REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 3 of 2003

REPUBLIC ……PROSECUTOR

VERSUS

KAZUNGU MWALIMU CHENGO

MWALIMU CHENGO NGARI ……..……ACCUSEDS

R U L I N G

Pursuant to Section 306 of the Criminal Procedure Code, Kazungu Mwalimu Chengo and Mwalimu Chengo Ngari, the accuseds herein, urged this court to find that the prosecution had not established a prima facie case to enable this court place them on their defence. The accused persons also claimed that their constitutional rights under S.72 (3) (b) of the Constitution of Kenya had been breached, They urged this court to dismiss the charge Mr. Monda, learned Senior State counsel indicated to this court that he was not going to submit under section 306 of the Criminal Procedure Code. This court only received the submissions of Miss Osino, learned advocate for the accused persons.

The accused persons herein are before this court on the information of the Attorney General jointly facing a charge of murder contrary to section 203 as read together with section 204 of the penal code. The particulars are that on the 9th day of July 1998 at Gotani Village, Kifungo Location in Kilifi district within Coast Province, jointly murdered Kahindi Kayaa. At the close of the prosecution case, a total of 8 witnesses testified in support of the prosecution's case. Miss Osino has urged this court to find that the testimonies of the eight witnesses did not establish a prima facie case to warrant the accused persons being placed on their defences. It is argued that the elements of actus reus and mensrea were not established. It is also averred that the evidence of P.W. 1 and P.W.2 contradicted each other hence the same should be given in favour of the accused persons.

I have considered the evidence of the eight (8) prosecution witnesses. Under Section 306 of the Criminal Procedure Code, this court has the discretion to place the accused persons on their defence if the prosecution can prove that it has a prima facie case. In **Ramanlal Bhatt –vs- R [1957] E.A. at 334** the court of Appeal for **Eastern Africa** defined the meaning of a 'prima facie case' as follows:

"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 evidence could convict if no explanation is offered by the defence"

In order to establish the offence of murder, two elements must be proved, namely *actus reus* and *mensrea*. The evidence tendered by P.W. 1 and P.W.2 indicated that the 2nd accused was known to have accused the deceased of practicing witchcraft. In fact they claimed that the dispute was pending before the area chief. According to P.W.1, the assailants who killed the deceased arrived in their home at 8.00 p.m. wore musks hence she did not recognize them. P.W.2 claimed he heard Kazungu Mwalimu, 1st accused tell some people that they did the job too early. P.W.1 and P.W.2 argue in their testimonies that Kazungu Mwalimu was not in good relationship with the deceased. The duo suspects that he killed the deceased because he suspected the deceased practiced witchcraft. There is no direct evidence that the accused participated in killing the deceased. The prosecution's case heavily rely on circumstantial evidence. I have considered the evidence and I find that the element of actus reus was not proved. What came out from the evidence of P.W.1 and P.W.2 and strong suspicion that the accused persons murdered the deceased. I find that though the suspicion is strong, it cannot substitute proof. I am convinced that there is some material contradiction in the evidence of P.W.1 and P.W.2. P.W.1 had stated that the assailants wore musks plus T-shirts. She said the musks fell down when the attackers fled upon her screaming. She said that is when she managed to see Mwalimu Chengo. P.W.1 also claimed she saw one Martin Kahindi.

On cross examination P.W.1 denied having seen the accused persons because she was too tired. She however admitted that she did not tell the police all these details. She even said that she told the area chief that she did not know the people who murdered the deceased. P.W.2 on the other said he did not see people who wore musks. Apparently whatever he

told this court were not given to the police. These are serious discrepancies which cannot change the position I have taken even if the accused persons are placed on their defences.

Miss Osino, also urged this court to find that the accuseds' constitutional rights under S.72 (3) (b) were breached. It is her argument that the accused persons were arrested and kept in police custody for more than 14 days before being taken to court. I have perused the evidence tendered. It is clear from the evidence of P.W. 8 that the 2nd accused was arrested on 4th December 2002 but was not taken to court until 31.3.2003. Mr. Monda did not deem it fit to explain the reason for the delay. I am enjoined by law to excuse the delay if acceptable reasons are given for the delay under S.72 (3) (b) of the constitution of Kenya. The court of Appeal in **Albanus Mwasia Mutua =vs= Republic Cr. Appeal No.120 of 2004** stated as follows:

"**Constitutionally, the burden was on the police to explain the delay. At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that apart from violating his rights under** Section 72 (3) (b) **of the constitution also amounted to a violation of his rights under** Section 77 (1) **of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."**

In this case the prosecution failed to explain why Mwalimu Chengo, the 2nd accused was not taken to court within the period fixed by the constitution. I find that the constitutional rights of the 2nd accused, under S.72 (3) b were breached. I declare the charge as against the 2nd accused to be null and void hence he should be acquitted at this juncture.

In the final analysis, I am convinced that the prosecution has failed to establish a prima facie case against both the accused persons. I dismiss the charge of murder and order that the accused persons be acquitted. The should be set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 30th day of September 2008.

J. K. SERGON

J U D G E

In open court in the presence of Miss Obura h/b Abdalla for 1st accused and Miss Osino for 2nd Accused.

Mr. Monda for the state.