



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 105 of 2005

REPUBLIC..... PROSECUTOR

-VERSUS-

JOSEPH ZAKAYO MAITHIA.....1ST ACCUSED

SAMMY NDIKU.....2ND ACCUSED

ANTHONY MULI NZIOKA.....3RD ACCUSED

JOHN MUTINDA.....4TH ACCUSED

MORRIS ODHIAMBO.....5TH ACCUSED

RULING

A. BACKGROUND TO THE TRIAL

1. In the information dated 28th October, 2005 and filed in Court in the name of the Attorney-General, the five accused persons were charged with the offence of murder contrary to s.203 as read with s.204 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the accused persons, on 31st March, 2005 at Tassia Estate in Nairobi, murdered one *Mutuku Mukanga*.

2. Plea was taken before *Rawal, J.* on 23rd November, 2005 each accused pleading not guilty, and trial, with assessors, commenced before me on 25th January, 2007. Subsequently, on 29th January, 2008 orders were made discontinuing the participation of assessors in the trial, following the enactment of Statute Law (Miscellaneous Amendments) Act, 2007 (Act No. 7 of 2007) which entered into force on 15th October, 2007. The Act had taken away the role of assessors, and the Court no longer had the competence to make a summing-up to assessors, or indeed to authorise the payment of allowances to them.

B. EVIDENCE ADDUCED BY THE PROSECUTION

1. PW1, *Samuel Kikulu Daniel*, from Kibwezi in Eastern Province, testified that he had been living in Nairobi and working as a mason and steel artisan, during 2005, the year when the incident the subject of the prosecution case, took place. On 31st March, 2005 the then Member of Parliament for Embakasi Constituency in Nairobi, *Mr. Mwenje*, had called a meeting with his constituents at Tassia, and PW1 attended. Just before the MP's arrival at the venue of the meeting, the small gathering of some 50 people,

PW1 among them, saw a larger group of people, something in the order of 200, armed with bows, arrows, clubs and machetes, closing in on them. PW1's small crowd was overpowered, and he was struck with an arrow on the face, and he fell. PW1 regained consciousness only to find himself at Kenyatta National Hospital; he had had *no opportunity to identify anyone* among the gang that had assaulted him and his group.

2. On cross-examination, PW1 said he had not known the collective identity of the gang that attacked him at the venue of *Mr. Mwenje's* planned meeting. Within the Embakasi area, gang fights were not uncommon; PW1 did not know if those who attacked him were members of the anti-*Mwenje* group. The witness knew *none* of the five accused, and he had not met any of them before the Court appearance.

3. PW2, *Joseph Seng'e Mutunga*, had in 2005 been doing odd construction-site jobs in the Embakasi area. On the morning of 1st April, 2005 he was at his rural home in Makueni, in Eastern Province, when he was called by his elder brother in Nairobi; PW2 was *told* that his uncle, *James Mutuku Mukanga*, had been one of those killed the previous day, during the attack on those attending *Mr. Mwenje's* meeting.

4. PW3, *Bernard Ugao Maweu* of Makueni, had been working as a driver, and living at Kayole, in the Embakasi area, during the year 2005. While he was at his Kayole house, on the morning of 1st April, 2005 a child was sent to inform PW3 that his uncle had on the previous day, been injured while attending *Mr. Mwenje's* meeting and was taken to Kenyatta National Hospital; but when he went to the hospital, he found that the said uncle had died.

5. PW4, *Peter Muriuki Ndegwa*, who is a pathologist with the medico-legal section of the Ministry of Health, and is attached to the Nairobi City Mortuary, conducted a post-mortem examination on the body of *Mutuku Mukanga*, the deceased, on 15th April, 2005 after the body was identified to him by both PW2 and PW3. The history given to PW4 was that the deceased had died on 31st March, 2005 at Tassia Estate following an assault upon him. The deceased was a male African adult, of good nutritional status. The body had a stitched cut on the left frontal scalp, and a depressed and displaced fracture on the right tempo-parietal skull. The deceased had experienced an intra-cranial haemorrhage; but his other systems were normal. It was PW4's *opinion* that death had been caused by head injury from blunt trauma. He signed the post-mortem form on 15th April, 2005 and now tendered this as an exhibit.

6. On cross-examination by learned counsel *Mr. Kanyangi*, PW4 said he had examined the whole body of the deceased, and the only wound he found was the one on the left frontal scalp. This wound, in the opinion of the witness, was caused by a blunt object – such as a stone, or a stick. The witness was unable to say whether the said blunt object could have originated at short or long-range. Colossal force must have attended the fatal impact, judging by the resulting intra-cranial haemorrhage; and the witness thought such force would have originated from a single person. PW4 thought it unlikely that the said force could have emanated from five persons, the number of the accused herein.

7. In response to re-examination by learned counsel *Mrs. Ouya*, and to a question by the Court, PW4 said it was possible the deceased had been subjected to assault-impact *twice* by the same attacker, or by two different attackers; but as there were injuries on only one side but not the back side of the head, he reckoned that the head was not lying on any surface, at the time of the fatal trauma.

8. PW5, Police Force No. 42504 *Police Constable Joseph Ndung'u*, who was working at Embakasi Police Station in 2005, testified that he had visited Kenyatta National Hospital on 14th April, 2005, and there, he met PW2 and other relatives of the deceased; he then escorted the body of the deceased to the City Mortuary, where relatives identified the deceased, before post-mortem examination was conducted.

9. PW6, *Dr. Zaphania Kamau* of the Nairobi Police Surgery, testified that on 23rd June, 2005 three men, namely *Sammy Ndiko* (2nd accused) *Maurice Odhiambo* (5th accused) and *John Mutinda* (4th accused), were brought before him, so he may assess their ages and mental status, and examine them for any injuries.

10. PW6 found 2nd accused to be aged 34, of sound mind, and with *no physical injuries*; 5th accused to be aged 39, of sound mind, with *no physical injuries*; and 4th accused to be aged 27, mentally sound, and with *no physical injuries*.

11. *Joseph Zakayo Maithia* (1st accused) and *Anthony Muli Nzioka* (3rd accused) were brought before PW6 on 20th June, 2005; and he found 1st accused to be aged 47 years, mentally sound, and with *no physical injuries*; and 3rd accused to be aged 38, mentally sound, and with *no physical injuries*.

12. PW7, Police Force No. 74580 *Police Constable Nahashon Kivindu*, testified that he had been stationed at Embakasi in 2005. He was at the station on 31st March, 2005 when the Officer Commanding the Station called him, and *showed him four men* as bearers of vital information. The OCS asked PW7 to go with the said four men to Tassia, so they would *show him suspects* who had allegedly assaulted and harmed two persons (apparently, the deceased, and PW1) *the previous night*. PW7 and the four men were accompanied by three other Police officers, and they drove to Tassia in a Police motor vehicle. At Tassia, PW7 and those accompanying him found a group of 50 – 100 people, *some of whom came close*, while others ran away from the place. *Some*, in the said group of 50 – 100 people, were armed with machetes and knives.

13. PW7 and his fellow Police officers “*confronted the [armed persons in the group], and arrested four of them.*” PW7 then *delivered the four arrested persons to Embakasi Police station*, and “*booked them with assault charges.*” Although this testimony shows *random arrest and detention* of the *four*, PW7 testified: “*Later, [the] Investigating Officer came to tell me [these four] would be charged with murder; one of those assaulted had died.*” PW7 testified that the four arrested were “*the four now in the dock.*”

14. On cross-examination by learned counsel *Mr. Kanyangi*, PW7 said the OCS had sent him and his fellow-officers to Tassia, to be *shown* “*those who had assaulted the deceased persons.*” One of those who led PW7 and his fellow-officers to Tassia was *Njeru Muiruri*, and he is the one who informed these Police officers: “*this is the group of attackers who assaulted the [deceased].*” PW7 said that the four persons arrested were within the large group of 50 – 100 people who were found at Tassia at the time, and “*nobody identified the four specifically.*” The witness said:

“I just arrested the four, and investigations followed thereafter.”

15. PW7 said the distance between Tassia and Embakasi Police Station was about 5 km, and that *Njeru Muiruri* and his three companions had covered that distance by unknown means, to come and report about the trouble at Tassia; and upon receiving their report, the Embakasi OCS dispatched PW7 to Tassia, where he arrived at 12.00 noon. PW7 *did not know* the four men (including *Njeru Muiruri*) very well, and did not know the nature of their occupation at Tassia.

16. On how PW7 and his colleagues arrested the accused herein, out of a large group of 50 – 100 people, he testified: “*We shot in the air, and that is when the accused persons surrendered; I arrested the four.*”

17. PW7 said he had worked at Embakasi Police station for some seven years, and he did not know that Tassia was a restless neighbourhood; “*fighting over plots [of land] in Tassia were a frequent occurrence.*”

18. PW7 testified that he *did not see* the deceased or PW1 being assaulted by the Tassia crowd; and he did not know the number of those who assaulted the deceased.

19. PW7, all the time, spoke of the *four persons* (among the five accused) whom he arrested at Tassia at 12.00 noon on 31st March, 2005 [could it be 1st April, 2005?], after being sent there by the Embakasi OCS.

20. Then, what about 5th accused, *Morris Odhiambo*? Did anyone see him at Tassia, assaulting the

deceased, or PW1?

21. This is what PW7 said in Court: “*I saw him at the Police station. I had known him before and after the fight; I found that he was arrested later; I don’t know why. I did not know he was a chairman of a local company.*”

22. How did PW7 associate the first four accused persons with the killing of the deceased? This is his testimony:

“The four accused had a hoe-handle each. Some hoe-handles were cast away by [members of the crowd] running away. Some had machetes; but they all took off; I didn’t arrest them.”

He said *Muiruri* was the one who pointed out the accused persons to him, so that PW7 may arrest them; and *Muiruri* told him that two persons (presumably the deceased, and PW1) had been assaulted; but he *did not know* for certain, that such assaults had taken place at all. The identification process leading PW7 to arrest the first four accused was rather sketchy; in his own words:

“Those who identified them only said: ‘It is this group!’; they did not pin-point the four [accused persons]; but the four were in the group.”

23. On re-examination by learned counsel *Mr. Ndemo*, PW7 said, of the manner in which they effected the arrest of the first four accused:

“We were few; we didn’t ask them questions, for they were advancing on us; we shot in the air. We just arrested the four; we recovered hoe-handles; we took them to the Police station. They surrendered; lay down; we arrested them.”

C. THE EVIDENCE DOES NOT DISCLOSE A CASE TO ANSWER: SUBMISSIONS FOR THE FIVE ACCUSED

1. With PW7’s testimony recorded, learned counsel *Mrs. Ouya* closed the prosecution case, and indicated that an eighth witness (one *Police Constable Mboya*) previously intended, would “not make much of a difference.”

2. Learned counsel *Mr. Kanyangi* submitted that the prosecution had not made out a *prima facie* case against the accused persons. The evidence of *P.C. Kivindu* (PW7) in particular showed, counsel urged, that the prosecution had not placed before the Court a *prima facie* case. The OCS had called PW7 and showed him four people who would take him to Tassia and *point out a suspect* who had injured two men (including the deceased). PW7 then went to the scene, 5 km away, and met some 50 – 100 people who, while armed, advanced towards PW7 and his fellow officers. Then the four people who had reported the matter signalled to these Police officers that *four men in the crowd* (four of the five accused) were the ones who committed the assaults – and PW7 promptly arrested the *four* from the large crowd. Clearly, the *5th accused* was not identified during the arrests; but he was arrested separately two weeks later. During the incident-reporting made at Embakasi Police Station, the four who became 1st, 2nd, 3rd and 4th accused respectively, were not at all *mentioned and named* as the persons who assaulted the deceased and PW1. Thus, the first report carried no indication of knowledge of, and ability to identify the suspects.

3. Neither *Njeru Muiruri*, nor any of his three companions with whom he had seen the Embakasi OCS, who as a result sent PW7 to *make arrests*, came to Court as a *witness*. PW7 was unable to recall who these companions of *Njeru Muiruri* were, when he was asked about them during cross-examination. And none of these reporting persons even as-much-as *recorded a statement* with the Police station.

4. *Mr. Kanyangi* questioned the veracity of the evidence regarding the moment of arrest of the first four accused. The four simply *lay down and surrendered*; they were *arrested and taken away*; the hoe-sticks they surrendered were not brought to Court as exhibits.

5. PW1, a witness who testified that he had been assaulted and injured on the material date, *did not perceive* the happenings well, and *did not see the first four accused* as some of the attackers, at the material time. PW2 was just *informed* that the deceased had been battered to death, on the material occasion. PW3 only identified *the body* of the deceased, at the mortuary. PW4 only performed the *post-mortem* examination. PW4 said in the cross-examination, that causation of the deceased's death could have come from *only one or two persons* – not from a mob. PW5 only witnessed the *post-mortem examination*.

6. In all these circumstances, *Mr. Kanyangi* urged, there was *no direct evidence* to incriminate the first four accused persons; and as to the *fifth accused*, no evidence at all had been adduced to associate him with the fatal injuries to the deceased person. Counsel urged that there was *no conclusive proof* as to who killed the deceased.

7. *Mr. Kanyangi* urged that the five accused persons be acquitted at this stage, as there was no *prima facie* case, and their continued prosecution would have no evidentiary basis to sustain it beyond this point.

8. *Mr. Kanyangi* also urged that the accused persons had been detained by the Police for as long as *eight months*, before having them arraigned in Court, and there was *no explanation* for this. It amounted, counsel urged, to an affront to the accused persons' *trial rights*.

D. PRIMA FACIE CASE SPEAKS FOR ITSELF: PROSECUTION'S STAND

In the briefest response, learned counsel *Mrs. Ouya* urged that the prosecution had established a *prima facie* case, requiring that the accused persons be put to their defence.

E. ANALYSIS OF THE EVIDENCE

1. From the foregoing detailed account, the evidence is, in my assessment, outstanding by its failure to directly show the hands of any of the five accused persons in the causing of the death of the deceased; and it is equally remarkable by its complete and utter failure to reveal inculpatory incidents that could even remotely suggest that any of the five accused, was associated with the circumstances in which the deceased was killed.

2. In a case of this nature, common practice shows that there would be at least one *key witness*, who stood close to the events occasioning the death of the deceased, i.e., a witness, or a couple of witnesses whose evidence, founded on clear perceptions or experiences, opens up the horizon, so the Court can see the jigsaw puzzle of perception or logical deduction, depicting the plot which culminated in the death of the deceased.

3. PW1 does *not at all* advance the prosecution case; he did not see any of the accused persons at the *locus in quo*, and he has no way of saying any of them was connected with the death of the deceased.

4. It is the same with PW2 who, moreover, was not even at the *locus in quo* at the material time; and that is precisely the position with PW3.

5. PW4, the pathologist, knew nothing about the circumstances in which the deceased was killed. His evidence, moreover, only goes to prove that the five-accused ought not to have been charged with the offence of causing the death of the deceased. In PW4's reckoning, the fatal blows were probably inflicted by just a *single person* and in any case, *not more than two persons*. And, given the uncontroverted evidence that tens of people, forming a large crowd, were in a state of rumpus at the *locus in quo*, at the material time, it cannot be said any of the five accused is the one who advanced from the crowd, and inflicted the fatal blow; there is *no evidence* to support such a proposition.

6. Such a dim state of the evidence is fatally vitiated, in my opinion, by the testimony of PW7, who could, I think, be regarded by the prosecution as their chief witness. PW7 did not himself perceive the events occasioning the death of the deceased. He says the fatal assault took place *at night* – presumably

on 31st March, 2005; and if he visited the scene at midday next following, this would have been on 1st April, 2005, and at least six-to-eight hours since the incident took place. This Court takes judicial notice that a crowd which had gathered at the *locus in quo* so many hours earlier, would have substantially dispersed, and it was inconceivable that PW7 would still find at the scene those who had attacked and wounded the deceased.

7. Since PW7 did not see any assaults being committed by the crowd he found at Tassia, there would have been *no basis for those he arrested to be booked in at Embakasi Police Station "with assault charges."* This discloses a wrong in law, and an infringement of the accused persons' rights to liberty.

8. It is not logical that, following the booking-in of four of the accused persons herein, the Investigating Officer would approach PW7 with the announcement that "*[these four] would be charged with murder, because one of those assaulted had died.*" If that is the basis on which *four* of the accused persons were charged, it would not be a responsible discharge of the Attorney-General's prosecutorial function, as he is expected to rely on firm and credible evidence which would make sense before the Courts of law.

9. PW7 arrived at the act of arresting *four* of the accused persons through essentially *unreliable representations* of one *Njeru Muiruri* and his three companions whose particulars the Police officers had not recorded; who themselves recorded no statements at the Police station; who were not called as witnesses; and whose very names or identities PW7 said he did not remember. Such evidence given by PW7, would suggest he was acting on *no sincere investigative directions*, but was being moved by fictitious, or possibly malicious reporting.

10. It was PW7's testimony that, while at the *locus in quo*, the first four accused were not identified to him by specific indication, as the ones who had battered the deceased; he was merely told: "this is the group of attackers who assaulted the deceased". He then says:

"I just arrested the four, and investigations followed thereafter."

11. True, in the administration of criminal justice, it is possible to arrest suspects who later turn out to be the very ones who were already sought, in connection with some particular offence; and in such cases, *identification* is of the greatest moment, and would often be achieved through the mounting of an *identification parade*. But in the instant case there is no evidence that any of the accused persons had been suspected of the killing of the deceased; that any description at all had been attached to the killers; that any attempts at all were made to match the accused persons herein, by their appearances, to any face-descriptions or other appearance already reported (in *first reports*); and the possibility of resorting to an identification parade was not at any time ever considered.

12. PW7 was not arresting persons known to have had anything to do with assaults on the deceased. What he did is clear from his own words: "*We shot in the air, and that is when the accused persons surrendered; and I arrested the four.*"

13. If the evidence seeking to implicate the 1st, 2nd, 3rd and 4th accused is so flimsy and negative, what of the 5th accused? There is no evidence at all on the circumstances in which 5th accused was arrested, some two weeks following the material date, and then charged with *murder*, alongside the first four. It is more than plain, that there was absolutely *no basis* for preferring murder charges against 5th accused; but this goes also to prove beyond any doubts that there was no basis for preferring murder charges against the *first four accused*.

14. I come to the *conclusion* that this was an ill-advised prosecution case, as the Attorney-General could not have had in his possession evidence such as justified him authorising that a case for murder be initiated against the five accused.

F. APPLYING THE LAW

1. The law on whether or not there is a case to answer is stated in the Court of Appeal decision in *Ramanlal Trambaklal Bhatt v. R.* [1957] E.A. 332; in the words of Sir Newnham Worley, P (at p.335):

“A mere scintilla of evidence can never be enough, nor can any amount of worthless, discredited evidence. It is true...that 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.”

2. The onus of proving that the accused has committed the offence charged is always on the prosecution. The obligation to answer to the charge does not arise at all, unless the prosecution has already laid before the Court a *prima facie* case. A *prima facie* case, in my opinion, 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 closer examination of those circumstances could well lead to a finding that the accused did commit the offence.

3. It is clear from my review of the evidence that the prosecution had *not* a scintilla of evidence pointing to the hands of any of the five accused, in the commission of the offence; and so this is a prime case for *acquittal* at this preliminary stage.

4. From the record, the arrests of the five accused persons took place as follows: 1st accused – arrested on 1st April, 2005, and brought to Court on 8th November, 2005; 2nd accused – arrested on 1st April 2005, and brought before the Court on 8th November, 2005; 3rd accused – arrested on 1st April, 2005, and brought before the Court on 8th November, 2005; 4th accused – arrested on 1st April, 2005, and brought to Court on 8th November, 2005; and 5th accused – arrested on 11th April, 2005, and brought to Court on 8th November, 2005. These are only approximate dates, as the documents on file are hopelessly muddled, as regards relevant dates – and I take this to be a confirmation that the prosecution had not acted in good faith, and in responsible discharge of duty, in bringing charges of murder against the five accused.

5. An allowance may be made for the errors of dates in the prosecution documents; and when that is done, it turns out that the first four accused persons were detained by the Police for some 210 days before being arraigned before the Court; and the fifth accused was detained for 200 days before being brought to Court. The accused persons should ordinarily, by s.72(3)(b) of the Constitution, have been brought before the Court within 14 days of their being arrested; and where this was not possible, a *reasonable explanation* was required to be given in Court. But in a prosecution which, as already noted, was not conducted in responsible discharge of duty, no explanation at all for the delay was given. Learned counsel *Mr. Kanyangi*, in the circumstances, has quite properly urged that the prosecution case was in violation of the *constitutional rights* of the five accused persons.

G. CONSTITUTIONAL ISSUES: VIOLATION OF TRIAL RIGHTS

OF THE ACCUSED

1. Section 26(3) of the Constitution thus provides, in relation to the initiation of prosecution:

“The Attorney-General shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any court ...in respect of any offence alleged to have been committed by that person...”

Thus, initiation of prosecution, such as in the instant matter, was the mandate of the Attorney-General. But the Attorney-General’s exercise of that discretion required *responsibility* and *good faith*, and the

custodian of those values is this Court. That is evident from the content of s.123 (8) of the Constitution, which provides:

“No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any function under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”

2. Since there was *no evidence* which the Attorney-General could place before the Court, in support of the prosecution case, it follows, firstly, that the High Court was moved *in vain*; secondly, that the prosecutorial power in question was not exercised in *good faith*; and thirdly, that the constitutional rights of the accused persons were *unlawfully curtailed*.

H. FINAL ORDERS

1. There is no *prima facie* case against all the five accused, and, accordingly, by virtue of s.306(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya), I hereby acquit all of them, and order that they shall forthwith be set at liberty, unless they are otherwise lawfully held.

2. I hereby declare that all the five accused persons were unlawfully detained in connection with the proceedings herein, and they are entitled to compensation by the State, as provided in s.72(6) of the Constitution of Kenya; I order that compensation shall be duly paid to each of the five accused persons.

3. This file shall be placed before His Lordship the Chief Justice, to give directions for an assessment of compensation payable in the terms of Order No. 2 herein.

Orders accordingly.

DATED and DELIVERED at Nairobi this 22nd day of July, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Five Accused: Mr. Kanyangi

For the Prosecutor: Mrs. Ouya