



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL CASE NO. 57 OF 2004

REPUBLICPROSECUTOR

-VERSUS-

BILLOW ABDI ABDULLEACCUSED

RULING

A. INTRODUCTION

The information laid against the accused carried a murder charge contrary to s.203 as read with s.204 of the Penal Code (Cap.63, Laws of Kenya), in three counts. The particulars in the first count were that, on the night of 18th – 19th October, 2003 at an unknown place in Kajiado District, Rift Valley Province, jointly with others not before the Court, the accused murdered ***Ibrahim Ali Abdulleh***.

The particulars on the second count were that, on the night of 18th – 19th October, 2003 at an unknown place in Kajiado District, the accused, jointly with others not before the Court, murdered ***Hassan Abdurahman Mohamed***.

The particulars on the third count were that on the night of 18th – 19th October, 2003 at an unknown place in Kajiado District, the accused, jointly with others not before the Court, murdered ***Mohammed Haji Abdi***.

A plea of not guilty was entered on each of the counts, before me on 4th April, 2006 and on that occasion, as the requirement for assessors was then operational, I selected as assessors the following persons: ***Truphena Auma Kiiza; Policena Wanja; and Jemimah K. Ingotsi***.

B. TESTIMONIES FROM 12 WITNESSES

Hearing began with ***Nuria Mohamed Ali*** (PW1) who was sworn and gave his evidence on 14th June, 2006.

PW1, a goat-seller living in Marsabit was at his home on 22nd June, 2004 at 3.00 p.m. when two Police officers came along, arrested her, and took her to Wajir Police Station. The reason for this arrest was that PW1 had sold a used cellphone to one ***Adan Ibrahim***, and this phone turned out to have been used for communication linked to crime. PW1 testified that she had purchased the said telephone as a used item at

Kariobangi in Nairobi, before selling it off to the said **Adan Ibrahim**. PW1 had bought the said phone for Kshs.10,000/= and sold it for Kshs.12,000/=, apparently, so soon thereafter, that she had not familiarized herself with its main features. It was a silver-coloured phone with flap; and she had bought it from **Billow Abdi**, the accused herein. She had known **Billow Abdi**, a goat trader at Kia-Maiko in Nairobi, for several years. The accused had told PW1 that he had bought the said cellphone from a shop, and had been using it for some time. PW1 used the phone only on 3rd December, 2003 and sold it the next day, when an opportunity presented itself. When PW1 made use of the said cellphone, she inserted in it her own sim-card, and her number was a Celtel number, 0733-739296. She retained the said sim-card when she sold the phone to **Adan Ibrahim**, who was her driver, ferrying goats from Wajir to Nairobi for sale.

PW2, **Ibrahim Abdikarim Hassan** who works at Wajir as a training officer with the Ministry of Education, bought the said cellphone, a silver-coloured Samsung A800, from one **Osman Abdille**, a broker who worked as a petrol attendant in Wajir. **Osman Abdille** arranged the sale as an agent for the seller, **Adan Ibrahim**. PW2 made payment for the Samsung A800 cellphone in the presence of three witnesses, but was not given any documents relating to the transaction. One day, on 2nd May, 2004 PW2 lost the phone, and he thought it had been stolen by one **Guhat Hassan** who worked in Wajir. Later, both **Guhat Hassan** and PW2 were arrested in connection with the said cellphone, and were taken to Garissa. PW2 later learned that **Guhat's** arrest was in connection with the record of calls made on the said cellphone, Samsung A800. The cellphone when stolen, had PW2's sim-card No. 0733-525379.

On cross-examination, PW2 testified that he had bought the said cellphone through **Osman Abdilleh** as broker, but the real seller was **Adan**, a petrol station lorry-driver who plied long routes including Wajir-Nairobi-Mombasa.

PW3, **Osman Abdilleh Ahmed** testified that he and **Adan** were co-workers at a petrol station in Wajir. He had arranged for a sale of the said Samsung A800 cellphone by **Adan** to one **Ibrahim Abdikarim**, and he saw the consideration being made over to the seller; that was the last time he knew anything about the phone.

PW4, **Abdi Hassan Madey**, was called by the Wajir CID officers on 5th June, 2004, and asked questions about the said cellphone, Samsung A800. He had told the CID officers that he had bought from, but later returned the said cellphone to **Adan**. At the time of selling the phone to PW4, its instructions manual had not been provided; and on this account, PW4 returned the goods after about one month, and got a refund of purchase price.

PW5, **Mohammed Hassan Alas** who used to live at Huruma in Nairobi, had been interviewed by CID officers about the said cellphone. He had used the said phone on one occasion after the accused, who was his brother, lent it to him.

PW6, **Robert Murega Kigunda**, testified that he was, summoned by Police officers on 26th March, 2004; and they were asking him about a cellphone, Samsung R220 which he had bought from his uncle. He had taken possession of this phone on 14th or 15th January, 2004. PW5 and his uncle who had sold the phone to him, were both arrested and held by the Police for sometime.

PW7, **Buhad Abdi Adan**, testified that he was summoned by the DCIO, Wajir on 5th June, 2004 and asked if he had a Samsung A800 cellphone. He did, and he produced it to the Police officers; it was silver-coloured, and bore serial number 351004263248660. He said he had borrowed this phone between 24-28 May, 2004 from one **Ibrahim Abdikarim Hassan**, and used it with his own sim-card, No. 0734-902341. PW7 and one **Abdi Hassan Mudey** were later arrested and taken first to Garissa, and later to Ngong.

Although PW7 recognized in Court the said Samsung A800 cellphone, he noted that the serial number now marked on it had 16 digits, instead of 15 – namely, 3510042632486600.

On cross-examination, PW7 noted that the serial number which was inscribed on the said Samsung A800

cellphone was different in certain particulars, from those earlier associated with that phone; this number was: 351004/26/324866/5 – a total of 15 digits, and ending not with 00 or 60. Pw7 said that those serial-number particulars which had been pasted on the handset would have come from the Police officers conducting investigation.

PW8, **Dr. Zephania Mwangi Kamau**, testified that he had conducted post-mortem examination on deceased **Hassan Abdurahman**. He found the body, which had been identified to him by one **Mohamed Jaman** and one **Siad Hussein**, to be that of a fifty-five year-old male African in good physique and good nutritional condition, its length being 5ft 8 inches. The body was refrigerated; it had a blood-stained shirt; its mucous membrane was pale; there was bleeding from the nose, mouth, left ear; minute bruises on the back of left forearm. The deceased had been shot, with bullet entry on the front-right temporal area of the head; the shot had caused a fracture; the bullet had exited on lower-left part of the head, leaving a fracture; there had been bleeding into the brain, resulting in haematoma formation. The cause of death, in PW8's opinion, was head injury and brain haemorrhage.

PW8 also conducted post-mortem examination on deceased **Mohammed Haji**, who was identified to him by one **Abdi Omar Ibrahim** and one **Ruth Nekesa Wandera**. The deceased was a male African, 5ft 6 inches in height, and of good physique and nutritional condition. The body was dressed in a blood-stained shirt and jacket; the face was swollen; bleeding in left nostril, and from left ear and from mouth. The deceased had been shot, the bullet entering above right ear-lobe and causing fracture, exiting at left nostril and causing fracture in front mouth and nasal bones, and causing brain haemorrhage. PW8 formed the opinion that head injury from gun-shots occasioned brain haemorrhage and caused death.

PW8 also performed post-mortem examination on the body of **Ibrahim Ali Abdulle** which was identified to him by one **Abdulle Farah Hersi** and one **Mille Olad Awalle**. The body was covered in a blood-stained shirt and sweater, it was 5ft 6 inches in length, of good physique, and in good nutritional condition. The age of the deceased could not be established. He had been shot, the bullet entering through the anterior part of the head, causing fracture, and exiting on the left side of the neck. In PW8's opinion, death was occasioned by head injury and related brain haemorrhage.

PW9, Police Force No.76696 Police Constable **Ibrahim Abdi Hassan** testified that he had been stationed at CID Wajir in June, 2004 and had conducted investigations on the instant matter. With other Police officers, PW9 had recovered the silver-coloured Samsung A800 cellphone involved in this case, from **Guhad Abdi**; these officers arrested both **Guhad Abdi** and **Abdi Hassan** – on the ground that **Abdi Hassan** had used that cellphone on the same day.

On cross-examination by learned counsel **Mr. Kilukumi**, PW9 testified that the Samsung A800 cellphone produced in Court now had a serial number label pasted on it which had not been there before, namely, 3510042632486600; and he said that the manufacturer's serial number inscribed on the handset was: 351004/26/324866/5.

PW10, Police Force No. 230681 Chief Inspector **Eliud Lagat** of Nairobi CID Headquarters was called to the *locus in quo*, Ololua Forest in Ngong, on 19th October, 2003 and he teamed up with other senior Police officers – one Inspector **Otieno** and one Police Constable **Mogaka**. PW10 was then shown two bodies of male adults, with bullet injuries above their ears. Upon examination of the scene, PW10 found no evidence of struggle at the scene. He also found motor vehicle tyre marks at the edge of the road – which suggested that the said two bodies could have been brought to the scene from elsewhere. About 1Km from the location of the two bodies, a third body of a male adult was found, with a bullet wound on the right forehead. There was no sign of struggle at the place where this third body was found.

On cross-examination by learned counsel **Mr. Kilukumi**, PW10 said he had formed the opinion that the bodies of the deceased persons had been dumped at the *locus in quo*. He checked the scene, and found no spent cartridges within a radius of 20 -30 metres around the bodies. The witness took photographs of the scene, especially to show the existence of reversing motor vehicle tyre-marks. PW10 testified that the *loci in quo* were not intact when he visited; they had been interfered with.

PW11, Police Force No. 231105 Inspector **Paul Mumo** who works at CID Headquarters, and is in charge of investigations and analysis, came to give evidence on cellphone communications, which he sought to show as connecting the accused to the crimes charged. The witness said he has undergone special training on data analysis, at the local as well as the international level.

PW11 had been charged with the task of analyzing communications data, in relation to the deaths of the three persons in the charges herein. He was asked to analyze certain cellphone use-details, including the one with sim-card number 0722-851616, which was alleged to have been used by one of the deceased, **Hassan Abdulrahman Mohamed**. He had communicated with Safaricom, a leading cellphone service provider, and sought certain categories of information touching on the use of mobile phone number 0722-851616. He found that the said phone number was attached to handset, serial number 35100426324866000. He found too that the said handset, at 15.14.25hrs on 19th October, 2003 bore a Safaricom phone number 0721389892, and that number remained attached to the same handset though occasionally being interchanged, notably with No. 0722-777641 (which belonged to **Hassan Abdulrahman Mohamed**), No. 0722-827535 (which belonged to one **Noor Mami Ali**) No. 0733-671352 (which belonged to one **Abdi Hassan Mande**); and No. 0733-902341 (which belonged to **Guhat Abdi Aden**). On 5th June, 2004 PW11 went to conduct investigations at Wajir, after he heard that the handset in question was being used there; and while there, he recovered the deceased's phone, serial No. 351004263248665. PW11 found tht the said handset had been taken to Wajir by **Muria Mohamed Ali** (PW1), and that the first service-provider number to be used on the phone after that of the deceased was removed, was 0721-389892. PW11 said he had obtained a computer printout from Safaricom on the said Samsung A800 cellphone, with sim-card number 0722-851616.

On cross-examination by learned counsel **Mr. Kilukumi**, PW11 testified that there were, in mobile telephony, both registered and unregistered subscribers, and that it was possible for a handset owner to be unregistered as a subscriber.

C. DISCHARGE OF ASSESSORS

At the hearing of 30th October, 2007 the Court had to deal with the question of assessors, as a new law, Statute Law (Miscellaneous Amendments) Act (Act No.7 of 2007) had been passed and came into operation on 15th October, 2007 and it had repealed the requirement for assessors in the trial of capital cases in the High Court. After considering the relevant provisions of law I made a ruling as follows:

“At the beginning of today’s hearing, learned counsel Mr. Kilukumi drew the Court’s attention to the recent enactment of the Statute Law (Miscellaneous Amendments) Act, 2007 (Act No.7 of 2007) which has a bearing on the role of assessors in criminal trials.

“Critical sections of the Criminal Procedure Code (Cap.75) touching on the role of assessors, to wit, ss.299, 322 and 394 have been deleted. So they are no longer part of the trial procedure set out in the statute law.

“Not only has Parliament made this important change to the law, but the new law has already come up to date of commencement, which is 15th October, 2007.

“It is clear that the law affecting the position of assessors is already in force; and the consequence is that further trial with assessors would be contrary to law.

“This is affirmed by the taking away of the Court’s function of summing-up to the assessors, and the Court’s power to authorise pecuniary compensations to assessors.

“There can be no doubt that it is time to stop the old mode of trial, with assessors, so as to comply with the intent of Parliament.

“Consequently, the trial in this case will proceed henceforth without assessors”.

D. CONTINUED TESTIMONY

Mr. Kilukumi proceeded with the cross-examination of PW11, who testified that the Samsung A800 cellphone serial number he was given by Safaricom during his investigations, had 17 digits, namely, 35100426324866000 and not the shorter sets of numbers which had been given to him, for the same handset. He could not explain the discrepancy, and testified that he was trained in computer packages but not in computer software engineering. PW11 said service providers could only identify 15 digits in the serial number, and that the 15th digit was invariably shown as digit 0; in PW11's words: "It's the way their machines are computerized"; and he added that he had not worked for Safaricom or Celtel, service providers.

PW11 testified that, before he began his analysis, he had recovered the actual box in which the mobile phone Samsung A800 had been purchased, and he noted that the serial number inscribed on it was the same as that printed on the box; and he said this number was different from the one provided by the service provider.

PW11 testified that the line attached to the Samsung A800 handset was 0722-851616, and it belonged to a registered subscriber, **Mohamed Hassan**, of Mombasa. He said the last telephone call made by the deceased was on 18th October, 2003; but he then remarked that he did not know *who* was in possession of the said phone at that time; he said:

"I cannot say it was the deceased calling. Somebody else could have been using this phone then".

PW11 testified that the three deceased persons had disappeared on 18th October, 2003, and it is likely they were killed between that date and 19th October, 2003. He said the Samsung A800 in question got lost "presumably" on 18th October, 2003, and was recovered eight months later – and in the meantime, it had been bought and sold seven times.

PW12, Police Force No. 216017 **Rtd. Insp. John Otieno** had been stationed at Ngong CID Police Division in 2003. On 19th October, 2003 the witness received a report on Police radio, that three dead bodies of African male adults had been found in Ooloolua Forest, in the neighbourhood. PW12 and one **Inspector Obiero** went to the scene, and found two bodies lying side-by-side, and a third, about half a kilometre from that spot. The three bodies had gun-shot wounds on their heads, inflicted in similar pattern, from right ear to left ear, and blood was oozing from the wounds. No document or other items were found on the bodies. After photographs were taken, the Police took the bodies to Nairobi City Mortuary. At the mortuary, there were relatives who helped with identification of the bodies. The deceased were identified as – (i) **Ibrahim Ali Abdulleh** – a Member of Parliament in the Somali Transitional Government, killed while attending peace talks at Mbagathi, Nairobi; (ii) **Abdi Haji**, a driver employed by **Ibrahim Ali Abdulleh**; (iii) **Hassan Abdurahman Mohamed** – a businessman selling electronics along Luthuli Avenue, Nairobi.

PW12 testified that he had recovered a mobile telephone box from the wife of 1st deceased, bearing serial number 351004/26/324866/5, and this information was used to track down the handset, Samsung A800, in Wajir. He said this phone had been acquired and used by many people, since the death of the three persons named in the charges.

PW12 testified that the Police had acted on information that the said phone, Samsung A800, had come into the possession of the accused immediately it left the body of the deceased – and this was the basis of the charge. In the words of the witness: "*We got no other evidence against the accused.*"

When the Police sought the accused in connection with the matter, he voluntarily reported to Ngong Police Station, and he was then arrested and charged.

PW12 said on cross-examination that he and his fellow Police officers had found "*a crowd of people where the bodies were found,*" and that if members of the crowd had taken anything from the bodies, the

Police would not know. PW12 said, however, that the scene was undisturbed; and he formed the impression that the deceased persons had been killed elsewhere, and then dumped in Oloolua Forest. There had been no signs of struggle.

A security officer at Mbagathi was at the scene, and was the one who told PW12 that one of the deceased was a Somali MP attending peace talks at Mbagathi. This security officer was reluctant, however, to make a formal statement to the Police. The Police officers had seen no need to compel the security officer to make a statement.

PW12 testified that the three deceased had been travelling in one motor vehicle, registration number KAM 277P on 18th October when they met their death; and this motor vehicle was not recovered.

E. SUBMISSION OF NO CASE TO ANSWER

Mr. Kilukumi, learned counsel for the accused, submitted that the facts coming before the Court via the testimonies of the twelve prosecution witnesses, had failed to connect the accused to the offence charged, and, consequently, there was no basis in law for putting him to his defence. He asked the Court to acquit the accused at this preliminary stage, by virtue of s.306(1) of the Criminal Procedure Code (Cap.75).

Learned counsel attempted a methodical analysis of the prosecution evidence, based on testimony and exhibits. He classified the testimonies as falling in three categories: (a) PW1, PW2, PW3, PW4, PW5, PW7, PW8, PW9, and PW11 in relation to the cellphone handset which was used as the original information-base for the investigations preceding prosecution; (b) PW8 and PW10, regarding the death of the deceased persons; and (c) PW11 and PW12 as witnesses who had been the investigation officers.

Mr. Kilukumi submitted, and, with respect, correctly, that the evidence of one particular prosecution witness, PW6 (**Robert Murega Kigunda**), had proved to be unrelated to the prosecution case. This witness spoke of a cellphone, Samsung R220 (MF12) which was not produced as an exhibit; about which no other witness spoke at all; and which was not in any way linked to the accused herein.

Learned counsel noted that though PW8, **Dr. Zephania Kamau**, gave testimony that brain haemorrhage occasioned by gun-shot, was the primary cause of death of each of the deceased persons, there was no testimony establishing the identities of these persons. There was no evidence given by any relative, or anyone else who had known the deceased persons, and even the persons said to have identified the deceased to the pathologist conducting post-mortem examination, were not called as witnesses. On this account, counsel submitted that since the examining doctor (PW8) did not himself know the deceased persons, “*he could very well have been examining some other bodies.*”

In these circumstances, learned counsel urged, if the accused, if put to his defence chose the legal option of silence, could the Court find this to be a proper case for convicting? And counsel was clear that the answer would be in the negative – for there would have been no proof-beyond-reasonable-doubt. Hence, counsel submitted, the accused was entitled to an acquittal.

Mr. Kilukumi submitted, quite correctly, with respect, that this case was founded exclusively on circumstantial evidence, as there was not a single person who saw the killing of the deceased persons take place. The investigating officer, PW12 had made it quite clear that the sole basis for investigations leading to prosecution, was the cellphone handset, Samsung SGH-A800 which was believed to bear records of communications pointing an accusing finger at the accused. As already recorded in this Judgment, PW12 was clear, that “*We got no other evidence against the accused*” – i.e apart from the evidence linked to the said Samsung A800 cellphone.

Learned counsel, therefore, focused his attention on the plural ownership-transactions involving the said Samsung A800 cellphone, to assess the possible extent to which it would implicate its first known owner, the accused, in the crimes of murder specified in the charge-information.

PW1 had bought the said Samsung A800 cellphone on 2nd December, 2003 from the accused, and then

sold it only some two days later. The accused had told PW1 that he had purchased the said cellphone from a shop, but it had already been used at the time. From the time of death of the deceased persons, on 18-19th October, 2003 up to the time the accused sold the Samsung A800 cellphone to PW1, amounted to a period of 44 days; and as much as 229 days then passed, before PW11 recovered it in Wajir, on 5th June 2004. Counsel submitted that in view of the fact that the said cellphone had changed hands rapidly over the months, it was not a reliable basis for fixing the accused with responsibility for the killing of the deceased persons. It would not even be possible, counsel submitted, to infer that the earlier registered owner of the said cellphone referred to as **Hassan Mohamed** of Mombasa, was the same as **Hassan Abdurahman Mohamed**, one of the deceased persons. Even assuming the registered owner of the cellphone was the said **Hassan Abdurahman Mohamed**, counsel urged, it had not been shown by any of the prosecution witnesses that on 18th October, 2003 this cellphone was in the hands of the accused; the prosecution had failed to connect this cellphone to the hands of the accused, as at 18th October 2003 when the deceased persons would have been killed. It was urged that proof of crime by the accused was not achieved by merely stating that the deceased, **Hassan Abdurahman Mohamed** had left home with the said Samsung A800 on 18th October, 2003; it must be shown that at the material time, this cellphone had been in the hands of the deceased.

Mr. Kilukumi also questioned the data obtained by PW11 from Safaricom the cellphone service-provider: because whereas the serial number attached to the handset by PW11 had 16 digits, the manufacturer's number shown on the handset and on the box-container, had 15 digits.

Counsel also noted that the prosecution had failed to produce in Court certain two sim-cards which had been used on the Samsung A800 cellphone around the material time. As the said two sim-cards would have enabled the Court to know the time from which they were in use, counsel urged, their non-production should be construed adversely against the prosecution case.

Mr. Kilukumi attached significance to the element in PW12's testimony: that the accused had voluntarily travelled from Wajir, and presented himself to the Police at Ngong, when he received word that he was required there. This could only show, it was urged, that the accused was not the one who killed the deceased persons.

Learned counsel urged that in the several respects set out herein, the prosecution had failed to make out a *prima facie* case against the accused. The main authority relied on in this regard was **Ramanlal Trambaklal Bhatt v. R** [1957] E.A. 332, a decision of the Court of Appeal for Eastern Africa. The Court in that case, stated the legal obligation resting on the prosecution, in regard to burden of proof (*per Sir Newnham Worley, P.*, at pp.334-35):

“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 truethat 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.”

Those principles are also found in another appellate Court decision, *Simoni Musoke v. R* [1958] E.A. 715 (at pp.718 – 719, *per Gould, J.A.*) (which relates to proof, much as in the instant case, by *circumstantial evidence*):

“The learned judge did not expressly direct himself that, in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As it is put in *Taylor on Evidence* (11th ed., p.74) – ‘The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt’.”

The Court of Appeal adopted the position stated in the *Privy Council* case *Teper v. R* [1952] A.C. 480 (at p.489):

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

In the instant case, *Mr. Kilukimi* submitted, there are co-existing circumstances which point towards innocence, namely, that cellphone handsets were routinely sold in the market, and it was all- so-normal that the accused bought his Samsung SGH-A800 in this way; the accused voluntarily reported to the Police at Ngong, when he heard that the Police were looking for him; the one person who told the Police at Oloolua Forest in Ngong that he knew the deceased, was not called as a witness.

Counsel submitted that PW11’s testimony ought not to be accepted as expert evidence; because he had no convincing explanation for the discrepancy between the serial number for the handset, Samsung SGH-A800 which he obtained from the service provider, and the manufacturer’s serial number which was prominently shown on the handset and on its holding-box. (The relevant principle of the law of evidence is considered in the Court of Appeal decision in *Kimani v. Republic* [2002] 2 E.A. 417, at p.421: *opinions are not binding on the Court; they are to be taken alongside the evidence, insofar as they make good sense*).

Counsel urged, from the testimony of PW12, that the mere fact that the Samsung A800 had been owned by the accused had raised suspicion that he was involved in the killing of the deceased persons; but suspicion by itself cannot be a basis for initiating a criminal case. This is a legal position well stated in the Court of Appeal decision in

Sawe v. Republic [2003] 1 E.A.280, at pp.281-282:

“There was nothing to connect the appellant with the death of the deceased except mere suspicion. Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The prosecution must prove the case against the accused beyond reasonable doubt.”

Counsel urged that the Court could only convict after sufficient evidence had been laid on the table, and it would not look outside the set of evidence provided so as to find new inculpatory material. To underline this point counsel cited the Uganda High Court case, *Burunyi & Another v. Uganda* [1969] E.A.123 in which *Sir Udo Udoma, CJ.* thus remarked (pp.128-129):

“It is not the duty of the Court to ‘stage-manage’ cases for the prosecution; nor is it the duty of the Court to endeavour to make a case against an accused person where there is none.

“In a criminal case the Court cannot enter....the arena. The duty of the Court is to hold the scale to see that justice is done according to law on the evidence before it.”

F. PROSECUTION’S POSITION ON THE PRELIMINARY SUBMISSTIONS

Learned State Counsel, **Mr. Ondari** did not feel inclined to make a response and, instead, invited the Court to consider the merits of the defence submissions and to give a ruling.

G. ANALYSIS AND ORDERS

The search for a just decision, in practically all cases, but more particularly in criminal law, must always set out from, and end up with, the *facts*. Facts come through the evidence placed before the Court, tested, confirmed, and recorded appropriately. Are there facts established through evidence, in this case, that ought to move this case forward, beyond this preliminary stage of submissions?

The accused was arraigned in Court for the reason that three cadavers were found in Ooloolua Forest in Ngong, and, from information pieced together from a certain cellular phone, a Samsung SGH-A800, it was believed that the deaths were the handiwork of the accused. A vital witness, was PW8, **Dr. Zephania Mwangi Kamau**. On the three bodies whose identities he did not himself know, PW8 conducted a post-mortem examination and formed the opinion that each of the deceased persons had been shot in the head. The investigating officer, **Rtd. Insp. John Otieno** (PW12) left no doubts, that the killing of the three had taken place elsewhere, and then the bodies were dumped at Ooloolua Forest. There is a gap in the evidence which learned counsel **Mr. Kilukumi** was able to bring out. How is it to be known that the three bodies recovered from Ooloolua Forest are the ones PW8 examined and concluded they had been shot? Before PW8, some individuals appeared and identified the deceased persons as persons they knew; but then, they did not come to Court to give evidence about their knowledge of the deceased persons. So, although the accused is charged with the murder of **Ibrahim Ali Abdulleh, Hassan Abdulrahman Mohamed** and **Mohamed Haji Abdi**, there is no evidence before the Court that those persons named in the charge, were the persons killed and their bodies dumped at Ooloolua Forest.

A criminal charge must be *specific*; proof of it must be specific and accurate; as only such a focus in the prosecution case would enable the accused to defend himself in the context of the safeguards of the law. The lack of evidence on how the bodies examined by PW8 were identified, firstly, raises questions as to the true identities of those bodies; and secondly, shows a failure in adducing evidence, on the part of the prosecution which this Court ought, as a matter of law, to construe as showing that there was **no** relevant evidence to be adduced.

The investigating officer (PW12) made it quite clear that there was no basis for laying charges against the accused, other than that it had been found the cellphone, Samsung SGH-A800 later owned by the accused, had been registered in the name of a person presumed to be one of the deceased persons, **Hassan Abdulrahman Mohamed**. There is, of course, the presumption of identity between the said registered owner of the Samsung A800 cellphone – which this Court holds to fall short of the proof of identity required in a criminal case ? and one of the deceased persons. But there is, secondly, the discrepancy in the serial number for the cellphone provided by the mobile phone service provider, and the actual manufacturer's serial number shown on the handset itself. This discrepancy, again, brings doubts in the specificity of the prosecution case, which, thus, detracts from the prosecution's task of making a *prima facie* case, at this stage.

There is evidence that, in relation to the killings which are the subject in this case, the Police had arrested and interrogated a number of people; but it turned out that each of these people had been but an innocent handler, through purchase or otherwise, of this phone which had changed hands about as much as seven times, within a period of several months. These circumstances tend to show that the accused could have been just one of such innocent persons into whose hand the cellphone, Samsung SGH-A800, came over the said period. It is also noted that the accused, of his own volition, came along to report to Ngong Police Station when he heard that he was being sought in connection with a criminal case. I hold these circumstances to be entirely consistent with innocence on the part of the accused; and the principle well established in criminal law is thus, herein, well exemplified:

“before drawing the inference of the accused's guilt from circumstantial evidence [the Court must be] sure that there are no other co-existing circumstances which would weaken or destroy the inference” – *Teper v. R* [1952] A.C. 480 (at p.489).

The conclusion to be drawn, on the facts of this case, is that the prosecution did not succeed in connecting the accused's hands to the causation of the death of the three deceased persons. There was no basis for laying the charges of murder against the accused; no *prima facie* case has been made out; it is clear the charges cannot be proved, and there is no reason to take this case to the final stage.

Accordingly, I hereby acquit the accused by virtue of s.306(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya). The accused shall forthwith be set at liberty, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 31st day of January, 2008

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mr. Huka

For Accused: Mr. Kilukumi

For the Respondent: Mr. Ondari