



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

Criminal Case 38 of 2007

REPUBLIC PROSECUTOR

V E R S U S

PETER CHEGE WANJA.....ACCUSED

R U L I N G

[On whether or not the accused has a case to answer]

The accused, PETER CHEGE WANJA was, on 8/6/2007, charged with the murder of PETER KARIUKI NYAMU, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63 of the Laws of Kenya.

The proceedings commenced on 1/10/2007, and closed on 26/5/2008 during which period the prosecution called a total of Seven (7) witnesses in support of their case.

At the close of the prosecution evidence, the accused, through his defence counsel – Mr. Mbiu – submitted that the prosecution had not made a prima facie case to warrant putting the accused on his defence.

The Learned defence Counsel submitted that none of witnesses who testified in court witnessed the killing of the deceased, nor did any of those witnesses witness the alleged fight between the accused and the deceased. The only person who allegedly witnessed the fight was a Mr. Mwangi Maina, who was not called to testify in this case. According to the prosecution – Learned State Counsel Ms. Wafula – Mr. Mwangi Maina could not be traced. But to the defence the failure to call such critical person was because his evidence would have been adverse to the prosecution case.

The upshot of all the foregoing, is that the prosecution's case was purely circumstantial, and it is the defence submission that the prosecution has not discharged the burden of proof of guilt, beyond reasonable doubt, nor met the test of what is required to be proved under circumstantial evidence, to warrant putting the accused on his defence.

The accused also submitted that his Constitutional and Fundamental Rights to be brought before the court within 14 days of his arrest were violated by the police in that they held him in custody for over four(4) months and 4 days before bringing him to court. That challenge was conceded by the prosecution, vide the Cross-Examination of P.W. 6 – the Investigating Officer, who stated that he had no authority, nor reason, to delay bringing the accused to court within the prescribed period.

In reply, the prosecution, through Ms. Wafula, the Learned State Counsel, submitted that the state relied on the evidence on record, and that even though the evidence is circumstantial there is no other way to

explain the death except through the hands of the accused.

On delay to bring the accused to court within the Constitutionally provided period, Ms. Wafula submitted that once they closed their case, they cannot re-open it, and that they were not given a chance to explain the delay.

I have carefully considered the evidence adduced by the prosecution through their seven witnesses and considered the submissions by both the Learned Counsel, plus the authorities cited and relied upon by the Defence Counsel, and I have reached the following findings and conclusions.

The prosecution did not call any witness who witnessed either the alleged killing of the deceased by the accused, nor the alleged fight between the accused and the deceased. To that end the prosecution evidence is purely circumstantial, in the absence of any direct evidence as to what caused the death of the deceased. As a matter of fact, the pathologist, who testified and put in the Post Mortem Report was unable to conclusively state what the cause of death was. This is because, as per the evidence, the body was decomposed when it was retrieved from the River and no injuries could be detected on the body.

On when circumstantial evidence is sufficient to support a conviction or putting an accused person on his defence, the Court of Appeal in OMAR MZUNGU CHIMERA VS. REPUBLIC, Cr. Appeal No. 56 of 1998, at P. 5 through P. 6 stated as under:

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;**
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”**

The court went on and stated that:

“.....circumstantial evidence in order to sustain a conviction (must be complete and incapable of) explanation on any other hypothesis than that of the guilt of the accused. Circumstantial evidence which falls short of the required standard on all material particulars cannot in law form a basis for a conviction.”

In the case before me I have found and concluded that even the pathologist could not conclusively state the cause of death, and that there were no injuries on the body due to the decomposed nature of the body when it was retrieved from the water. That is not all. P.W. 6, the Investigating officer, in this case, told this court that at the point where the body of the deceased was retrieved, the River was infested with hippos.

To conclude on this point of circumstantial evidence, I must stress the obvious that **it is the duty of the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution evidence the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.**

The above was the holding in RAMANLAL TRAMBAKLAL BHATT V.R. Cr. Appeal No. 76 of 1957, where the Court of Appeal for Eastern Africa, also stated:

“The question whether there is a case to answer cannot depend 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.”

On the basis of the foregoing, I hold that the prosecution has failed to make a **prima facie** case to warrant putting the accused on his defence. The circumstantial evidence sought to be relied upon has yapping gaps that raise myriads of doubts.

However, if the above were not sufficient reasons to dismiss the prosecution’s case, there is the issue of the violation of the Constitutional and Fundamental Rights of the accused as per the provisions of Section 72(3) (b) of the Constitution. The jurisprudence that have developed around this area is briefly that unless the prosecution can satisfactorily explain the delay in bringing an accused to court within the constitutionally permitted period, the proceedings are illegal, null and void and the accused must be released.

In an effort to circumvent the issue, the prosecution submitted that the question of delay was not directly raised and they had closed their case when the issue was raised.

With due respect, the evidence before me does not support the Learned State Counsel’s case. In the course of the evidence by the Investigating Officer (P.W.6), the prosecution admitted that the accused had been in police custody for over 4 months and 4 days, and that the police had no lawful authority to do so. Of even greater importance is that the admission of the delay came out during the testimony of the 6th prosecution witness. One more prosecution witness – P.W. 7 – testified thereafter.

The bottom line is that the prosecution had not closed its case when the issue of delay was raised by the accused, and the prosecution had the opportunity to explain the delay, if any. The prosecution did not do so, and it is dishonest of the prosecution to allege that they had closed their case or they had no opportunity to explain the delay.

All in all, and for the foregoing reasons, I find and hold that the prosecution has not made a **prima facie** case to warrant putting the accused to his defence.

Accordingly, I hereby order the release of the accused forthwith, unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered in Nairobi, this 18th Day of September, 2008.

O.K. MUTUNGI

JUDGE