



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 130 OF 2004

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMWEL KARANJA KURIA.....ACCUSED

RULING

It is stated in the information laid against the accused, **Samwel Karanja Kuria**, by the Attorney-General and dated 8th September, 2004 that he, the accused, on **21st June 2004** at Uthiru Village, Kinoo Location, Kikuyu Division of Kiambu District, in Central Province, murdered **Mathew Mbugua Kimwaki**. The accused pleaded not guilty before **Osiemo, J** on 7th October, 2004 and the matter, after being mentioned several times before **Rawal, Osiemo** and **Ombija, JJ** respectively, came up before me on 13th February, 2006 when I selected the three assessors, **Wilkins Kirwa Chepkurgor, Mary Kagwanja** and **Stanley Mucheru Mwangi** and thereafter commenced the hearing.

At the end of the testimony of the 8th witness, on 29th March, 2006 the Prosecution closed their case, and thereupon, learned defence counsel **Ms. Siganga** sought an opportunity to make a submission of no-case-to-answer. **Ms. Siganga**, most unfortunately, fell ill thereafter and could not come to Court on the several dates which from time to time, were reserved for the submissions; and on 23rd October, 2006 learned State Counsel **Mr. Bifwoli** informed the Court that **Ms. Siganga** had passed on. Subsequently learned counsel **Mr. Kanyangi** took over as defence counsel, and he was able to make his preliminary submissions on 5th December, 2006.

Mr. Kanyangi urged that the Prosecution through its eight witnesses, had made no case calling for an answer by the accused, and that the accused should be acquitted at this preliminary stage.

While learned counsel represented that the Prosecution had called six witnesses, the correct position is that these witnesses were eight.

Mr. Kanyangi submitted that none of the Prosecution witnesses had actually seen the accused kill the deceased – which was, of course, a true statement of fact. Learned counsel took time to consider in particular the evidence of PW4, PW2, PW3.

Of PW3's evidence that he and eight others had, at 10.00p.m on the material night, passed by Neighbours Bar and when they tried to check on the deceased who was lying on the lawns, the accused chased them away, **Mr. Kanyangi** submitted that the act of the accused in that regard, must be attributed to drunkenness, and not ill-intentions towards the deceased as he lay on the ground. Learned counsel further

submitted that since the deceased was not killed at the very spot where he had been lying, it could not be known who killed him, at the place in the verandah of the Bar where his body was found. **Mr. Kanyangi** urged that in the darkness, no witness had seen the accused being involved in the killing of the deceased; and that PW3's voice-recognition of the accused on the material night should be discounted, because "voices can be similar, and voices can be faked."

Mr. Kanyangi urged that there was "no evidence to prove that even if the person who chased [PW3 and his group] was [the accused] it can be said **he** it was who later killed the deceased, a distance away." Counsel contended that a different person could very well have emerged from the dark and killed the deceased where he was lying. Counsel wondered why, as emerges from the testimonies, members of the public and the Administration Police had arrested several suspects, but in the end officers of the Kenya Police identified only the accused herein as the person to be charged.

Mr. Kanyangi painted a negative picture of PW4's evidence because PW4's brother, **Njenga**, was a friend of the accused; counsel urged that this witness is likely to have testified untruthfully, so as to give protection in the murder case, to his own brother, **Njenga**.

Mr. Kanyangi also doubted the forensic evidence given by PW8, on the basis that the witness did not know how the blood samples were obtained, labelled, arranged and stored.

In learned counsel's overall assessment, the evidence tendered does not prove that the accused committed murder, but only shows that the deceased was lying drunk on the ground, in the middle of the night, and could have been killed by anyone and not the accused necessarily.

In response, learned State Counsel **Mr. Njogu** submitted that the Prosecution had submitted more than sufficient evidence to show a *prima facie* case against the accused. Counsel highlighted the following aspects of the evidence: (i) At about 10.30 p.m. on the material night, PW2 and PW3 had come across the accused lying down, and nearby, they saw or heard the accused who had in his hands a butcher's cleaver, and who chased them away declaiming **he** was the one guarding the deceased, who was then alive. (ii) PW2 testified that he and his eight colleagues, at that time of the moon-lit night, did have a spot-light, by means of which they did see the accused who they very well knew. (iii) Soon after PW2 and PW3 had been chased away by the accused, PW1 witnessed the accused decamping from the scene of crime; and he saw the deceased lying dead – with cuts in many parts of the body; (iv) PW8's evidence shows that blood stains on the accused's effects had DNA origin in the deceased; (v) PW4's evidence shows that the accused had blood-stained hands when he was arrested; (vi) the cleaver which came from the accused was blood-stained. Such blood, **Mr. Njogu** submitted, only got onto the accused and on his clothes during the course of killing the deceased.

Mr. Njogu submitted that while the evidence was circumstantial, it pointed irresistibly to the accused and no other person, as the killer of the deceased. He urged that the accused be put to his defence.

I have considered learned counsel's preliminary submissions in full. The question at this stage is not whether or not the accused is guilty as charged, but whether there is such cogent evidence of his connexion with the circumstances in which the killing of the deceased occurred, that the concept of *prima facie* case dictates, as a matter of law, that an opportunity be created by this Court for the accused to state his own case regarding the killing. The governing law, on this point, is well settled.

In a ruling which I gave at a preliminary stage such as the instant one, in **Republic v. Kamiro Chege**, H.C. Cr. Case No. 3 of 2005 I had thus stated the legal position:

"It is a well-established principle of law, firstly, that in criminal cases the prosecution is required to prove its case beyond [any] reasonable doubt, as a condition to the conviction of the accused. Obviously, that ultimate position where proof fails or succeeds is, ordinarily, at the end of the trial; but clear failings in the cogency of evidence will lead, by virtue of s.306 of the Criminal Procedure Code (Cap.75), to the acquittal of the accused at a preliminary stage, where a submission of no-case-to-answer is upheld.

“Whether or not a submission of no-case-to-answer succeeds is not governed by any unchanging law; it depends on the circumstances of a particular case; on the cogency of the evidence tendered by the prosecution; and on the manner in which the Court assesses such evidence.”

In the instant matter I have given much thought to the evidence of the eight witnesses, even though I have made no analytical record in respect of such evidence. However, I have already set out the lines of submission which learned counsel have taken at this preliminary stage; and as is to be expected, the submissions focus on counsel’s perception of the cogency of the evidence. I have borne in mind the principle expressed by the Court of Appeal in **Anthony Njue Njeru v. Republic**, Crim. App. No. 77 of 2006: that too detailed an analysis of the evidence, at the no-case-to-answer stage is undesirable if the Court is going to put the accused to his defence, as too much detail in the trial Court’s ruling could then compromise the evidentiary quality of the defence to be mounted.

On the basis of my own perception of the testimonies, and of the submissions on evidence as made by learned counsel at this preliminary stage, the exercise of judicial discretion dictates that I should put the accused to his defence, and I hereby make an **order** accordingly.

Consequently I have to give certain directions. The accused having listened to the evidence adduced by the prosecution, may do **one** of **three** things, and the choice he takes is to be stated here in Court and, in this regard, the accused may consult with the defence counsel ?

(1) ***the accused may be sworn and then he gives his own evidence on oath:*** and if he takes this option, then he will be cross-examined by the prosecution;

(2) ***the accused may make an unsworn statement from where he is:*** and if this choice is taken, then he will not be questioned on what he has said;

(3) ***the accused may remain silent:*** and if he takes this choice, then again, he will not be asked any questions;

and whichever one of the three choices the accused takes, he may **call witnesses**;

and if he intends to call witnesses, then he may indicate the number of witnesses he intends to call;

and in the event the accused intends to call witnesses, then in fairness to the prosecution, the statements of these witnesses should be availed to the prosecution counsel in good time before such witnesses give testimony in Court.

As the co-ordination and the arrangements for testimony just referred to, require some time, I hereby adjourn these proceedings to a more suitable date which I will fix after hearing the representations of counsel on both sides.

Orders accordingly.

DATED and DELIVERED at Nairobi this 18th day of January, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung’u

For the Prosecution: Mr. Njogu

For the Defence: Ms. Siganga, succeeded by Mr. Kanyangi