



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 57 OF 2002**

REPUBLIC PROSECUTOR

VERSUS

1. WILLIAM ODHIAMBO ODINDO 1ST ACCUSED

2. PHILLIP OUMA OBARE 2ND ACCUSED

RULING OF COURT

The two accused persons were jointly charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. At the close of the prosecution case, the defence Counsel Mr. Ogeto submitted that no Prima Facie case had been made up against them to require them each to make a defense.

The prosecution case was supported by 8 witnesses the most important of whom are PW1, Esther Nekesa Mukoya and PW2, Benson Mwangi Gachancha.

PW1 was a girlfriend to the deceased Albert John Kamau and stayed in Silanga Estate at Kibera. In the evening of 28.11.2001 at about 8.00 p.m., she was in her house when the door was pushed from outside. When she opened it the deceased entered, followed by two persons. One of the two, who had a knife, suddenly stabbed the deceased with it. PW1 saw this by the help of a hurricane lamp burning in the room. The room was about 10 feet by 10 feet. She said that she used to see the attacker near or at the local NDP office and believed she identified the attacker as Athony, but was unable to identify the other person in company of the attacker. Later in her story she called the other person Athony and indicated she did not know the name of attacker. They then went out where they remained for about 10 minutes before they left as they threatened to set the house on fire. When the attackers left, the witness sought the help of Mucheru, Joel, Gichuru and Kenya who took the deceased to Bara Clinic for treatment but the deceased soon lost his life while at Bara Clinic. PW1 also confirmed that the night was dark and there was no moonlight. She further confirmed that the person who stabbed the deceased was not among the accused in court nor was his colleague. Nor was Athony who she claimed to have been seeing around and whose face looked familiar. By the time the deceased was taken to Bara Clinic, the witness went to call his relatives and that is why she was not there by the time he died. When later the police arranged a police identification parade, PW1 was unable to identify the man who stabbed the deceased nor his colleague Athony, who accompanied him that night.

PW2 who was a cousin to the deceased, testified that he was in company of the deceased that evening of 28.11.2001. At 8.00 p.m., he was escorting the deceased when near NDP's office, they were confronted by a group of young men who appeared to be NDP supporters. Around the office, shopkeepers and vegetable vendors were selling their merchandise using lantern and pressure lamplight. The area was at the time tense between people of Kikuyu community and those of the Luo community due to a difference arising from the level of house rents then being charged by landlords, the majority of who were

Kikuyu's. There is some evidence that the deceased and PW2 were attacked by the group numbering about 10. The deceased managed to run away while PW2 fell down after being hit with a blunt object probably a piece of water pipe. When PW2 stood up, he also began running, taking the same route the deceased had gone. He identified the 1st accused who he said was George and whom he said he used to see, as he was at some occasions, his customer in his barber business. PW2 claimed that before they were attacked, he had requested George to inform or persuade the group of young men not to attack or beat the deceased and PW2. However, the said George had indicated that he was not in control of the group and there is nothing he could do. He also in court identified the 2nd accused as one of NDP Youth Wingers but insisted that he did not play any particular part in attacking the witness that evening. When PW2 arrived at PW1's house he saw some youths outside the house but none of them was in this court during this trial. When he finally reached PW1's house in company of one Sammy Ndungu and John Njenga they pushed in the door and found the deceased lying down injured. PW1 one Esther was not there and they carried him to Bara Hospital where he later died. At the Police identification parade PW2 identified the two accused as those who were in the group of the NDP Youths, which confronted the witness and the deceased near NDP office. He confirmed that the 1st accused did not harass or beat the witness nor the deceased. He admitted that the night and place where the incident took place was dark. So was the corridor leading to PW1's house.

PW3, Sgt. Joseph Mathenge accompanied by several of his colleagues and being led by PW2 went to Silanga, Kibera near NDP office and arrested about 7 suspects who were NDP Youth Wingers. This was two days after the death of the deceased and it was at night. Before such arrest no names of suspects had been fronted by any of the witnesses. More, it appears, could have been arrested if they did not escape from the NDP office. 1st accused was pointed out by PW2 while accused two was arrested because he was generally pointed out by the members of the deceased's family.

I have carefully considered the evidence given by the above mentioned witness. There is no doubt that the deceased Albert John Kamau was stabbed that night of 28.11.2001, probably in the house of his girl friend PW1 by a person who followed him there. He died some minutes thereafter at Bara Medical Clinic. PW1, who should be the eyewitness to the stabbing, could not identify the attackers either in the police parade or in the dock. Her evidence does not therefore link the two accused in court. She was categorical that neither accused was one of the two attackers who pursued the deceased in the room.

PW2 who was in company of the deceased earlier when a group of youths attacked them and the deceased escaped, failed to link the two accused to the stabbing of the deceased. By the time he arrived at PW1's house, he saw some people ran away but could not identify them. But two days later he led the police to NDP office at night. A group of youths was found there. The police arrested 7 youths there among who were the three accused and one of whom died in prison. There is no evidence that the two accused were the people who stabbed the deceased. The only ground given for their arrest is that they were among the group of young men who confronted the deceased and PW2 on the 28.11.2001. PW2 in his evidence agrees that George, who he identified as 1st accused but who apparently was neither accused one nor accused two, did not play any positive part to harass the witness or the deceased. Nor was PW2 any better in identifying the accused persons. He confused the names of the two accused, switching the names across, not only at the police identification parade, but also in the dock. In my finding the identification in either the police parade or at court, amounted to little. It negated his evidence. It matters not that the real confusion in the said identification was started by police officers, who apart from confusing the names of the accused in the identification forms, also misdirected it. For example if the 1st accused was known to be wearing glasses and was wearing them at the time when the offence was being committed, it would be a misdirection to direct that the accused's eyeglasses be removed during the identification parade. The duty of the police was to find other eye-wearing glasses to accompany the suspect and not otherwise.

Furthermore, PW2 did not appear to be sure of who were the suspects he was looking for. If he did, then he could have given the suspects names or their descriptions at the earliest. Thereafter the police could know who they were looking for. It is also strange that the police decided to go for arrest at night. Nor does it make sense that they arrested anyone they would find near the NDP office when the witnesses leading them were present. Who then was PW2 trying to point out?

It is also my finding that there was no adequate lighting at the scene where the deceased and PW2 were attacked on 28.11.2001 to enable PW2 to identify those who surrounded and attacked them. Nor was the standard of investigation in this case satisfactory. This is the evidence then upon which the defence submitted a no case to answer.

As now fully accepted the legal onus of proving a criminal case is always on the prosecution and this onus is on the standard beyond a reasonable doubt. A prima facie case is not made out if at the close of the prosecution, the case is merely one, which on full consideration, might possibly be thought sufficient to sustain a conviction. If the court would not be prepared to convict on the evidence from the prosecution at that stage, it should not call the accused to give his defence with a hope that he will fill in the gaps in the prosecution case. It also means that it is not some evidence, irrespective of its credibility or weight that can be said to be sufficient to put the accused on his defence. As stated in the case of Ramanlal T. Bhatt V. Republic (1957) E.A. 332 (C.A.) by the court of Appeal: -

“A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

In the same case it was also stated,

“It may not be easy to define what is meant by a ‘prim a facie case’, but at least it must mean one 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 find that the prosecution evidence in this case is inadequate. It does not link the two accused to the crime directly or circumstantially. Part of it is confused and self-contradictory. To put the accused on their defence would be hoping that they would in defending themselves fill the large gaps in the prosecution case. That I am not prepared to do.

The upshot is that this court dismisses the charge of murder against each accused at this stage and proceeds to acquit each of them in accordance with section 306 (1) of the Criminal Procedure Code. Each shall be released forthwith unless otherwise lawfully held in prison.

It is so ordered.

Dated and delivered at Nairobi this 6th day of June 2003

D.A. ONYANCHA

JUDGE