



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 119 of 2005

REPUBLICPROSECUTOR

- VERSUS -

JOHN WANYOIKE WAINAINAACCUSED

RULING

An information dated 10th November, 2005 was laid by the Attorney-General, charging the accused with murder contrary to s. 203 as read with s. 204 of the Penal Code (Cap. 63, Laws of Kenya). It was alleged that the accused, **John Wanyoike Wainaina**, on 8th August, 2005 at Witeithie Village in Thika district of Central Province, murdered **Dominic Wanyoike**.

I have carefully reviewed all the evidence given by the prosecution's witnesses. The object of this exercise was to see whether or not a *prima facie* case – a case which, by dominant appearances, points to the accused's hands in the circumstances of the death – had been made out, requiring that he be given an opportunity to defend.

I should not at this stage, set out my detailed review of the evidence, for reasons which I had stated in a similar matter, **Republic v. Joseph Karuri Mungai**, Nairobi H. Ct. Crim. Case No. 70 of 2006:

“... if I did so, this might set sign-posts that could influence the line of defence, in the event I put the accused to his defence – and a line of defence thus pre-ordained may not be appropriate”.

As the accused has several options in his line of defence, it follows that he should be perfectly free in prosecuting any such line of defence as would best suit him, and the Court should not colour his options by setting up the terms of defence.

The basic rule to guide the Court at this stage, is well summarized in the East African Court of Appeal decision in **Ramanlal Trambaklal Bhatt v. R** [1957] E. A. 332 (at P. 335, per **Sir Newnham Worley, P.**):

“... the Court is not required at this 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”.

According to learned defence counsel **Ms. Sirma**, there is no case to answer, and so the accused should be acquitted at this preliminary stage. Counsel's reasoning was that no murder weapon was found at the *locus in quo*; secondly, that there was no evidence of a quarrel having arisen between accused and deceased – such as to show intentions on the part of the accused; thirdly, that there was no direct evidence of the stabbing incident; fourthly, that the doctor was not called to state the cause of death.

Learned counsel **Ms. Mwanza**, for the respondent, urged that a *prima facie* case had been made out; for the death of the deceased did occur, and several witnesses had spoken to this incident.

The appearances from the evidence adduced, in my assessment, overwhelmingly associated but one person with the circumstances in which the deceased's death occurred; and that person is the accused herein. This means a *prima facie* case has been made out; and the applicable law now dictates that the accused be put to his defence.

I hold that the accused has a case to answer, and I hereby put him to his defence. With regard to the conduct of defence, I will give directions as follows:

(i) The accused may elect to remain silent; and in that event he will not be asked any questions; and even if he takes that option, he may call witnesses.

(ii) The accused may elect to make an unsworn statement, and again, in that event, he will not be cross-examined; and further he may if he wishes, call witnesses.

(iii) Lastly, the accused may elect to make a sworn statement; but if he does so, then he may be cross-examined by the prosecution; he will be at liberty, in any event, to call witnesses.

I will give counsel an opportunity in Court to consult with the accused, and then to state the line of defence elected by the accused. Thereafter, I will give directions for further hearing.

Orders accordingly.

DATED and DELIVERED at Nairobi this 2nd day of March, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Prosecution: Ms. Mwanza

For the Accused: Ms. Sirma