



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 49 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

DENIS WAMAYE KIMEMIA.....1<sup>ST</sup> ACCUSED

NJOROGE MBUGUA.....2<sup>ND</sup> ACCUSED

RULING

**BACKGROUND**

1. The accused persons **DENIS WAMAYE KIMEMIA** and **NJOROGE MBUGUA** were charged with the offence of murder contrary to Section 203 of the Penal Code as read with Section 204, the particulars of which were that on the night of 6<sup>th</sup> and 7<sup>th</sup> February 2010 with another not before the court murdered **JOHN MAINA MUBIA** a Kenyan citizen who was then living in the city of Athens Greece and who had returned home that night carrying in his suit case Thirty Thousand Euros (€30,000) in hard currency to settle back home together with his wife who was to follow him soon thereafter only to have his hard earned cash stolen and life taken away from him at the hands of robbers passing off as 'bodaboda' operators.

2. This case has had a checkered history in the corridors of justice and it is in the best interest of justice if the panoramic view of the same leading to the final orders herein is set out for record purposes.

3. On 23<sup>rd</sup> day of July 2010 the accused appeared before Khamoni J. (now retired) when a plea of not guilty was recorded in their favour and the matter placed before Warsame J. (as he then was) when the issue of representative between Mr. Kang'ahi and Masara arose and the file referred to the Presiding Judge who then set down the matter for hearing for 31<sup>st</sup> January - 1<sup>st</sup> February 2011 but did not take off.

4. On 11/7/2011 the trial commenced before Ombija J. (as he then was) who took the evidence of four (4) prosecution witnesses namely **PW1 DR. KAMAU**, **PW2 PETER KIMANI MUBIA**, **PW3 CAROLINE WAKIO MWANGI** and **PW4 DR. NDEGWA** before the matter found itself to Justice Korir who on 8/8/2013 granted the accused persons bond. The matter then went back to Ombija J. who on 24/3/2014 issued witness summons to two named intended eye witnesses who failed to turn up in court causing the court to issue warrants for their arrest and on 22/5/2014 one of the said witnesses **JUSTIN MACHARIA** testified in court as a material eye witness while under arrest in execution of the said warrant. His evidence was followed by that of **PW8 CORP. ADAN ROBA** leaving the evidence of the investigating officer. On 12/5/2015 Ms. Mwaniki for the prosecution informed the court that she did not have the said witness and therefore opted to close their case at that stage and the matter fixed for submissions.

5. After several adjournments caused by the fact that the submissions had not been filed, on 14/7/2015 Ms. Mwaniki informed the court that their last witness **PW8** had been partially cross-examined by the first accused and not at all by the second accused and she applied that the case be re-opened for **PW8** to be fully cross-examined and the court reserved his Ruling for 16/07/2015 and by a ruling of the same date declared a mis-trial in the following terms:-

**“On 14<sup>th</sup> July 2015 when the matter came up for mention Ms. Mwaniki disclosed to the court that PW8 was neither cross-examined by neither Counsel for the 1<sup>st</sup> accused nor Counsel for the 2<sup>nd</sup> accused before the case for the prosecution was closed. Upon drawing my attention to this anomaly I thought it wise to declare the trial MIS-TRIAL because in the event the accused persons or one of them is convicted he/she will raise this issue in the Court of Appeal as a substantial ground of appeal mis-carriage of justice. Those are the reasons why I declare the trial MIS-TRIAL.”**

6. On 22/7/2015 the parties appeared before Lesiit J. for directions when Ms. Nyamongo for the 2<sup>nd</sup> accused indicated that they intended to appeal against the decision declaring the trial MIS-TRIAL only to abandon that position on 21/10/2015 when the Judge directed that the

matter starts afresh before me and that is how it landed in my docket.

## PROSECUTION CASE

7. To prove its case against the accused persons at the new trial before me the prosecution called a total of six (6) witnesses at the close of which Mr. Meroka asked the court to adopt the proceedings which had been tendered before Justice Ombija which application was opposed by the defence and by a Ruling dated 28<sup>th</sup> February 2018 I declined to allow the said application on the basis that mis-trial results in nullification of the previous trial and the parties then return to their original position. The State therefore opted to close its case at that stage and relied on the evidence on record and left it to the court to make a determination as to whether a *prima-facie* case had been made. The defence also left it to the court to make a determination and therefore in this journey the court has been left alone.

8. At this stage of the proceedings, what the court is required to do is to determine whether the State has proved a *prima facie* to enable the court call upon the accused to make a response and answer to the charges if it so wishes as was Stated in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** at 334-335:-

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one ‘which on full consideration might possibly be thought sufficient to sustain a conviction.’*

*This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends 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 or 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.”*

9. In the Ugandan famous case of **FRED SABA HASHI v UGANDA CRIMINAL APPELA NO. 23 OF 1993 (SC)** the Supreme Court of Uganda Stated:-

*“In the practice Note (1962) ALLER 448 Lord Parker Stated:-*

*A submission that there is no case to answer may properly be made and upheld;*

*(a) When there has been no evidence to prove an established element in the alleged offence.*

*(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.”*

Lord parker continued and gave the test of *prima facie* case:-

*“If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.”*

10. With that in mind I will now look at the ingredients of murder and consider whether there is evidence placed before the court to prove it to the degree required to establish a *prima facie* case as follows:-

*a) The death and the cause thereof.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused persons.*

*c) That it was done with malice aforethought.*

11. The fact and the cause of the death of the deceased is not in dispute. The fact of death was confirmed by the evidence of **PW2 PETER KIMANI MUBIA** who was called by one **Musyoka** with information that his brother or somebody looking like him had been beaten which he later confirmed was the deceased through a photocopy of his passport. He went to the scene and was told that he had been beaten by motorcycle riders who were never identified. He confirmed the death of the deceased. **PW2 REV. JOHN PETER KIHAIU, PW4 CORP. ADAN BOBA** the investigating officer and **PW5 CP SAMUEL LANGAT** all confirmed the death of the deceased with **PW6 DR. PETER NDEGWA** confirming the cause thereof as multiple injuries due to blunt force trauma consistent with assault.

12. On whether the said death was caused by unlawful act on the part of the accused person; it is sad that the prosecution called no eye witness to connect the accused persons with the offence herein. **PW1** the brother of the deceased testified that he was called by **Musyoka** who had witnessed the deceased being beaten by ‘*bodaboda*’ operators but the said **Musyoka** was never called to testify. Thereby leading the court to make adverse inference against the prosecution case. **PW1 CAROLINE WAKIO MWANGI** the wife of the deceased was in Athens Greece at the time of the incidence only confirmed that the deceased had travelled back home leaving her behind. **PW4 CORP. ADAN ROBA** the investigating officer’s evidence was based upon the evidence of the witness who were not called to testify and at the close of the prosecution case his evidence and that of **PW5 SAMUEL LANGAT** who arrested several ‘*bodaboda*’ operators who named the two

accused persons as having been seen when the deceased was hiring the motor cycle to ferry him within the stage Stated that the information was given to him by **PW4** thereby making his evidence hearsay and inadmissible.

13. Whereas there is strong suspicion that the accused persons were involved in the unlawful killing of the deceased, the said suspicion is based on hearsay evidence which is uncorroborated and the court has said over and over again that mere suspicion however strong cannot be a ground for sustaining a conviction in a criminal case as was Stated by the Court of Appeal in **MARY WANJIKU v REPUBLIC, CRIMINAL APPEAL NO 17 OF 1988** that:-

***“Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused freedom and at times life.”***

14. Having found that the prosecution evidence was tendered save for that of Dr. Ndegwa is based on hearsay and without any direct eye witness called to connect the accused persons with the offence herein, it logically follows that should the accused persons be placed on their defence and they opt not to testify so as to fill the gap in the prosecution case, this court based on the said evidence cannot reasonably convict them thereon. It follows that the prosecution has failed to prove *prima facie* case against them and therefore should not make the accused persons face the rigors of offering their defence.

15. Before penning off I must State for record purposes that this was a clear case where the prosecution should have appealed against the trial court in declaring a mis-trial or in the alternative sought for review for had the trial proceeded to its logical conclusion the outcome might have been different. Further the trial courts should be slow at declaring mis-trial when the case is at an advanced stage as securing witnesses for the prosecution after a long period of trial is always a challenge which courts ought to take judicial notice of.

16. Having said all that I find that the prosecution has failed to prove *prima facie* case to enable me put the accused persons on their defence and therefore find the same not guilty under the provisions of **Section 306 (1) of Criminal Procedure Code** and hereby acquit the same. The accused persons should be set at liberty unless otherwise lawfully held and it is so ordered.

17. The State has right of appeal.

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> day of February, 2019**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mrs. Nyamongo for Kanga'hi for the 1<sup>st</sup> accused person*

*Mrs. Nyamongo for the 2<sup>nd</sup> accused person*

*Accused 1 & 2 present*

*Court Assistant: Karwitha*