



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 50 OF 2005

REPUBLICPROSECUTOR

-VERSUS-

JOHN KURIA KIHANJAACCUSED

RULING

On the information filed by the Attorney-General and dated 26th April, 2005 the accused herein, **John Kuria Kihanja**, was charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal Code (Cap. 63, Laws of Kenya). The particulars of the offence were that on **12th February, 2005** in the night, at the Nairobi West Shopping Centre in the Langata area of Nairobi, the accused had murdered one **Chacha Mwita**.

The record showed, at the beginning of the hearing, that the plea had been taken before **Lady Justice Rawal** on 30th May, 2005 and the assessors, namely **Daniel Mwai, Mildred Osotsi** and **Wilson Ogutu Nyegenye** had already been named.

PW1, **Peter Cosmas Kamende**, was sworn on 1st March, 2006 and went on to testify as follows. He is a resident of Nairobi West, and operates a security firm, Cosmobile Security Limited, of which he is the General Manager. At about 11.00 p.m. on 11th February, 2005 a lady by name **Wanja**, came to see him at his house. **Wanja** worked at a bar, Jean's Bar, at Nairobi West, and the bar's two security guards had been supplied by PW1. On that night the two guards, one being **Fred Wafula**, and the other being **Chacha Mwita**, were on duty at the bar.

Wanja came to report that **Chacha Mwita** while on night duty, had been stabbed with a knife, by a street boy. She was requesting PW1 to take **Chacha Mwita** to hospital. He acted by driving to the scene of the incident, and confirmed that, indeed, the guard had been stabbed. PW1 found **Chacha Mwita** groaning in pain and, at the scene, there were officers from the Langata Police Station. These Police officers helped PW1 to place **Chacha Mwita** in the back seat of his car. There were two "Good Samaritans" who also helped, and they accompanied PW1 to Kenyatta National Hospital. At the emergency ward of the hospital, the injured was promptly attended, being put on drip, and attempts were made to stop his bleeding, in the area covering the heart. PW1 and his party were then asked to wait outside, only to be informed by a clinical officer ten minutes later, that **Chacha Mwita** had died during treatment. PW1 then

took the deceased's guard uniforms, soaked in blood, as well as his personal possessions, and returned to his office.

PW1, after arrival at Nairobi West, attempted to get more information about the incident. He returned to the scene of the stabbing, and talked to people who were there. These people, who included taxi operators (but who were not identified), gave him the name of a street boy who had been involved in a quarrel with the deceased, earlier in the evening. In PW1's words: "*They mentioned the street-boy by name. He was a frequenter of the area. I can't recall the name*".

PW1 testified that when he had seen the deceased, following the stabbing incident, he had been in great pain. PW1 testified: "*He was calling my name. I asked him to cool down. I did not get any information from him.*"

PW1 confirmed on cross-examination (by learned counsel **Mr. Nyachoti**): "*I did not see the act of stabbing. I came after it had happened*". The witness averred that all his information had been gathered from the scene, after the act of stabbing had taken place. When he arrived at the scene he found "*many people there*". He did not remember the name of the taxi-man who had spoken to him about the assailant.

PW2 was **Magdalena Wanja wa Wachira**. She said she lived at Nairobi West, where she worked at Jean's Club, supervising workers. She is employed by one Richard Kimani Rugendo who owns the Club – a hotel and bar.

While inside the building, on the material date and at the material time, PW2 had been informed that one of her guards and a car-washer were chasing each other in the street. She came out through the gate. In her words: "*I found the guard lying down, and there were Police officers*". When she asked the officers to take the guard to hospital, they asked her to find a motor vehicle. At that time the prostrate guard was not talking. But she saw no blood oozing from the body of the guard. He was lying close to a building and the place was somewhat lit by light bulbs in neighbouring shops. PW2 thought to report this matter to the Manager of the security firm which employed the deceased; and she proceeded to the home of the Manager which was nearby. The Manager, **Cosmas**, drove to the scene and took **Chacha Mwita** to hospital. Having entrusted the guard to his employer, PW2 returned to her business; and it was only a week later that she learned that the guard had died. Her nickname for the guard was "*soldier*"; and she now testified: "*I do not know who killed Soldier; I was not there when it happened*".

PW3, **Fred Wafula Wanyonyi**, testified that at the material time he had been a security guard for Cosmobile Security, and would be deployed as the Manager of the firm, **Cosmas**, saw fit. At Jean's Pub, PW3 and the deceased – whose real names were not known to him but whom he invariably referred to by ethnic identity, Kuria — had been deployed. On 11th February, 2005 PW3 reported at Jean's Pub at about 6.00 p.m. He estimates that it was at about 9.30 p.m. that he heard noises in the neighbourhood; but he could not pursue this, as he was guarding the gate, and had responsibility for ensuring that nobody left with the pub's property. The commotion was like that associated with somebody being chased in the streets. At some point, PW3 locked up the back gate which he was guarding, and nipped into the front, out of curiosity. He found that the pub's customers were giving chase; and from that point he could see, some 100 metres away, "*Kuria*" lying down, face upwards. He approached, and called out "*Kuria's*" name – but he did not respond. PW3 immediately went to his employer's house to report the matter; and he then returned to work. He returned in his employer's vehicle, as the employer was coming to see to the matter. He later saw **Cosmas** taking away the deceased, in his car.

At the place where the deceased had been lying before he was taken to hospital, there was a crowd; but PW3 did not know any of the people in that crowd.

PW3 had not noticed any injury on the body of the deceased. The place was dimly-lit. After some three days, **Cosmas** told PW3 that **Chacha Mwita** had died. He further testified: "*I can't say who killed 'Kuria'. I did not know.*"

PW4, **Corporal Patrick Wanjohi Wanyeki** (Officer No. 40086) testified that he is attached to the Langata

Police Station, and that on 12th February, 2005, at about 3.00 p.m. he and **P.C. Michuki**, **P.C. Misheck Mutua**, and **P.C. Hamisi Kasika** were on patrol duties in the Nairobi West area. PW4 was, while on patrol, called on pocket-phone from Control 99; and he was asked to proceed to Mitumba Village in the area, to collect a prisoner who had been arrested by villagers. He acted accordingly, and in the process learned that the prisoner was a suspect in the killing of a guard the previous day. The prisoner denied the allegations; but PW4 arrested him, and took him to Langata Police Station for further investigations. He identified the accused, in the dock, as the man he had arrested. PW4 testified, upon cross-examination, that he had not followed up on this matter until he had been requested to come and give evidence in Court.

Hearing continued on 22nd June, 2006 when PW5, **Sgt. Francis Kolokosi** (Officer No. 31491) testified that he had reported to office on 11th February, 2005 and later learned that a person had been stabbed in the Nairobi West area and died on the way to hospital. He undertook investigations, by first visiting the scene of the incident, which was some 50 metres from Jean's Pub. He established that the deceased had been guarding the pub, when he saw a street-boy interfering with a parked vehicle. When the guard approached the street-boy he took off, and the guard went after him in hot pursuit; and in the process the street-boy turned and stabbed the guard.

Such evidence, however, was hearsay, as the witness had not himself seen the events unfolding. So by itself, such evidence would be accorded no weight.

PW5 testified that at the time he commenced his investigations, already the body of the deceased was at the mortuary. He went to the mortuary and booked the body for post-mortem examination. Post-mortem examination was done by **Dr. Wasike**, a Police Pathologist; and PW5 was given the pathologist's report, which had now been filed in Court. PW5 had the original post-mortem form prepared by **Dr. Wasike**. The body had been identified by a relative of the deceased, **Michael Mwita Kisangare** and by one **Joseph Mwita Makori** before the post-mortem examination was carried out. Learned counsel **Ms. Amenge**, for the prosecution, at this point applied under ss.33 and 77 of the Evidence Act (Cap. 80, Laws of Kenya), that PW5 be allowed to produce the pathologist's post-mortem report – on the ground that the author could not be called without undue delay. **Ms. Amenge** urged that the witness was familiar with the author's handwriting and signature, as well as with the particulars of the report. Learned counsel **Mr. Nyachoti** had no objection to the application, and the post-mortem report was admitted as Prosecution Exhibit No. 1.

PW5 testified that several days following the stabbing incident, members of the public arrested the accused and alerted the Police – and subsequently the accused was confined in the Police cells. PW5 visited the accused's house and inspected it, but did not find any trace of the murder weapon.

On cross-examination PW5 admitted that he was not an eye-witness to the commission of the offence, and that his role was that of arranging for post-mortem examination, recording statements, and formulating charges against the accused.

With the five witnesses having testified, learned counsel **Ms. Amenge** closed the prosecution case on 22nd June, 2006; and for the accused, learned counsel **Mr. Nyachoti** thereupon indicated that he wished to make submissions under s.306(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

In his submissions made on 19th July, 2006 — and to which the prosecution did not reply — **Mr. Nyachoti** urged that the Prosecution had not made a *prima facie* case so as to justify putting the accused to his defence. He submitted that the main witnesses had not perceived the commission of the offence; and that the investigating officer had gathered no evidence from the scene of crime. He submitted that the only possible eye witnesses would have been PW2 and PW3 – but these two had not witnessed the commission of the offence. It was urged that a taxi-man had been mentioned as an eye witness, but he had neither been named nor called as a witness.

Mr. Nyachoti relied on the Court of Appeal decision in **Ndiba v. Republic** [1981] KLR 103 for the

proposition that it was incumbent upon the prosecution to establish a **link** between the accused and the commission of the offence. Their Lordships had in that case remarked as follows (p.107):

“As we find no other sufficient evidence connecting the appellant with the offence of which he was convicted we allow this appeal, quash the conviction and set aside the sentence of death passed on the appellant. We direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.”

The foregoing review of evidence, I believe, illuminates the entire range of circumstances within which it can be told whether or not there is a case to answer and so the trial process should be prolonged to incorporate a defence being mounted. It is for sure that somebody, unlawfully, did severely injure the deceased on the 11th February, 2005 and, several hours thereafter, this led to his death. *Somebody*, therefore, had committed homicide in circumstances which could very well justify a charge of murder. All the same such a charge must be proved by evidence adduced in Court; and the classical rule governing the Court in this respect is that proof is to be beyond reasonable doubt. In the progression towards such absolute proof, is the process of determining the question whether the accused is to be called upon to answer to a charge already proved on a *prima facie* basis.

So the question before me now is, has the prosecution laid on the table *prima facie* proof, so that I should call upon the defendant, if he wishes, to defend himself? Whether or not the defendant is to be invited to defend, does not depend on a whimsical exercise of discretion; the legal position is that cogent evidence must already have been placed on the table, thus obligating the Court to be inclined to allow for defence.

At what point does the Court decide that a *prima facie* case has been made, and so the accused may be put to his defence? I think this will be dependent on the *facts and circumstances of each case*. But from the daily experience of the trial Court, I think there is at least one radical point which if it is not established, then it is unlikely that the accused will be put to his defence; and that point is **identification** of the suspected offender. The *mode of identification* is an evidentiary question, and the prosecution ought to have placed before the Court *evidence which identifies the accused* as the person at the scene of crime who performed the unlawful thing.

In the instant case, has the prosecution properly **identified** the person who had stabbed the deceased in Nairobi West? The taxi-men who are said to have seen the scuffle between the assaulter and the assaulted have not been named and have not been called as witnesses. None among the member of the public said to have arrested the accused at the Mitumba slums, has been called as a witness, to say how he knew that the accused was the wrongdoer. So, the Court is completely in the dark as to how the accused could come to be the individual who allegedly was being chased by the deceased, then he suddenly turned round and sank a knife into the chest of the deceased. Since the Court's decision must be guided by evidence, it follows that there is, at present, no basis for holding that the accused should now begin defending himself. In terms of forensic technique, issues are unlikely to be joined at all, as regards causality of death, and so the setting does not exist for continuing the trial process.

Peter Cosmas Kamende (PW1) did not witness the incident, and indeed he perceived nothing that would incriminate the accused. **Madgalina Wanja wa Wachira** (PW2) stated clearly that she had no evidence touching on the causation of the death of the deceased. **Fred Wafula Wanyonyi** (PW3) had perceived nothing that points in the direction of the accused as the culprit. **Corporal Patrick Wanjohi Wanyeki** (PW4) was merely instructed to proceed to Mitumba Village and arrest somebody already under civilian arrest, but he did not come to know of the link between the person arrested and the crime which had been committed. **Sergeant Francis Kilokosi** (PW5) performed only the most minimal role in the investigations, and he spoke to no eye witness who would have seen the offence being committed.

Besides, up to this stage, the evidence adduced does not open up any implicative circumstances which would, to any degree, point a finger towards the accused as the probable culprit.

The foregoing analysis carries the message that the Court has *no legal basis* for putting the accused to his defence.

I would, therefore, accept the submissions of learned counsel **Mr. Nyachoti**, and apply the principle in **Ndiba v. Republic** [1981] KLR 103. I would hold that the accused has not at all been identified as the person who, on the night of 11th February, 2005 fatally injured the deceased. I will, therefore, apply s. 306(1) of the Criminal Procedure Code, finding the accused “*not guilty*” at this stage. I will order that the accused be forthwith set at liberty, unless he is otherwise lawfully held.

And in the light of this decision, I now discharge the three assessors, **Deniel Mwai, Mildred Osotsi** and **Wilson Ogutu Nyegenye**. I record thanks to them for having served in this trial.

Orders accordingly.

DATED and DELIVERED at Nairobi this 31st day of July, 2006

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung’u

For the Prosecution: Mrs. Ogoma; Ms. Amenge

For the Accused: Mr. Nyachoti