



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KABARNET

CRIMINAL CASE NO. 56 OF 2017

REPUBLIC.....PROSECUTOR

V E R S U S

PETER KEMBOI KANDIE.....1ST ACCUSED

BENSON ROTICH.....2ND ACCUSED

JAPHETH KERIENY.....3RD ACCUSED

RULING

Procedure history

The issue before me is whether they have a case to answer in terms of section 306 (1) and (2) Criminal Procedure Code (Cap.75) Laws of Kenya. **The accused are charged with murder contrary to section 203 as read with 204 of the Penal Code (Cap.63) Laws of Kenya**, in respect of the deceased, Felix Kimutai. They pleaded not guilty. The prosecution called five (5) witnesses in support of the charge and all of whom testified before Murithii, J. The prosecution closed their case before me; after I granted them one last adjournment on 8/3/2021.

The prosecution case

The prosecution called David Chebeyi (PW 1), who was the father of the deceased (Felix Kimutai). PW 1 testified that he identified the body of his deceased son to Dr Wekesa Nyarieny (PW 4) at Moi Teaching and Referral hospital. PW 4 performed the postmortem examination on the body of the deceased on 28/11/2014. PW 1 further testified that the accused persons are his neighbours. Francis Cherutich (PW 2), who was a teacher testified that on 20/11/2014 he heard people call for help to arrest the 1st accused. The deceased while armed with a knife responded. PW 2 reached a certain plot near the road, and saw the deceased lying on the ground. There he also saw the 2nd accused, who was bleeding from his head and forehead. The 2nd accused told PW 2 that he had been stabbed with a knife by the deceased. The 2nd accused also told PW 2 that the 1st accused had been chased by the deceased. In addition to the foregoing, the prosecution called Japheth Kimutai (PW 3); who was the assistant chief. PW 3 testified that on 20/11/2014 at 1.30 pm while he was at Pemwai Centre, he saw people running away. He went to find out what was happening. He found PW 2 escorting the 2nd accused. The 2nd accused was bleeding from his head. A man nicknamed Kirinyaga (the 3rd accused) was following the 2nd accused. The 3rd accused told PW 3 that no one had been stabbed. He found the deceased lying on the ground. PW 3 then called the acting chief of the location. Upon returning back, PW 3 found that the deceased had been removed to hospital. In cross examination PW 3 testified that he did not see the 1st and 3rd accused at the scene. The prosecution also called Dr. Wekesa Nyarieny (PW 4), who performed the postmortem examination on the body of the deceased on 28/11/2014; after it was identified to him by PW 1. His findings were as follows. The deceased was aged 24 years old of a height of 162. The body had injuries behind the head, the right side of the neck, chest and left hand. One of the right ribs had been broken. In the head there was blood in the brain. PW 4 concluded that the cause of death was due to severe head injury due to a blunt trauma. PW 4 then produced his report as exhibit 1.

Finally, the prosecution called Edwin Kibyegon (PW 5), who was a boda boda rider. PW 5 testified as follows. On 20/11/2014 at 1.30 pm he saw the deceased and the accused quarrelling over tools.

The 1st accused was a boda boda rider and the deceased was a puncture repairer. The deceased asked the 1st accused about his tools for the repair of punctures. The 1st accused started to beat the deceased. PW 5 intervened to assist the deceased in the course of which he was stabbed by the 2nd accused. The 2nd accused carried a knife as he worked in a hotel. The 2nd accused went on beating the deceased. PW 5 got injured and stepped aside. Many people arrived and screamed. The 1st accused, the 2nd accused and the deceased then stopped fighting. The deceased had injuries all over the body. The 1st and 2nd accused were using fists a knife and sticks in beating the deceased. PW 5 denied

knowing a person by the name Kirinyaga (the 3rd accused).

The submissions of counsel for the accused.

Mr. Kemboi for accused decided not to file any submissions.

The submissions of the prosecution.

Mr. Mong'are for the prosecution filed submissions in which he urged the court to put the accused on their defence. After summarizing the prosecution evidence, counsel cited the Court of Appeal decision in *Ogero Omurwa v Republic*, Criminal Appeal No. 14 of 1979, Kisumu, in which that court held that the appellant, was positively recognized by one Mecha and then proceeded to dismiss the appeal. Counsel also cited *Republic v Ann Karimi*, Criminal Case No. 18 of 2017, in which the High Court held after finding that the offence proved in that case was manslaughter and not murder. Based on those authorities and the evidence, Mr. Mong'are submitted that the accused have a case to answer and should be put on their defence.

Issues for determination

I have considered the entire evidence in the light of the applicable law. I find the prosecution witnesses have not implicated the 3rd accused (Japheth Kerieny) in the death of the deceased. Edwin Kibyegon (PW 5 who intervened to separate the fighting between the 1st accused and the deceased denied knowing the 3rd accused and has not implicated him in the death of the deceased. PW 5 testified that it was the 1st and 2nd accused who beat the deceased.

The applicable law in this regard is that a case is made out so as to require the accused to be put on his defence if a tribunal properly directing itself on the law and evidence could convict if the defence offers no explanation. *See Bhatt v Regina [1957] EA 332.*

Additionally, I am not required at this stage to finally determine the credibility of the witnesses; as this is a matter to be done at the close of main hearing of the case.

In the premises, I find that no case has been made against the 3rd accused to warrant his being put on his defence with the result that he is hereby acquitted and set free unless held on other lawful warrants.

However, I find that the 1st and 2nd accused have a case to answer and I hereby put them on their defence in terms of section 306 (1) and (2) Criminal Procedure Code, *supra*.

Ruling Signed, and Dated 18th day of October, 2021

J M BWONWONG'A

JUDGE

Ruling Signed, dated and delivered in open court at Nairobi this 28th October, 2021

D.O. OGEMBO

JUDGE

In the presence of:

1. *Messrs Kinyua and Kemboi, Court Assistants*
2. *Mr. Mong'are for the Republic*
3. *Mr. Kemboi for the 1st & 2nd accused persons*