



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 29 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**THOMAS KIPKEMOI KIPKORIR.....1<sup>ST</sup> ACCUSED**

**JOSEPH KOMEN YATICH.....2<sup>ND</sup> ACCUSED**

**SEBASTIAN YANO KOMEN.....3<sup>RD</sup> ACCUSED**

**RULING**

Thomas Kipkemoi Kipkorir (named in the file as No. 66003 SGT Thomas Kipkemoi Kipkorir), Joseph Komen Yatich (named as No. 217643 APC Joseph Komen Yatich) and Sebastian Yano Komen (named as No. 21652 APC Sebastian Yano Komen) who are the 1<sup>st</sup> accused person, 2<sup>nd</sup> accused person and 3<sup>rd</sup> accused person respectively are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence state that on the night of 30<sup>th</sup> March 2012 at Kwitu Classical Bar (herein Kwit Bar) in Eastleigh Section III within Nairobi County they jointly murdered Nicholas Ochieng Odongo (herein the deceased). The accused persons have individually denied committing this offence. They are represented by Ms Onyinkwa for the 1<sup>st</sup> accused, Ms Odembo for the 2<sup>nd</sup> accused and Mr. Koech for the 3<sup>rd</sup> accused.

The prosecution has presented evidence of sixteen (16) witnesses in support of its case. From their evidence, specifically the evidence of Dr. Minda Okemwa, (PW5), the deceased had sustained multiple injuries: a laceration measuring 5cm long; a cut at the back of his head extending deep to the soft tissues; multiple bruises on the shoulders and lower limbs; a black left eye; intra-abdominal bleeding with perforation of small bowels (intestines) and outpouring of the abdominal contents causing an infection; injuries on the heart; tiny bleeds attributed to shock; and mild brain contusions. The doctor formed the opinion that the deceased died as a result of perforated small intestines with infection due to blunt trauma.

The prosecution led evidence that the three accused persons before this court are the ones who assaulted the deceased on 30<sup>th</sup> March 2012 at Kwit Bar in Eastleigh Section 3 Nairobi occasioning him the injuries that led to his death. The three accused persons are said to have been drinking in the said bar when a confrontation between them and the deceased occurred leading to the three assaulting the deceased. The prosecution evidence shows that the three accused arrested the deceased after the assault on allegations that he had caused a disturbance at Kwit Bar; that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons escorted the accused to Eastleigh Patrol Base; that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons failed to take the deceased to

hospital as directed by IP Francis Muthee Gichuhi, PW9; that the two abandoned him and did not report back to PW9; that the deceased was rescued and taken to hospital by his friends Collins James Akhamuye, PW1, Nivel Ogesa, PW2, and his wife Racy Nyandifa, PW14; that he later died in hospital while undergoing treatment.

At the close of the prosecution case the prosecution counsel Ms Macharia submitted that the prosecution had made out a prima facie case against the accused persons and called on the court to place each of them on their defence. She submitted that the three accused persons were placed at Kwitu Bar by PW3, PW4, PW6, PW8 and PW10; that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons were seen in company of the deceased by PW9 making a report at the Eastleigh Patrol Base; that the two did not take deceased to hospital as directed by PW9 but abandoned him; that all the three accused persons were seen assaulting the deceased and that the prosecution has proved that the three accused persons possessed the intention to kill the deceased or to cause him grievous harm. She urged the court to place the three accused persons on their defence.

I wish to state that the order of submissions is mixed up as appears on the court file record. The defence counsels submitted before the prosecution counsel. I noted this anomaly and made a ruling that despite the anomaly none of the parties has been prejudiced by the same and that this is a technicality that can be cured under the law.

On the other hand, Ms Onyinkwa for the 1<sup>st</sup> accused submitted that the prosecution did not establish a prima facie case against the 1<sup>st</sup> accused; that PW4 is the only eye witness but she did not witness the assault because she hid behind the counter; that the deceased caused a disturbance at the bar and the 1<sup>st</sup> accused had a duty to maintain law and order by arresting the deceased who resisted arrest as a result of which he fell down; that the 1<sup>st</sup> accused and his colleagues took the deceased to the Eastleigh Patrol Base to book him in; that they were directed to take him to hospital first which they did and only left when his friends and wife went to hospital; that the 1<sup>st</sup> accused had good intentions and that the prosecution acted in haste in charging the 1<sup>st</sup> accused with murder. Counsel urged the court to acquit the 1<sup>st</sup> accused because he has no case to answer.

Ms Celine Odembo on behalf of the 2<sup>nd</sup> accused submitted that although PW1 said he saw the deceased being harassed by two officers he denied witnessing the alleged assault or knowing the 2<sup>nd</sup> accused; that PW3 Nicholas could not remember the people he left at the bar; that PW4 Jackline could not remember what the people who assaulted the deceased were wearing and she did not identify the 2<sup>nd</sup> accused; that the cause of death could have been caused by negligence by the doctor or attributed to a fall; that PW6 contradicted PW4 when she said that no one threatened them and that these contradictions casts doubt into the credibility of their evidence.

Counsel further submitted that no witness identified the 2<sup>nd</sup> accused as having assaulted the deceased; that witnesses contradicted themselves as to who took the deceased to Eastleigh Patrol Base, whether 1<sup>st</sup> and 3<sup>rd</sup> accused or 1<sup>st</sup> and 2<sup>nd</sup> accused; that the ingredients of murder have not been proved; that there is no proof of motive and malice aforethought; that this could have been a case of “mob justice” and that there were no exhibits in court. Ms Odembo cited the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332** in support of her submissions for no case to answer and asked the court to acquit the 2<sup>nd</sup> accused person.

Mr. Koech on behalf of the 3<sup>rd</sup> accused submitted the only issue at this stage is to determine whether the prosecution has established a prima facie case against the 3<sup>rd</sup> accused person to warrant his being placed on his defence. Counsel submitted that the 3<sup>rd</sup> accused person was not directly or indirectly implicated with the assault of the deceased; that although the 3<sup>rd</sup> accused was at Kwitu Bar there is no evidence that he came into contact with the deceased; that there are gaps in the prosecution case in respect of the involvement of the 3<sup>rd</sup> accused and these gaps will not be filled now that the prosecution has closed its case and that the law does not place any obligation on the accused to fill gaps for the prosecution case.

Mr. Koech further submitted that there is no evidence of intention on the part of the 3<sup>rd</sup> accused to harm the deceased; that the 3<sup>rd</sup> accused was not identified in the identification parade. Mr. Koech cited **Republic v Bernard Obunga Obunga [2015] eKLR** a decision by this court to emphasize on the factors to be considered by the court when determining whether an accused should be put on his defence or not. He urged the court to acquit the 3<sup>rd</sup> accused under section 215 of the Criminal Procedure Code.

A criminal trial is conducted in stages. The first limb of the trial involves taking down the evidence of the prosecution in support of the case. The State prosecutes accused persons who are charged before the court. It is the State through its law enforcement agencies who arrest and charge an accused person. It is the State through its agencies that gathers evidence and presents it to court in a bid to convince the court that the person who is charged before it is indeed guilty as charged. It is no wonder that the law places a heavy burden on the State to prove a case beyond reasonable doubt. However before the court finally determines whether the accused person(s) is/are guilty after listening to evidence from both the State and the accused, the court must make a finding after the prosecution has closed its case whether the evidence establishes a prima facie case against the accused in which case the accused person is placed on his defence and if not the accused person is acquitted.

At this stage of the trial as stated in the **Ramanlal T. Bhatt case**, the court is not required to decide with finality whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively. This final determination can only properly be made when the case for the defence has been heard.

The **Ramanlal case** also admits that it is not easy to define what a “prima facie case” means but nonetheless defines it to at least mean **a case 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.**

The resolution of this issue, whether the accused has a case to answer or not, determines whether the court will embark on the second limb of a criminal trial, taking down the evidence of the defence and the ensuing final stages of determination of the case by conviction and the consequent sentence or acquittal.

I have carefully read and considered all the evidence of the 16 prosecution witnesses and rival submissions. I have considered the two authorities cited by the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. Without getting into the finer details of the evidence at this stage I wish to state that I find the evidence tendered by the prosecution sufficient and that it can be relied on by this court while properly directing its mind to the evidence and the law to convict the accused persons if no explanation is offered by the defence.

I have distinguished this case before me with the **Bernard Obunga** case, above. In that case the evidence was shaky and could not have been relied on to convict the accused person, besides the cause of death was not established. The beating of the deceased by the accused did not lead to his death.

I commend the defence counsels for putting up a spirited case on behalf of their clients. However, my finding is that each of the three accused persons has a case to answer. I will therefore put the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons on their defence. In the course of writing the judgement this court will give detailed analysis of the evidence and address all the issues raised by the defence. The accused persons are hereby informed of their rights under section 306 of the Criminal Procedure Code to inform the court the manner in which they wish to give their evidence in defence and whether they wish to call any witnesses.

Orders shall issue accordingly.

**Dated, signed and delivered this 14<sup>th</sup> day of March 2016.**

**S. N. MUTUKU**

## **JUDGE**

### **In the presence of:**

Ms Macharia for the prosecution

Ms Onyinkwa for the 1<sup>st</sup> accused person

Ms Celine Odembo for the 2<sup>nd</sup> accused person

Mr. Koech for the 3<sup>rd</sup> accused person

Mr. Thomas Kipkemoi Kipkorir, 1<sup>st</sup> accused person

Mr. Joseph Komen Yatich, 2<sup>nd</sup> accused person

Mr. Sebastian Yano Komen, 3<sup>rd</sup> accused person

Mr. Daniel Ngumbi, court clerk