



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 52 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

ANTONY MWANGI MUCHIRI1ST ACCUSED

GEOFFREY KAMAU MUIRURI2ND ACCUSED

JOHN JOSEPH KAMAU.....3RD ACCUSED

SIMON NJUGUNA GACHINGA4TH ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 5th day of July 2012 at Kangemi within Westlands District within Nairobi County jointly murdered **NJIIRANI THUO *alias* TOSTI**.

2. On 20/7/2012 they appeared before Ombija J. (as he then was) when the Judge ordered that Advocate be appointed for them for purposes of taking plea. On 26/7/2012 they appeared before Achode PJ who deferred their plea taking to 30/7/2012 before Muchemi J. where a plea of not guilty was entered in their favour and hearing date fixed for 24/25/1/2015 when the State applied for adjournment which was duly granted. After several further adjournments on 22/4/2013 the accused appeared before R. Koriri J. for the hearing of an application for bond and by a Ruling dated 11/7/2013 granted the 4th accused person bond.

3. On 25/11/2013 the matter went back to Muchemi J. for hearing of bond application on behalf of the remaining accused persons and by a Ruling dated 19/12/2013 granted them bond and set down the matter for hearing. After several false start at hearing on 9/7/2014 the hearing commenced before Muchemi J. who heard the evidence of three (3) prosecution witnesses being **PW1**, **PW2** and **PW3** before proceedings on transfer.

4. On 10/3/2015 Lesiit J. issued directions under **Section 201 (2)** of the **Criminal Procedure Code** and directed that the matter proceed from where it had reached and on 1/2/2016 further proceedings commenced before me and at the end of the prosecution case I had heard the evidence of a total of seven (7) witnesses being **PW4**, **PW5**, **PW6**, **PW7**, **PW8**, **PW9**, **PW10** and **PW11** and have had the advantage of reading the recorded evidence of **PW1**, **PW2**, **PW3** and **PW4** for the purposes of his Ruling.

5. At the end of the prosecution case Mr. Ongaro filed written submissions on behalf of the 4th Accused which he relied upon and made oral submissions on behalf of the 1st to 3rd Accused. On behalf of the 4th Accused it was submitted that the information identified one of the accused persons as **Simon Njukuna Gachinga** which was not the said 4th accused for which he was entitled to an acquittal. It was further submitted that the prosecution case was full of inconsistent and contradictory evidence coupled with the fact that one suspect Chrispus Muthenya a General Service Unit Police Officer who was found in possession of the subject motor vehicle which led to the death of the deceased was missing. It was therefore submitted that no witness adduced evidence direct or circumstantial connecting the 4th accused with the death of the deceased.

6. On behalf of the other accused persons it was submitted that the person who brought the motor vehicle to the said **Chrispus Muthenya** was one **Edward Mutuma Mwenda** who is not any of the accused persons. It was submitted that the prosecution had not shown by evidence how the subject motor vehicle was washed by **PW7** four (4) days earlier before he led them to the 4th accused and that telephone call logs during the period under inquiry were never produced.

7. On behalf of the prosecution it was submitted by Mr. Okeyo that the deceased died through strangulation and that the four (4) accused persons were linked to his death through **PW1, PW3, PW10** and **PW2** his wife. It was stated that on arrest of the 1st accused the chain of implications followed as he revealed his co-conspirators leading to their arrest and therefore establishing *prima facie* case.

8. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a *prima facie* case to enable the court place the accused person on his defence. *Prima facie* case has been defined in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean 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.” (Emphasis added)

9. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1)** TLR as follows:-

“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 borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.” (Emphasis added)

10. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on *prima facie* case:-

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted.” (Emphasis added).

11. With this in mind I have looked at the evidence on record and in particular the evidence of **PW2 JELIS WANJIRU** the wife of the deceased who testified that he was called by one Tony who had a customer who wanted to use his motor vehicle for two weeks when the same left at 1.00 a.m. to meet the said Tony and that was the last time he was seen alive. **PW3 PETER K. WAMBUI** who corroborated that evidence and **PW7 PAUL MUNGAI** who connected the 4th accused with the offence together with the evidence of **PW10 TOM NDULO** and without commenting further on the said evidence as stated by Ojwang J. (as he then was) I have asked myself this fundamental question: If I decide to call upon the accused to enter their defence and should they elect to exercise their constitutional right under **Article 50 (2)(i) and (l)**, that is the right to remain silent and to refuse to give self-incriminating evidence, am I prepared to convict them on the totality of the evidence contained in the prosecution case?

12. With the evidence so far placed before the court my answer to the said question is in the positive and therefore that evidence can only be overturned by evidence in rebuttal and therefore find and hold that a *prima facie* case has been established by the prosecution to enable me put the accused persons on their defence which I hereby do. The accused persons are therefore advised of their rights under **Section 306 and 307** of the **Criminal Procedure Code** and are called upon through the legal advice of their counsels to choose how they wish to defend themselves and it is so ordered.

Dated, delivered and signed at Nairobi this 27th day of February, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Kariu for Opolo for the 1st accused

Mr. Kariu for the 2nd accused

Ms Wambui for the 3rd accused

Mr. Ongaro for the 4th accused

Accused 1, 2, 3, 4 - present

Court assistant: Karwitha