



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 35 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MAINA WANGUI.....1ST ACCUSED

JOSEPH KIRERO SEPI.....2ND ACCUSED

RULING

Jackson Maina Wangui, the 1st accused, and Joseph Kirero Sepi, the 2nd accused, are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the night of 7th and 8th May 2012 at Click Club along Baricho Road, Industrial Area in Nairobi Area within Nairobi Province (*sic*) they murdered Kevin Oduor Onyango, the deceased. The 1st accused is represented by Mr. Bowry, advocate. The 2nd accused is represented by Mr. Naeku, advocate.

Each of the accused persons pleaded not guilty to the charge. The case proceeded to full trial. The prosecution has presented a case that on the Monday of 8th May 2012 around 1.30am Click Club was full to capacity. It was reggae night and it was a popular night for revelers. An altercation ensued between 2 or 3 patrons inside the Club. The 2nd accused person who worked as a bouncer at the Club intervened and took the fighting patrons outside the Club. Evidence by the prosecution shows that one of the patrons, the deceased in this case, was taken by the 1st and 2nd accused persons to the rooftop where the Club kitchen was situated with a view to interrogating him over allegations that he had stolen a mobile phone. Shortly thereafter the deceased was shot on the head and injured. He died as a result of the gunshot wound. Evidence further shows that as a result of the shooting, the two accused persons reported the matter at Industrial Area Police Station. Police visited the scene and confirmed that the deceased had died. The two accused persons were arrested and after investigations, the two were charged with this offence.

At the close of the prosecution case after the testimony of 14 witnesses, the learned counsels for the prosecution, Ms Catherine Mwaniki represented by Ms Esther Macharia, and counsel for the 2nd Accused, Mr. Naeku, made their respective submissions. Mr. Bowry for the 1st accused chose not to submit at this stage of the trial. This ruling is to determine whether the evidence presented to this court by the prosecution is sufficient to establish a prima facie case against the 1st and the 2nd accused persons to necessitate their being placed on their defence. If no prima facie case has been made out against the accused persons or any of them, then the court must enter a finding of not guilty and acquit them at this stage of the trial. This is a procedure provided for under section 306 (1) and (2) of the Criminal Procedure Code which provide as follows:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

In her submissions at the close of the prosecution case, the prosecution counsel told the court that the prosecution has tendered evidence to prove that the body of the deceased was removed from the rooftop of the building where Click Club is situated and the post mortem examination on the body revealed that the deceased died as a result of the gunshot wound to the head; that the Government Analyst testified that the 1st accused person's shoes were moderately stained with deceased's blood; that a spent cartridge was recovered from the scene and confirmed by the Ballistics Examiner to have been fired from the 1st accused person's firearm a Ceska pistol Serial Number A785987; that this evidence places the 1st accused person at the scene. She further submitted that the 2nd accused person was seen leading the deceased from the Club and that later in the company of the 1st accused they went to Industrial Area Police Station to report the shooting and therefore the evidence places the 2nd accused person at the scene as well.

The prosecution counsel further submitted that if it is true that the deceased had caused a commotion inside the Club then he ought to have been removed from of the Club and taken outside; that by taking the deceased to the rooftop where he was shot the accused persons had malice aforethought as defined under **section 206 of the Penal Code**. Counsel submitted that **sections 20 (1) and 21 Penal Code** define the persons who may be charged with committing an offence. Prosecution counsel further submitted that the 2nd accused person's conduct of removing the deceased from the Club and taking him to the Club's rooftop enabled the 1st accused person to shoot the deceased and therefore his actions are not those of an innocent person. Counsel urged the court to find that the prosecution has presented sufficient evidence on which this court can convict even if the accused persons were to remain silent. She asked this court to find that the prosecution has made out a prima facie case against the two accused persons and place them on their defence.

Mr. Naeku submitted a no-case-to-answer in respect of the 2nd accused person. He submitted that the evidence does not prove that the 2nd accused person committed any offence and that a prima facie case is made out where the evidence adduced by the prosecution is so compelling that even if the accused person chose to remain silent a conviction could result. Mr. Naeku further submitted that there is no dispute that the deceased died as a result of a gunshot wound to his head but there is a dispute as to what act or omission on the part of the 2nd accused person led to that death; that the burden of proof lies with the prosecution and does not shift and that the totality of all the evidence of the witnesses who mentioned the 2nd accused person fails to show the link between the 2nd accused person and the deceased's death.

Mr. Naeku went on to submit that the 2nd accused person was not at the scene and did not know what happened between the deceased and the 1st accused person because he had taken the two patrons who had followed the deceased to the rooftop and had attacked away as directed by the 1st accused person and that he was directed by the 1st accused to accompany him to Industrial Area Police Station to report the incident. Mr. Naeku termed the evidence against the 2nd accused person as worthless and urged the court to consider the submitted authorities and find that malice aforethought and the common intention have not been proved. He urged the court to reserve its reasons for acquitting the 2nd accused person at this stage

of the trial should the court find that he has no case to answer to avoid prejudice to the 1st accused person. In this regard counsel cited **Republic v. Wilson Gachanja & 11 Others (Nairobi High Court Criminal Case No. 40 of 2000 UR)**.

I have carefully read and considered all the evidence of the 14 prosecution witnesses. I have read and considered all the six authorities cited by Mr. Naeku on behalf of the 2nd accused person, including **Ramanlal Trambaklal Bhatt v. R [1957] EA 332, Republic v. Wachira [1975] EA 262, Murimi v. Republic [1967] EA 542, and Republic v. John Gachamba Mwangi [2006] eKLR**. It is not necessary, in my view, to repeat what each case states but the common thread running through all these authorities is what constitutes a prima facie case. In the **Murimi case** the Court was of the view that:

“The previous decisions of this court do not in any way detract from the fact that the law requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused is wrongly called on his defence then this is an error of law.”

In the **John Gachamba case** the Judge stated as follows:

“A prima facie case, in my understanding, is a well-based case which, at first glance, carries clear pointers that the accused has a substantial involvement in the circumstances attending the commission of the offence; so that a close examination of those circumstances could well lead to a finding that the accused did commit the offence – and hence it makes practical sense that the accused be given a chance to explain his position in the matter.”

I have also considered the exhibits that were presented to court including the two statements recorded from the two accused persons under enquiry. My considered view is that the 1st accused person Jackson Maina Wangui has a case to answer. I hold the contrary view in respect of the 2nd accused person. I was asked to reserve my reasons for my findings in the event I find one of the accused persons has no case to answer. I hereby do so save for stating that evidence against the 2nd accused is not sufficient to warrant his being placed on his defence.

I have read the ruling in **Criminal Case No. 40 of 2000 Republic v. Wilson Gachanja & 11 others** which case has persuasive value to this court. I am persuaded that it would not be in the interest of justice to pronounce my reasons at this stage for the orders I am making in this ruling for fear that doing so may adversely prejudice the remainder of the trial on the remaining parties. The reasons for my orders at this stage of the trial shall be included in the final judgement.

In accordance with section **306 (1) Criminal Procedure Code**, I hereby record a finding of not guilty in respect to the 2nd accused person Joseph Kirero Sepi and acquit him forthwith. He is free to go home unless for any other lawful course he is held in custody.

In accordance with the provisions of **section 306 (2) Criminal Procedure Code**, I hereby inform the 1st accused person Jackson Maina Wangui of his rights to inform this court whether he will give his defence under oath or without taking oath and whether he wishes to call any witnesses to his defence.

Orders shall issue accordingly.

Dated, signed and delivered in open court this 28th July 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Catherine Mwaniki for the prosecution

Mr. Bowry for the 1st accused persons

Mr. Naeku for the 2nd accused person

Mr. Jackson Maina Wangui, 1st accused person

Mr. Joseph Kirero Sepi, 2nd accused person

Mr. Daniel Ngumbi, court clerk