



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 36 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EDWIN KARIUKI KAMAU.....1<sup>ST</sup> ACCUSED**

**JOSEPH ANANDA MWANYIKA.....2<sup>ND</sup> ACCUSED**

**RULING**

In a criminal trial, the court is required by law and procedure to determine at the close of prosecution case whether the evidence so far presented is sufficient to warrant the accused person to be called upon to give his defence. If the contrary is the case, then the accused is acquitted at this stage of the trial. This requirement is captured in **Section 306 (1) and (2) of the Criminal Procedure Code** which provides 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.**

Edwin Kariuki Kamau, 1<sup>st</sup> accused, and Joseph Ananda Mwanyika, the 2<sup>nd</sup> accused, are jointly charged with manslaughter (*sic*) contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the 1<sup>st</sup> day of May 2014 at Shabir Centre, a building situated along Kirinyaga Road, within Kamukunji Area in Nairobi County they jointly murdered Robert Ndungu.

It is obvious that the charge sheet is defective. I have read the court file record and I did not note anywhere that this issue was addressed by the prosecution or the defence. The issue also seems to have escaped the attention of the court during the time of taking the plea. Mr. Aluku for the accused persons

hinted to the issue during his submissions but he thought better of it and let it be and rightly so in my view. The intention of the drafter of the charge was obviously to charge the two accused persons with murder but erroneously charged them with manslaughter. The sections of the law quoted are the provisions of a murder charge. The particulars of the offence are clearly indicated as murder. To correct the error, this court will and does hereby invoke the provisions of the **Criminal Procedure Code Section 382** and cure this defect to the effect that the charge for which the two accused are facing is murder contrary to section 203 as read with section 204 of the Criminal Procedure Code and not manslaughter.

Six witnesses testified for the prosecution. Among them is PW6 Dr. Joseph Maundu who examined both accused persons and certified them mentally fit to stand trial; Dr. Okemwa Minda (PW3) who examined the body of the deceased on 1st May 2014. His findings are that the deceased had a large tear at the scalp on the left forehead measuring 12cm with a large blood clot. He found a depressed skull fracture and blood oozing through the nose and mouth. The eyeballs were black due to bleeding and were swollen. The doctor formed the opinion that the cause of death was due to severe head injury secondary to blunt trauma secondary to history of falling from a height.

There is the evidence of Jamila Mohamed Hassan (PW2) who told the court that on 1<sup>st</sup> May 2014 while in her house on the 1<sup>st</sup> floor of Shabir Building at 6.00pm she saw something falling from the upper floors. She realized it was a man. With help of neighbours they took the injured person to Kenyatta National Hospital where he died before he was treated. She said although she reported to the police they did not go to the scene but instead told her to take the victim to hospital. She did not know the man at the time. She said she looked up and saw some young men but she could not see them well.

The prosecution key witness is Ronni Fahim Arero (PW1). Ronni lived in Shabir Building. On that day (1<sup>st</sup> May 2014) he was at the rooftop with the deceased and another person whose name he did not give. Ronni was playing video games while the deceased and his friend were chewing *miraa (khat)*. Ronni told the court that he saw one Tom who was holding a metal bar and a knife approach the deceased from behind. He said Tom hit the deceased on the head with the metal bar and that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons assisted Tom to push the deceased from the rooftop to the ground. He said that Tom and the two accused escaped from the scene before they could be arrested.

Administration Police Constable Charles Simiyu (PW4) is the arresting officer. He told the court that while on patrol along Kirinyaga Road in company of APC Charles Ondipo (not a witness) on 8<sup>th</sup> May 2014, they met Ronni who informed them where to find two suspects who had committed this offence. He said they proceeded to the place near Coast Bus Station and arrested the accused persons. He told the court that they were aware of the case before arresting the accused persons.

Police Constable Benson Langat from Kamukunji Police Station investigated the matter with PC Kiama (not a witness). He told the court that the information he received was that the deceased had been with Ronni and one Wilson Ngugi at the rooftop of Shabir Building when the two accused persons in company of Tom Mathenge and Owen attacked the deceased and pushed him down that building.

Ms Nduati relied on the evidence on record but Mr. Aluku submitted on behalf of the two accused persons. He took issue with the prosecution evidence terming it as inconsistent and full of contradictions. He submitted that the evidence so far adduced by the prosecution cannot be relied on by a reasonable court to convict the accused persons given that the prosecution has closed its case; that the accused persons are presumed innocent until the contrary is proved; that the accused persons have no duty under the law to prove their innocence and that it is the duty of the prosecution to prove the accused persons guilty which the prosecution has failed to do.

Mr. Aluku cited **R. V. Bernard Obunga Obunga [2015] eKLR; James Tinega Omwenga v. R [2014] eKLR; R. v. Joseph Shitandi and Another [2014] eKLR; Robert Barinja v. R [2013] eKLR and R. v. Ndegwa Juma Iddi [2014] eKLR** to support his submissions. I have read the authorities cited. Generally these authorities are about the issues on identification of an accused, contradictions in prosecution evidence as well as issues on burden of proof and inadequacy of prosecution evidence.

The onus is on me to decide whether this court, which I believe is a reasonable one, properly directing its mind to the law and the evidence so far tendered, could convict the accused persons basing on the evidence on record if no explanation is offered by the defence. Jamila did not identify the young men she saw at the rooftop at the time she saw the deceased falling. There is no other witness save Ronni. It is therefore to the evidence of Ronni that I must turn to decide this case.

Ronni puts the time when this incident occurred as 3.00pm. The time when this incident occurred is contradicted by Jamila who placed the time as 6.00pm. There are 3 hour difference between the 3.00pm and 6.00pm. One cannot mistake one hour to the other. Who was telling the truth? I do not have an answer to this question.

Ronni was busy playing video games. Part of his evidence is captured thus:

**“I was playing game and Robert was chewing *miraa (khat)* with his friend. .... I did not know what was happening due to the game. After some time I saw Tom hiding behind the tanks. I have known him since childhood. Tom came carrying a knife and a metal bar. Tom came from Block G and came from Robert’s behind and hit him with the metal rod from the back. Robert was hit and lost balance. I panicked and remained standing. Two people came from my right to attack Robert. Tom had already hit Robert. I knew the 2 who came from my right. These were Kariuki and Joe (in reference to the two accused persons).”**

When cross-examined Ronni said this:

**“Tom hit Robert from behind using a metal bar on the head. This shocked me and I moved one step down the stairs. .... I was playing video games. I was leaning on the wall. I was facing the stairs. Robert was seated with his friend .... Tom came from Robert’s behind.....”**

The problem I find with this evidence is that Ronni did not seem to know exactly what happened because admittedly he was absolved in his video game. He also said he went down one level of the stairs. Even his description of what happened after the said Tom hit the deceased is not clear. His testimony that the accused persons held the deceased by the shirt and pushed him came at the re-examination stage and may have been an afterthought. I am of the considered opinion that Ronni may have been too absolved in his game to see exactly what happened.

Ronni did not mention that he led police to arrest the accused persons. He did not mention the fourth person alleged with Tom and the accused persons. The investigating officer PC Benson Langat (PW5) said there were four suspects with one Tom Mathenge being the key suspect. He said this:

**“I am aware accused blocked deceased’s way and the 4 of them ganged up and threw him down. Tom Mathenge is the key suspect. He is the one who hit the deceased first.”**

Where did PW5 get this information from? Obviously not from Ronni who never mention Owen, the alleged 4<sup>th</sup> suspect. Without evidence from the witness who informed PW4 of this, his evidence remains hearsay and is not admissible.

There is also the issue of the description of the building. Ronni said it was 4 floors high; PW4 APC Charles Simiyu said the building had 6 floors while PW5 says it had 3 floors. These witnesses were not talking about the same building.

The evidence by the prosecution has serious flaws. It leaves many gaps. The law does not expect the accused to fill these gaps for the prosecution. It is the kind of evidence which this court cannot rely on to convict now that there is no further evidence expected. It creates doubts in my mind. In my view it will not serve any purpose for this court to place the accused persons on their defence unless this court expects a miracle that the accused persons will admit the offence.

In conclusion, my finding is that the prosecution has failed to establish a prima facie case against the accused person or any of them. The law, under section 306 (1) Criminal Procedure Code demands that where there is no evidence against the accused at the close of the prosecution case, the accused be acquitted. I have no option but to obey the law and acquit Edwin Kariuki Kamau and Joseph Ananda Mwanyika which I hereby do. They shall be set at liberty forthwith unless for any lawful reason they are held in custody. It is so ordered.

**Dated, signed and delivered this 25<sup>th</sup> day of July 2016.**

**S. N. Mutuku**

**Judge**

**In the presence of:**

Ms Nduati for the prosecution

Mr. Aluku for the accused

Mr. Edwin Kariuki Kamau, 1<sup>st</sup> accused

Mr. Joseph Ananda Mwanyika, 2<sup>nd</sup> accused

Mr. Daniel Ngumbi, court clerk