REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL CASE 3 OF 2005

REPUBLIC …….....…….PROSECUTOR

-VERSUS-

KAMIRO CHEGE…….....……ACCUSED

RULING

I. THE CASE BEFORE THE COURT: AN INTRODUCTION

The information laid against the accused herein reads: "***Kamiro Chege****: on the night of 7th and 8th September, 2004 at Kaguku 'C' Village, Kaguku Sub-Location, Ithanga Location in Thika District within Central Province, murdered* ***Simon Ngaruiya Michong'o."***

The accused pleaded not guilty before ***Rawal, J*** on 17th January, 2005. On 10th May, 2006 I selected as the three assessors ***Ben Joel Oyieko, Philip Ndonye Nzuve*** and ***Williams Okoth Arony,*** and immediately began hearing testimonies.

At the end of the testimony of the ninth witness, learned Prosecution counsel ***Mr. Bifwoli*** closed the case, whereupon learned Defence counsel ***Mrs. Rashid*** applied for occasion to make a no-case-to- answer submission.

II. IS THE BURDEN OF PROOF DISCHARGED? - DEFENCE SUBMISSIONS

Her request having been granted, the Defence counsel made her submissions on 17th October, 2006. Her contentions were founded on several parameters in the proceedings as she perceived them, namely:

> (i) that the Prosecution has not made out a *prima facie* case and, if the accused elected to remain silent were the case to proceed beyond this preliminary point, then no proof would be existing on the basis of which a conviction could be obtained;
>
> (ii) that the Prosecution has not discharged its burden of proof, and the accused had no obligation in law to fill gaps in the Prosecution case;
>
> (iii) that PW1 had testified that the deceased was a great friend of the accused, and the accused needed him alive so he could be the accused's witness in a land dispute between the accused and his own mother which stood to be resolved through litigation;

(iv) that PW2 too had testified that the accused and the deceased were great friends;

(v) that PW5 had testified that while he had seen the accused and the deceased walk together past his home on the material day at about 5.00 pm, he (PW5) did not know who had killed the deceased several hours later;

(vi) that PW5 himself had been arrested and interrogated in connection with the offence, before being later released;

(vii) that PW6 only saw two people (one of them being probably the deceased) in the dark; and so he could not identify the accused as the other person; and no identification parade had been mounted for PW6 to identify the accused by way of voice recognition, as the person he had met in the company of the accused on the material night;

(viii) that PW7 though he testified that at about 3.00 pm he had met the deceased and the accused walking in the opposite direction, and then later at 5.30 pm still found the two together, with the deceased apparently drunk and immobile, did not know the accused until he came to Court during this trial and saw the accused in the dock; and besides, PW7 had himself been interrogated in connection with the offence;

(ix) that PW8's testimony that some of the witnesses had been interrogated in connection with the offence shows them to be accomplices whose evidence is suspect.

III. DO THE CIRCUMSTANCES POINT IN THE DIRECTION OF THE ACCUSED? – PROSECUTION SUBMISSIONS

Learned Prosecution counsel ***Mr. Bifwoli*** contested the foregoing contentions, urging that the Prosecution has indeed discharged its task of making out a *prima facie* case against the accused who should, therefore, be put to his defence.

Mr. Bifwoli rested his submission on several premises, as he perceived:

(i) that PW1 had testified that when on the material day, at mid-day the accused sought the deceased from the deceased's home, and found him gone to the shopping centre, the accused had made his way to the shopping centre to find him;

(ii) that PW5 had testified that at about 5.00 pm the same day he had seen the accused and the deceased walking together past his (PW5's) home;

(iii) that some two-to-three hours later, at about 8.00 pm or close to that time, PW6 had met the deceased and the accused near to the *locus in quo* when the deceased was so drunk that he was under disability, and the accused held him, shouting orders at him and wielding a stick;

(iv) that there was strong circumstantial evidence indicating that the accused was the last person to be seen with the deceased; and the accused had the opportunity and the means to cause the death of the deceased; and that the circumstantial evidence irresistibly pointed to the accused as the culprit;

(v) that even those witnesses who had been interrogated were still competent witnesses, and their evidence is good evidence, and indeed their testimonies remain unshaken; and in any case such witnesses cannot in law be treated as accomplices.

IV. WITNESSES WHO DURING INVESTIGATIONS, WERE ARRESTED AND INTERROGATED BY THE POLICE — ARE THEY ACCOMPLICES?

Osborne's Concise Law Dictionary, 6th ed. (London: Sweet & Maxwell, 1976) thus defines the word accomplice (pp. 6 – 7):

> "**Any person who, either as a principal or as an accessory, has been associated with another person in the commission of any offence. The evidence of an accomplice is admissible, but the judge must warn the jury of the danger of convicting on such evidence unless corroborated, and if this warning is omitted a conviction may be quashed."**

From the evidence before the Court, it has not been the Prosecution case, and it has not emerged in the evidence, that any of the witnesses acted in cahoots with whoever may have killed the deceased, ***Simon Ngaruiya Michong'o.***

Therefore I reject the submission by the Defence counsel that the evidence of any of the witnesses is accomplice evidence which carries little weight unless corroborated.

It follows that I will arrive at my ruling in this matter on the basis that the averments made by the witnesses, each stands or falls on its own merits in terms of veracity.

V. WHEN IS A *PRIMA FACIE* CASE ESTABLISHED, SO THAT THE LAW REQUIRES THAT THE ACCUSED BE ACCORDED AN OPPORTUNITY TO DEFEND?

It is a well-established principle of law, firstly, that in criminal cases, the Prosecution is required to prove its case beyond 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*** 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 determining the question, the guiding principle is now established as the presence or absence of a *prima facie* case, as judged from the evidence tendered. The *prima facie* case is defined in the East African Court of Appeal case in ***Ramanlal Trambaklal Bhatt v. R*** [1957] E.A. 332, and 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."**

I have recently stated my own understanding of such a situation which calls for the accused to be put to his defence, in ***Republic v. John Gichamba Mwangi***, H.C.Cr. No. 103 of 2005:

> "**A *prima facie* case…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 — and hence it makes practical sense that the accused be given a chance to explain his position in the matter."**

I have perceived a misapprehension among counsel, in several criminal trials that I have conducted: they have argued that the accused should not be put to his defence unless, first, proof of guilt has been provided which, in effect, goes ***beyond reasonable doubt***. In the first place it would not comport with criminal procedure to determine that question ***before*** the case has been fully heard. But more importantly, the actions taken by the accused when put to his defence, are not to be perceived as a filling-up of gaps still left in the Prosecution case; rather, the Defence actions in response constitute a vital process of testing the claims of *prima facie* status for the Prosecution case as it already stands, and this test provides

the occasion for the case to now crystallize as having been proved ***beyond reasonable doubt***, or to ***fall flat*** and so in consequence, the accused is acquitted with finality.

VI. CURSORINESS WHERE COURT RULES THAT THERE IS A CASE TO ANSWER: THE COURT OF APPEAL DECISION IN *ANTHONY NJUE NJERU -v- REPUBLIC*

Whenever the Court rules that there is a case-to-answer and puts the accused to his defence, a ***detailing of its assessment of evidence*** could lead the accused to adopt a specific strategy of defence; and this could amount to a ***filling-in of gaps*** in the prosecution case. The Court of Appeal in the recent case, ***Anthony Njue Njeru v. Republic*** Crim. App. No. 77 of 2006 had thus remarked:

> "**Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a *prima facie* case as stated in *Bhatt's* case…, we are of the view that the appellant should not have been called upon to defend himself as all the *evidence was on record*. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused."**

VII. DOES THE EVIDENCE IN THIS CASE DICTATE ACQUITTAL, OR AN OPPORTUNITY TO DEFEND?

Being guided by the principles set out earlier, I have considered the evidence adduced and the submissions of counsel, and concluded that certain facts have emerged which point towards the accused, in relation to the circumstances in which the deceased met his death. It is my judicial decision in these circumstances, that the accused be put to his defence, and I hereby ***order*** accordingly.

Consequently I will now give the required ***directions:***

The accused having listened to the evidence for the Prosecution, can do ***one*** of ***three*** things, and the choice taken is to be stated in Court, and in this regard the accused may consult with his advocate —

a. ***Accused can be sworn and give his own evidence on oath***; and if this option is taken, then he will be cross-examined by the Prosecution;

b. ***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;

c. ***Accused can 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 makes, he may call witnesses;

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

As it is likely that the accused will need time for consultation with his advocate, and to make any appropriate arrangements to accommodate the due conduct of the case by the Prosecution if need be, hearing is adjourned to a more suitable date which I will fix after hearing both counsel.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 25th day of October, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Prosecution: Mr. Bifwoli

For the Defence: Mrs. Rashid