

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 5 of 2004

REPUBLICPROSECUTOR

VERSUS

ANTONY MWAMBANGA JUMWA1ST ACCUSED

GALU MAGHANGA2ND ACCUSED

JOHN MWASI3RD ACCUSED

FERDINAND BORA MWAVUNDO.....4TH ACCUSED

**AMOS MDAWIDA MWAVULA5TH
ACCUSED**

R U L I N G

Anthony Mwambanga Jumwa, Galu Maganga, John Mwasi Mwatate and Ferdinand Bora Mwavundo were jointly charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code in Mombasa H.C. Criminal Case No. 5 of 2004. One Amos Mdawida Mwavula, was also charged with the same offence in Mombasa H.C.Cr. Case No. 56 of 2004. The two cases were consolidated upon the application of Mr. Monda, learned Senior State Counsel with the approval of the learned advocates appearing for the accused persons on 21st May 2005. The particulars of the offence are that on the 22nd day of November 2002, at about 10.00 p.m. at Bungule village, Kasigau Location within Taita Taveta District of the Coast Province jointly with others not before court murdered Elizabeth Wanjala Mwandoe.

At the close of the prosecution's case a total of ten (10) witnesses had testified in support of the charge. Both Mr. Monda the learned Senior State and Messrs Obura, Kamoti and Hamza learned advocates for the 1st, 2nd, 4th and 5th accused persons respectively submitted under Section 306 of the Criminal code.

It is the submission of Mr. Obura, learned advocate for Anthony Mwambanga Jumwa, the 1st accused person, that the prosecution did not establish a prima facie case which necessitates the placing of the 1st accused person on his defence. It is the submission of Mr. Obura that the 1st accused presented himself to the police on 27th November 2002 and was taken to Voi Resident Magistrate's court on 16th December 2002 and later on, in the month of June 2004 he was brought to this court. The learned advocate argued that the prosecution in the evidence of Chief Inspector of Police Paul Odede (P.W.7) did not explain the reasons why the accused was not taken to court before the lapse of the 14 days fixed by the constitution. It is the 1st accused's submission that his constitutional rights have been breached hence the charge should be dismissed and that he should be acquitted. It is further the submission of the 1st accused that the evidence on record did not connect him with the murder of the deceased. There is an allegation that the eye witnesses (P.W.3 and P.W.4) who were called in support of the prosecution's case were too drunk that their evidence could not be relied upon as credible to sustain a conviction. It is also pointed out that P.W. 4 was held as a suspect for 3 days before he was released to testify in support of the prosecution's

case. This court was told not to rely on the evidence of P.W. 4 on that account. The 1st accused also argued that there were contradictory evidence between the evidence of P.W. 1 and P.W.3 vis-à-vis the evidence of P.W. 4 and P.W. 9 as regarding as to whether it was dark or there was moonlight in the fateful night. There is also the argument that there was no malice aforethought established as against the 1st accused. Mr. Kamoti, learned advocate for the 2nd, 3rd and 4th accused persons adopted the submissions of Mr. Obura. It is the submission of Mr. Kamoti that it was dark on the fateful night hence the conditions were not favourable for a positive identification which was free from error. It is the argument of Mr. Kamoti that there was no conclusive cause of death in that it is possible the deceased died of other causes other than injuries occasioned by assaults. Mr. Hamza, learned advocate for the 5th accused also adopted the submissions of Messrs Obura and Kamoti. Mr. Hamza was of the view that no malice aforethought was established on the part of the accused persons as there were many people who beat up the deceased on suspicion of practicing witchcraft.

On this part Mr. Monda, learned Senior State Counsel was of the firm view that the prosecution had established a *prima facie* case strong enough to put the accused persons on their defence. It is said that the evidence of P.W. 4 is that of recognition as opposed to identification because he was related to the accused persons. Mr. Monda pointed out that though P.W.4 was drunk, he was a truthful witness. Mr. Monda also agreed that the accused persons were brought after the lapse of 14 days fixed by the constitution. The learned Senior State Counsel was of the view that the complaint should have been raised as a Preliminary Point instead of waiting up to this late stage of the proceedings.

I have considered the evidence tendered by the ten (10) prosecution witnesses. I have also considered the oral submissions presented by both, the prosecution and the defence counsels. It must be remembered that at this stage, the court is dealing with the issue as whether or not the prosecution has established a *prima facie* case. The Court of Appeal for Eastern African gave the meaning to '**a prima facie case**' in **Ramanalal Bhatt =vs= Republic [1957] at page 334** 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’s case, the case is merely one ‘which on full consideration might possibly be thought to be 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, that the court is not required at the stage to decide finally whether the evidence is worthy 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.”

Having considered the meaning of a *prima facie* case, let me now apply the cardinal principle to this case by posing to this case by posing the following question: Can the evidence tendered by the prosecution sustain a conviction against all the accused persons if the accused persons opted to keep quiet without tendering any evidence? The answer to this question can be founded by critically analyzing the evidence. It would appear the conditions for identification may have been unfavourable for positive identification for a complete stranger. However there is evidence that the accused persons were recognized and placed in the scene of crime by persons well known to them, particularly P.W.1. There was no evidence that P.W. 1 had any grudge against the accused persons. The evidence tendered by the prosecution tend to show that the motive for the assault was witchcraft. The other serious submission is the fact that the first accused was said to have been held beyond the 14 days set by the constitution. It is the submission of Mr. Monda learned state Counsel that had he been given prior notice of the objection he could have been able to give a reasonable explanation as anticipated under Section 72 of the constitution. With great respect I agree with the submissions of Mr. Monda that it was incumbent upon any accused

person who intends to raise the issue as preliminary point to do so early enough so that the prosecution will be in a position to explain the cause of the delay. That duty to give the notice is placed on the accused person just like when an accused person seeks to rely on the defence of alibi, he must give prior notice so that the prosecution is not taken by surprise. For this reason I will not rule at this stage in favour of the accused persons.

In the final analysis I am of the view that the prosecution has established a prima facie case. Consequently all the accused persons are placed in their defence. They are now required to state whether or not they would personally testify. If the answer is yes, then they should state whether or not they would give sworn testimony. They should also inform this court whether they would be calling for independent witnesses to buttress their defences.

Dated and delivered at Mombasa this 29th day of July 2008.

J. K. SERGON

J U D G E