OF JUNE, 2021

HON. A. MSHILA

JUDGE