



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 46 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD WAINAINA MWANGI.....1ST ACCUSED

JOHN KARIANJA KINUTHIA alias MOHA.....2ND ACCUSED

MICHAEL NDEGWA NJAU alias OCAMPO.....3RD ACCUSED

RULING

Bernard Wainaina Mwangi (1st accused), John Karianja Kinuthia (2nd accused) and Michael Ndegwa Njau (3rd accused) are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 13th day of April 2014 at Annex Bar Plot Trading Centre in Ndeiya Location Kiambu County they jointly murdered Benson Thiong'o Mungai (the deceased). The accused persons individually denied committing this offence. The 1st accused is represented by Mr. Olunya, the 2nd accused by Mr. Ngige and the 3rd accused by Mr. Tunya. Ms Nduati led the prosecution.

The prosecution presented a case that the deceased was assaulted by the three accused persons at Annex Pub in Plot Trading Centre in Thigio, Ndeiya Location in Kiambu County on 13th April 2014. Nine (9) witnesses testified in support of the prosecution case including Dr. Bernard Owino Midia, PW8, who confirmed the death of the deceased that occurred on 14th April 2014 while undergoing treatment at Kenyatta National Hospital. The cause of death was due to head injury with epidural and subdural haemorrhage.

This court is required as a matter of law and procedure to determine at the close of the prosecution case whether the evidence on record establishes a prima facie case against the accused persons or any of them. If so, it is required that they be placed on their defence to testify, and if not so found then it is required that they be acquitted (see section 306 (1) and (2) of the Criminal Procedure Code).

Of the 9 prosecution witnesses, the only witness that was at Annex Pub on 13th April 2014 is Paul Kariuki Kamau, PW1. He testified that on the date in issue he was at Annex Pub drinking in company of one Kihui (not a witness). The three accused persons were also in the said Pub drinking. The accused persons were seated on a different table. The deceased Benson Thiong'o was also in the company of the accused persons. One Muchiri who was described as a motor cycle rider started a fight with the 1st accused. Muchiri left and returned in company of other motor cycle riders. They attacked the 1st accused. At this stage PW1 and his drinking mate left Annex Pub and went to Sister's Pub. The time was 10.30pm. After

30 minutes the accused persons also went to Sister's Pub. The 1st accused, who at that time was carrying one shoe belonging to the deceased, confronted PW1 and sought to know from him why he (PW1) had not helped him when the motor cycle riders had attacked him. The 1st accused started hitting PW1 with the shoe he was holding. PW1 left Sister's Pub. He later learned that the deceased had been assaulted.

The evidence of PW1 is confirmed by Gladys Thitu Njung'e, PW2, in as far as it concerns what happened at Sister's Pub. Gladys was working at Sister's Pub. She told the court that on 13th April 2014 at about 10.30pm PW1 went to the Pub with another person and informed them of a fight at Annex Pub. She was given the names of the three accused persons as the people who had been fighting at Annex Pub. Shortly thereafter, the three accused persons arrived at Sister's Pub with the 1st accused carrying the shoe belonging to the deceased. Gladys said that the 1st accused started hitting PW1 using the shoe he was carrying and that he (1st accused) told Gladys that he was taking the shoe to the mother of the deceased so that the mother could pay him (1st accused) his money, Kshs 100, claiming that the deceased had drunk his (1st accused's) beer. Gladys said she did not sell alcohol to the accused persons because it was late and she wanted to close the Pub. She said she learned in the morning that the deceased had been seriously assaulted.

On cross examination Gladys said that PW1 had told her that he had left a fierce fight at Annex Pub between the accused persons and the deceased and that PW1 did not mention that the fight involved one Muchiri. She said Muchiri did not go to Sister's Pub.

Ann Wanjiku, PW3, said she was the mother of the deceased and that she received information from one Kamau Douglas on 14th April 2014 at 7.00am that the deceased had been seriously assaulted near St. Mary's School. She went to the scene and found the deceased badly injured. She looked for transport to take the deceased to hospital. The evidence that the deceased was found lying along the road near Kigio St. Mary's Secondary School on the morning of 14th April 2014 was confirmed by Caleb Sore, PW5, an administration police officer attached to Ndeiya Administration Police Post. On arriving at the scene PW5 saw multiple injuries on deceased's forehead and body. PW5 assisted in taking the deceased to Tigoni District Hospital from where he was referred to Kenyatta National Hospital.

PW5 told the court that he was informed by one Muchiri that the deceased had drunk the 1st accused's beer leading to a fight and that the three accused persons were implicated in assaulting the deceased. PC William Rono, PW7, also testified that he on receiving the report of the assault visited Annex Pub where he learned that the deceased had drunk 1st accused's beer and that the 1st accused had hit the deceased with a blow on the forehead.

There are two versions of the story. The first one is that one Muchiri a motor cycle rider and the 1st accused started fighting at Annex Pub; that the said Muchiri left the Pub and returned thereafter with other motor cycle riders (court was not told how many) and a fight started between the three accused persons and the riders. The deceased is not mentioned as having taken part in that fight. PW1 said he left at this stage and went to Sister's Pub where the three accused persons joined him and the 1st accused started hitting him with the deceased's shoe which the 1st accused had carried with him. Gladys confirmed the evidence that PW1 went to Sister's Pub; that accused persons also went there; that the 1st accused had one of deceased's shoe and used it to hit PW1 and that the 1st accused said he was taking the shoe to deceased's mother so that she could pay him Kshs 100 for his beer that the deceased had taken.

The other version is that the 1st accused had hit the deceased at Annex Pub after the deceased had taken his beer. This part of evidence was not given by PW1 who did not implicate any of the accused persons with attacking the deceased. The two police officers, PW5 and PW7, testified to receiving information that the 1st accused hit the deceased on the head after the deceased drunk his beer at Annex Pub. There is no witness who testified to seeing this happen. Without other evidence to verify the information given to the two officers and that led them to arrest the three accused persons, their evidence on the issue remains hearsay and inadmissible in evidence.

Muchiri did not testify. No witness testified to the issue of deceased drinking 1st accused's beer and the 1st accused assaulting the deceased. There is evidence to show a fight between the motor cycle riders and the accused persons. There is no evidence that the deceased took part in this fight. There is also evidence that the deceased was found in the morning of 14th April 2014 at the road near St. Mary's Secondary School. This court did not benefit from evidence as to how far St. Mary's Secondary School is from Annex Pub. There is no evidence to show what the deceased did from 10.30pm on 13th April 2014 to the morning of 14th April 2014, the following day at about 7.00am when he was found seriously assaulted by the road side.

When the evidence of the prosecution witnesses is duly considered together it leaves gaps as to what exactly happened to the deceased because as noted in this ruling there is no evidence to show the 1st accused or any of the accused persons attacked the deceased other than what the two police officers told the court. There is no witness who came forward to verify the allegations that the deceased drunk the 1st accused's beer and that the 1st accused delivered a blow to deceased resulting in the injuries the doctor noted and that led to the death of the deceased's head resulting in the injuries that led to his death. The police officers blundered in not tracing the witnesses who could have testified to this. My question therefore is whether the evidence as given establishes a prima facie case?

To answer this question I am guided by the case of **Ramanlal T. Bhatt v. R [1957] EA 332** where the Court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the 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 would 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 agree 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 is true, as Wilson, J., said, (in Jagjivan M. Patel and Others (1), T.L.R (R) 85) that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It 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.”

I agree with the court in the **Bhatt case** that the evidence I have against the three accused persons at this stage of the trial in the present case is not one in which this court, believing that it is a reasonable court, properly directing its mind to the law and the evidence on record could convict if no explanation is offered by the defence. Consequently it is my finding that the prosecution through the investigators of this case has failed to present evidence establishing a prima facie case against the three accused persons or any of them so as to require this court to place them on their defence. I will and do hereby enter a finding of no case to answer against the accused persons and under section 306 (1) of the Criminal Procedure Code acquit each of them forthwith. Each of them shall be set at liberty forthwith unless for any other lawful cause they are held in custody. It is so ordered.

Dated, signed and delivered this 30th day of June 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Nduati for the prosecution

Mr. Olunya for the 1st accused person

Mr. Ngige for the 2nd accused person

Mr. Tunya for the 3rd accused person

The three accused persons

Mr. Daniel Ngumbi, court clerk