



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE IRUNGU MAINA.....1ST ACCUSED

IAN MBUGUA.....2ND ACCUSED

RULING

1. George Irungu Maina, 1st accused, and Ian Mbugua, 2nd accused, are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The statement of the offence reads that: **On the 24th day of December 2017 at about 14.30hrs at Zimmerman Estate in Kasarani Sub-County within Nairobi County, jointly with others not before the court murdered Joseph Ng’ethe Kiarie.**

2. Each accused pleaded not guilty to the charge. The 1st accused is represented by Mrs. Kinyori, learned counsel. The 2nd accused is represented by Mr. Muchiri, learned counsel.

3. The prosecution has concluded its case after calling evidence of 10 witnesses. The parties opted not to make submissions at this stage. The focus now shifts to the court to consider the evidence on record and determine whether the prosecution has discharged its duty of establishing a *prima facie* case against the accused persons. The task of this court at this stage in the proceedings is to decide whether the prosecution has made out a sufficient case against the accused persons to persuade this court to place on their defence (see **Republic v Peter Mungai Ndungu [2017] eKLR**).

4. The test as to whether the prosecution has established a prima facie case against an accused to warrant his being placed on his defence was stated in the case of **Ramanlal Trambaklal Bhatt v. R [1957] EA 332** thus:

“It is may not be easy to define what is meant by a “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.”

5. The case for the prosecution is that on 24th December 2017 at about 2.30pm, motor vehicle registration number KCF 793Z, a *matatu* and a private car registration number KBA 261W were involved in a non-injury accident at a junction of Kamiti Road and a side road. I wish to clarify that the nickname of this *matatu* is captured in evidence as Fast and Furious as pronounced by one of the witnesses but this court has confirmed from the photographs produced in court that it was nicknamed Fist of Fury. The *matatu* belonged to Bernard Mwanzia Mbwele (PW1) and was operated by Marimba SACCO. The small car belonged to and was being driven by Joseph Ng’ethe Kiarie (the deceased). It was joining Kamiti Road from a side road. The crew of that *matatu* confronted the deceased perhaps for causing the accident. They beat him severely occasioning fatal injuries on him.

6. Shortly after the accident and the confrontation, Kipkosgei (PW2) was driving an ambulance belonging to Kamiti Prisons along Kamiti Road. He stumbled on the scene. He found a group of people gathered at the scene. The road had been blocked with burning tyres and stones. He was approached by the public who asked him to help them to take the deceased to hospital. PW2 asked two people to accompany the deceased in the ambulance. Three people boarded the ambulance with the deceased. The third person was Edward Gichuhi (PW7).

7. Edward had been driving his *matatu* KAS 889A along Kamiti Road when he came across the attack on the deceased. He stopped his vehicle and attempted to intervene and stop the assault on the deceased. He was also attacked. He claimed to have been injured. He boarded the ambulance together with the deceased to go to hospital. PW2 took them to Neema Uhai Hospital in Kasarani. The deceased was pronounced dead on arrival. Edward was treated. Thereafter, PW2 reported the matter at the Kasarani Police Station.

8. Evidence shows that the 1st accused was arrested by Sergeant Charles Musyimi (PW10) on 30th December 2017 at Githurai 44. He named the second accused and led PW10 to arrest him at Roysambu stage. Identification parades were conducted for the two accused persons by CIP Muniywoiki Ngumbu (PW9). The witnesses were Edward Gichuhi (PW7) and Kennedy Kimani (PW8). After investigations were completed, the two accused were charged with this offence.

9. I have examined with great care the evidence on record to determine the issue at hand. Although none of the parties submitted before me on this issue, there is evidence on record and also the law and the applicable legal principles to guide this court in arriving at a determination on this matter.

10. In a murder trial, the prosecution must prove death of the deceased; the unlawful act or omission causing that death; the identity of the person who caused that death and whether that person possessed malice aforethought.

11. In the matter before me, even at this stage of the trial, it is clear to this court that Joseph Ng'ethe died as a result of head injury due to blunt force trauma as testified by Dr. Grace Atieno Midigo (PW5) on behalf of Dr. Oduor Johansen who performed the post mortem on the body of the deceased. I have no doubt that this ingredient has been proved to the required standard.

12. I will now turn my attention to the evidence on record to determine the strength or otherwise of this case in order to make my conclusions as to whether to place the accused persons on their defence or not.

13. Bernard Mwanzia Mbwele (PW1) the owner of KCF 793Z did not know the accused persons. He testified that his *matatu* operated two shifts: the morning shift operated by Peter Maina as the driver and Daniel Githinji as the conductor and the evening shift operated by George Mutiso as driver and Kenneth Mburu as conductor. At the time this incident occurred, the *matatu* was with the morning shift crew, Peter Maina and Daniel Githinji. Bernard told the court that the accused persons were not working for him.

14. Kipkosgei Kimutai (PW2) the driver of the ambulance did not know the accused persons. SSGT Peter Kamande Kiarie (PW3) brother to the deceased did not identify the two accused persons as the persons who caused the death of his brother. He did not know them. Paul Njihia Karun'go (PW4) the officer who reconstructed the scene and took photographs of the same did not find the accused persons at the scene. The remaining witnesses include the two doctors, Dr. Grace Atieno (PW5), the pathologist and Dr. Kizzy Shako (PW6) who examined the accused persons. Their role did not involve them at the scene and they did not know the accused persons. CIP Muniywoiki Ngumbu (PW9) conducted the identification parade. The Investigating Officer Sergeant Charles Musyimi (PW1) evidence depended on what witnesses told them.

15. This leaves me with the evidence of Kennedy Kimani (PW8) and Edward Gichuhi (PW7). Close examination of this evidence will determine this case in one way or the other.

16. Edward Gichuhi told the court that he found the crew of Fist of Fury assaulting the driver of the private car. He said he could identify the driver and the conductor because they were in uniform. He said there were other two people in civilians. He said the four of them attacked the deceased. He said he knew George Irungu, 1st accused, because he knew his father and used to see the 1st accused since his childhood. He said both the 1st accused and Ian Mbugua, the 2nd accused, were at the scene. He said both wore civilian clothes. Edward identified the 2nd accused as the person who stepped on his ankle with timberland shoes.

17. Edward participated in identification parade at Kasarani Police Station mounted by PW9 CIP Muniywoiki Ngumbu. In his evidence in reference to the parade, Edward told the court as follows:

“I was taken to a parade of young men. I identified 1st accused in the dock. I identified him to assist me get other suspects. At the confrontation he was not attacking anyone. The driver was not at the parade. Another suspect who wore several rings was not at the parade.”

18. Edward told the court on cross-examination that he had known the 1st accused since his school days. He said he went to the parade because the 1st accused was not alone. He said he found both accused at the parade. He contradicted himself when he told the court in cross-examination that **“I saw the 1st accused beating the deceased and that the 1st accused used fists”**. He also stated on cross-examination that **“the purpose of identifying the 1st accused was for him to help in the identification of other suspects.”**

19. In respect of the 2nd accused, Edward did not identify him at the parade despite him stating that the 2nd accused had stepped on his ankle with timberland shoes. On cross-examination in respect of the 2nd accused, Edward stated that:

“I knew Ian before this incident. I used to see him. I did not know his name but he looked familiar. I knew him that day. My statement does not show that Ian had stepped on my ankle with timberland shoe.”

20. Edward contradicted himself further on cross-examination when he told the court that he identified the 2nd accused during the identification parade by touching him on the shoulder. He also said it was easy for him to identify both accused persons at the parade because he knew them. The evidence of CIP Muniywoiki is that Edward identified the 1st accused but not the 2nd accused. This is also captured in identification parade form (Ex.7). Edward admitted in cross-examination that he did not mention both accused persons in his statement to the police.

21. Kennedy Kimani (PW8) in his evidence in chief mentions the two accused persons by name and stated that both were at the scene. He said both accused were known to him before this incident because both were *manambas* (touts) in Fist of Fury. He said both worked as

“kamagira” and on that day both had been given “squad” by a conductor called Dan in Fist of Fury. In simple terms I understood Kennedy to mean that the two accused were touts operating on freelance bases and worked in any *matatu* that gave them casual work of touting and that on that day they were working in the *matatu* belonging to PW1. They were not employed by SACCOs or by owners of the *matatus*. If this evidence is true, then it would not be far-fetched to take it that the Dan referred to as having given the two accused casual touting job in Fist of Fury is the Daniel Githinji mentioned by PW1 the owner of Fist of Fury as his conductor in the morning shift when this incident occurred.

22. What is clear from the evidence in chief of Kennedy is that he did not mention attending any identification parade or identifying anyone in an identification parade. It is therefore surprising to hear CIP Munywoki telling the court that Kennedy attended the identification parade and identified the 2nd accused.

23. On the face of that evidence as narrated in this ruling, it is clear to me that Edward identified the 1st accused not because he saw him assaulting the deceased but because he wanted him to assist him in identifying the people who had assaulted him. His evidence that the 2nd accused stepped on him cannot be taken as truthful since he did not identify him at the parade. He also contradicted himself in his evidence on the identity of the suspects who assaulted the deceased.

24. The evidence of Edward and Kennedy does not in the least assist the prosecution case. At its worst, it is worthless. This court can only describe it as untruth and incredible. It is unbelievable that the police conducted identification parade even when Edward and Kennedy knew the accused persons before the date of offence.

25. Since the evidence of the two witnesses is the only evidence that was aimed at giving the identity of the suspects then it means that there is no credible evidence pointing to the suspects who assaulted the deceased.

26. There is mention that four suspects assaulted the deceased. If the two accused persons are two of the four suspects, then the evidence against them is very weak. But there is evidence from PW1 giving identity of his driver and conductor in the morning shift when this offence occurred as Peter Maina and Daniel Githinji respectively. The Investigating Officer, SGT Charles Musyimi admitted that PW1 gave him the names of his driver and conductor. He said he has tried to look for and arrest them without success.

27. My careful consideration of the evidence tendered by the prosecution is that it falls short of establishing a *prima facie* case upon which this court could call upon the accused persons to make their defence. It is the kind of evidence that in the final determination of this case would not prove this case beyond reasonable doubt. It is trite that an accused person does not bear the onus of proving his innocence. With the conclusion of the case for the prosecution and there being no other evidence against the accused persons expected, it would be a waste of judicial time to place the accused persons on their defence for this court to come to the same conclusion in the final analysis.

28. In compliance with Section 306 (1) of the Criminal Procedure Code I make a finding of not guilty in respect of each accused person. None of them has a case to answer and therefore this court will not proceed to put them on their defence. Consequently, I hereby acquit George Irungu Maina and Ian Mbugua. They are at liberty to enjoy their freedom unless for any other reasonable cause they are held in custody.

29. Orders shall issue accordingly.

Dated, signed and delivered this 20th day of June 2019.

**S.
Judge**

N.

Mutuku