



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 75 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

MOHAMMED ISMAIL MADEY.....1ST ACCUSED

ABDI ELMOGE ABDI.....2ND ACCUSED

DAVID KIHARA MUCHIRI.....3RD ACCUSED

JOSEPH MUCHIRI MACHARIA.....4TH ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 21st day of September 2011 at Thome Area within Nairobi County jointly with others not before the court murdered **ANTONY NAHASON NGUNJIRI**.

2. They pleaded not guilty and on 24/11/2011 their trial commenced before Kimaru J. who heard the evidence of nine (9) prosecution witnesses in full and partly that of the tenth (10th) witness before disqualifying himself from hearing the cause. On 2/11/2015 the file was placed before me when directions were issued under **Section 200 (1)** of the **Criminal Procedure Code** for the matter to proceed from where it had reached.

3. For record purposes it must be stated that I partly heard the evidence of **PW5, PW8** and **PW9** and full evidence of **PW10** and **PW11** but have taken time to read the evidence tendered before and recorded by Justice Kimaru for the purpose of this Ruling.

SUBMISSIONS

4. At the close of the prosecution case all the accused persons filed written submissions which they highlighted in court while the prosecution made oral submissions. It was submitted by Mr. Omirera on behalf of the prosecution that they had tendered in sufficient evidence to disclose a *prima facie* case as was stated in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332**. It was contended that what the court ought to decide at this time is whether the court based on the evidence on record may convict the accused person should they opt to keep quiet. The court was not at this stage expected to find proof beyond reasonable doubt.

5. It was submitted that the prosecution had tendered in evidence both direct and circumstantial evidence linking the accused persons to the offence. It was submitted that the evidence of the prosecution witnesses were not inconsistent for which the case of **SYDWELL LANGA v THE STATE, Supreme Court Of Appeal of South Africa Case No. 640/2016** was submitted in support, where it was held that the contradictions in the version of the state witnesses were not material and that the mere fact that the witnesses' observation did not in all aspects coincide does not render their version untruthful or unreliable, with the test being whether the truth was told. It was contended that the prosecution had discharged their burden of proof and therefore the accused persons should under **Sections 111** and **119** of the **Evidence Act** be required to offer some explanation.

6. On behalf of the 1st and 2nd accused persons in addition to the written submissions, it was submitted by Mr. Sagana that the prosecution through its opening statement stated that it was to prove that the four (4) accused persons had common intention to commit murder and that after the 3rd and 4th accused persons with their workers having beaten the deceased senselessly, they called the 1st and 2nd accused persons to

shoot as a cover up. It was submitted that the prosecution did not tender in any evidence to support their opening statement. It was contended that there was evidence of state interference with investigations in the matter with the prosecution case being full of contradictions.

7. It was stated that the 1st and 2nd accused persons were not ordinary persons using force but police officers who were on duty and lawfully armed with firearms for which reliance was placed on the cases of:- **ANTONY NJUE NJERU v REPUBLIC [2006] eKLR** and **REPUBLIC v JONATHAN ONGWEKO OFWENDE [2018] eKLR**. It was submitted further that there was inconsistency and contradiction in the statement of the witnesses which went to the root of the case, for which the case of **PHILIP NZAKA WATU v REPUBLIC [2016] eKLR** was submitted. It was contended that the contradictions by the prosecution witnesses evidently showed that they were deliberately calculated to cover up the truth before the Honourable Court, for which the case of **PETER BORE WANJOHI v REPUBLIC [2012] eKLR** was tendered in support.

8. It was the 1st and 2nd accused persons' contention that *prima facie* case was not established by the prosecution to enable the court put them on their defence, since the prosecution had failed to demonstrate malice aforethought on their part and that they caused the death of the deceased.

9. On behalf of the 3rd and 4th accused persons, it was submitted by Mr. Wetangula that the prosecution case was that the deceased and **PW1** were on a mission to serve an order issued by the High court but no such order was produced before the court, which said order was very fundamental to the prosecution case. It was submitted that the only witnesses who would have testified to the existence of the said order if any, was not called by the prosecution and the court should make adverse inference that the said evidence if called would have been adverse to the prosecution case, for which reference was made to **BUKENYA v UGANDA [1967] EA**.

10. It was submitted that as per the evidence of **PW8 DR. JOHANSEN ODUOR** the cause of death of the deceased was head injury due to gunshot wounds from a low velocity firearm at close range. The said gunshot wounds on the head of the deceased were not discharged by the 2nd and 4th accused persons, as evidence on record stated that they were fired by officers of the law, the 1st and 2nd accused in discharge of their function. It was stated that the prosecution case having been entirely on circumstantial evidence did not meet the threshold stated in the case of **REPUBLIC v KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135** and therefore the prosecution failed to establish a *prima facie* case against the 3rd and 4th accused persons.

ANALYSIS AND DETERMINATION

11. At this stage of the proceedings what the court is required to determine is whether the prosecution has established a *prima facie* case against the accused persons either jointly or any of them to enable the court put them/him on his/their defence. The starting point in this judicial journey is:- What constitutes *prima facie* case? In the case of **UGANDA v KATO KAJUBI GODFREY, CRIMINAL APPEAL NO. 39 OF 2010 [2010] UGCA 48 (22 November 2010)**, the court had this to say:-

So, what is the meaning of prima facie case? Fortunately for us there are many decided East African authorities on this matter. One of the most famous ones is **FRED SABAHASHI VS UGANDA, Criminal Appeal No.23 of 1993 (SC)**. This decision was cited to the trial judge in this instant case. The Supreme Court stated:-

“In the Practice Note (1962) ALL ER 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 essential 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 a *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. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.’

A definition of a *prima facie* case was given by Sir Newhan Worley D, in **RAMALAL T. BHATT V R (1957) E.A 332 ABR 335**, as follows:-

‘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...’

Lord Paker concluded thus –

“It is clear from the above two authorities that the test of a *prima facie* case is objective and that a *prima facie* case is made out if a reasonable tribunal might convict on the evidence so far adduced. Although the court is not required at this stage to decide whether the evidence is worth of credit or whether if believed is weighty enough to prove the case conclusively, a mere scintilla of evidence can never be enough nor any amount of worthless discredited evidence. But

it must be emphasised that a prima facie case does not mean a case proved beyond reasonable doubt; WILBIRO v R. (1960) E.A. 184.”

A submission of no case can only be properly made and upheld, (a) when there has been no evidence to prove an essential element in the alleged offence. (b) when the evidence adduced by the prosecution has been so badly discredited as a result of cross-examination or is manifestly unreliable that no reasonable tribunal could safely convict on it.”

12. Justice R. Nyakundi in **REPUBLIC v ALEX MWANZIA MUTANGILI [2017] eKLR** quoted with approval Udoma JSC of Nigeria Supreme Court in the case of **DABOH & ANOTHER v STATE [1977] 5SC 122 at 129** as follows:-

“Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.

Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail.” (Emphasis added)

13. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on *prima facie* case:-

“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 connection 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 . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted.” (Emphasis added).

14. With that legal position in mind and being alive to the accused persons’ constitutional right under **Article 50 (2):-**

a. to be presumed innocent until the contrary is proved;

(i) to remain silent, and not to testify during the proceedings;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence.

and without saying much therein so as not to compromise the defence the accused persons are likely to advance, I have looked at the following evidence tendered before court:- **PW1 MASWARI MOGIRE GEORGE** who went with the deceased to the home of the 4th accused for purposes of serving a disputed court order as corroborated by the evidence of **PW2 DAVID OMIOYI ONYANGO** and **PW3 BERNARD WANJALA MASINDE** at a time when it was not yet dark and the evidence of **PW4 JANE WANGECHI** who put the 4th accused at the scene and the 2nd and 3rd accused, juxtapositioned against the evidence of **PW5 NO. 67661 CPL. CHURCHILL OWILI** who put the 1st and 2nd accused at the scene and **PW7 PATRICK MAINA MUNENE** who put the 3rd accused at the scene together with the evidence of **PW8 DR. JOHANSEN ODUOR** on the cause of death, when looked at against the evidence of **PW12 ALEX M. MWANDAWIRO** the ballistic expert, I have come to the conclusion and hold that a *prima facie* case has been established by the prosecution to warrant placing all the four (4) accused persons on their defences under **Section 300 (1) of the Criminal Procedure Code**

which I hereby do.

15. The accused persons are therefore advised of their rights under **Sections 306 to 311** of the **Criminal Procedure Code** and their constitutional right under **Article 50 (2)** of the **Constitution** and it is now upon them through the wise counsel of their Advocates on record to choose how they intend to defend themselves and it is so ordered.

Dated, Signed and Delivered at Nairobi this 17th day of July, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Wetangula for Sagana for the 1st and 2nd accused persons

Mr. Wetangula for the 3rd and 4th accused persons

All 4 Accused persons present

No appearance for LSK

Court Assistant: Karwitha