



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 65 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN KAMAU GATORA.....1ST ACCUSED

ISMAIL WAINAINA MUTHONI.....2ND ACCUSED

FLORENCE WANJIRU KAMAU.....3RD ACCUSED

RULING

The three accused person in this case are jointly charged with the murder of Stephen Karanja Karumba which is alleged to have occurred on 26th June 2015 at Ndonyo Market Dagoretti within Nairobi County. Each of the accused persons has denied committing this offence. Mr. Jumba, advocate represents the 1st and the 2nd accused persons while the 3rd accused person is represented by Mr. Ong'aro, advocate.

Initially the 1st and the 2nd accused persons were charged in High Court Criminal Case No. 65 of 2015. The two were arraigned in court on 7th July 2015. They pleaded not guilty to the charge when the plea was taken on 15th July 2015. Due to various reasons recorded in the court file, the hearing in this matter did not commence. On 7th April 2016, High Court Criminal Case No. 65 of 2015 was consolidated with High Court Criminal Case No. 73 of 2015 Republic v. Florence Wanjiru Kamau. In the latter case Florence Wanjiru Kamau was charged with the murder of the same deceased person that is alleged to have occurred on the same day. The principal file became High Court Criminal Case No. 65 of 2015 where all the three accused persons were jointly charged with the murder of the Stephen Karanja Karumba. Florence Wanjiru Kamau became the 3rd accused.

The evidence against the three accused persons was adduced by three witnesses. Dr. Peter Muriuki Ndegwa, PW1, testified that he examined the body of Stephen Karanja Karumba on 3rd July 2015 at the City Mortuary Nairobi after the body was identified to him by Catherine Wanjiku Karumba sister to the deceased and Edward Muchoki with PC Biko in attendance. The doctor found:

- (i) Grazes on the right frontal scalp
- (ii) Extensive bruises on the right upper arm
- (iii) Bleeding in the white of the eye
- (iv) Bruises on the occipital scalp

Dr. Ndegwa told the court that the injuries were caused by a blunt force trauma. After the examination of the body, he formed the opinion that the deceased died due to asphyxiation due to strangulation. These findings are recorded in a post mortem report tendered in court as exhibit 1.

The other two witnesses are police officers. SGT James Thuo, PW2, from Dagoretti Police Post testified that he received a report on 25th June 2015 from CPL Frederick Wambwa that there was a dead person lying at Dagoretti Market. He visited the scene at 8.00am and confirmed the report. He found the body of the deceased at the scene. The body was lying near a kiosk at the market. He observed the body and noted the bruises on one leg above the ankle. PW2 said this was the only injury on the body and that he did not note any other injury. PW2 testified that there was a crowd of people at the scene but no person was willing to give police information about the matter. He stated that an informer gave police information that the deceased had been seen with a woman the previous evening. PW2 further said that he gathered information that the deceased and two men had been seen where the deceased was found and that the names of the suspects were

given as Wasilvia, a woman identified as the 3rd accused, Kelvin identified as 1st accused and Bainaina identified as 2nd accused person. This is perhaps a misspelling of Wainina. PW2 said he recorded statements of witnesses which led to the arrest of the three accused persons on the same day 26th June 2015. On cross-examination by Mr. Jumba PW2 stated that the informer was a woman and that he gathered information that the deceased boarded a motor cycle with 3rd accused and that the three accused persons killed him. He was referred to the police covering report which he read in court. The report states that the deceased and the 1st and 2nd accused fought over the 3rd accused. He denied that he was aware of any fighting.

On further cross-examination by Mr. Ong'aro, PW2 told the court that the informer mentioned that the deceased was seen with a woman called Wasilvia and that he had talked to the woman called Wasilvia. PW2 identified 3rd accused as the one known as Wasilvia. He said that the law allows him not to disclose the informer.

PC Abednego Ruto, PW3, testified that he was instructed on 26th June 2015 to collect two suspects from Dagoretti Police Post. He identified the two suspects as the 1st and the 2nd accused persons. He said that he recorded statements from two witnesses one of them a key witness Lillian Nyaboke. He said Nyaboke had been hawking coffee at the scene of the murder and she told him that the 1st and 2nd accused persons, whom she knew, had been at Honey Pot Bar in Dagoretti Market. She told him that she was the two accused persons talking to the deceased and the 3rd accused on 26th June 2015 at about 1.00-2.00am; that they boarded a motor cycle but a confrontation arose between the deceased and the 1st and 2nd accused persons who were preventing the deceased from going away with the 3rd accused person; that the 1st and 2nd accused persons removed the deceased from the motor cycle and beat him to death.

PW3 said he investigated the case and that he was unable to trace Lillian Nyaboke, the key witness and Frederick Ndung'u to summon them to attend court to testify. PW3 admitted on cross-examination that his evidence is based on the statement given to him by Lillian Nyaboke.

In her submissions at the close of the prosecution case, Ms Nduati the Prosecution Counsel told the court that the prosecution has established a *prima facie* case against the accused persons by tendering evidence proving death of the deceased through the evidence of Dr. Ndegwa; that the death of the deceased was caused by an unlawful act; that the three accused persons were identified as the people with the deceased thereby placing them at the scene of the crime. She urged the court to find that the three accused persons have a case to answer and place them on their defense.

In their submissions, Mr. Jumba for the 1st and 2nd accused persons and Mr. Ong'aro for the 3rd accused told the court that the evidence by the prosecution is insufficient to sustain a conviction; that the evidence does not set out an iota of criminal participation on the part of the accused persons; that the findings of the doctor show death of the deceased was due to asphyxiation while the evidence refer to injuries and that the doctor ruled out the injuries caused by blunt trauma as the cause of death of the deceased. Defense submitted that PW2 and PW3 rely on the statement of Lillian Nyaboke who did not testify and therefore this evidence is inadmissible; that the informer was not called to testify and that the evidence against the accused persons does not pass the test laid down in ***Ramanlal Trambaklal Bhatt v. R. [1957] EA 332.***

Section 306 (1) of the Criminal Procedure Code provides that:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocates for the prosecution or the defense may desire to submit, record a finding of not guilty.

At this stage of the trial after the prosecution has closed its case, the duty of the court is to examine and analyze all the evidence with a view to determining whether the evidence adduced against the accused persons by the witnesses for the prosecution makes out a case against the accused persons at this stage so as to place them on their defence. If there is evidence pointing towards their guilt, the court under the provisions of section 306 (2) of the Criminal Procedure Code must make such finding and place an accused person on his defense. If the court holds a different view as provided under section 306 (1) of the Criminal Procedure Code, then the court must make such finding and acquit the accused person.

A *prima facie* case is made out when the test laid in ***Ramanlal Trambaklal Bhatt*** case (supra), which has been affirmed in various decisions, has been met. In that case the Court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the 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 would not be prepared to convict if no defense is made, but rather hopes the defense will fill the gaps in the prosecution case. Nor can we agree 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 defense.” A mere scintilla of evidence can never be enough; nor any amount of worthless discredited evidence..... 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 defense.”

I have examined and analyzed the evidence adduced by the three prosecution witnesses. In my view it raises three main issues. There is the question of the informer who gave police the information implicating the accused persons leading to their arrest; there is the issue of hearsay evidence and the issue as to the cause of death. The totality of the evidence before me is that the police received information about a body lying at the market place in Dagoretti. The body belonged to the deceased Stephen Karanja Karumba. The only evidence pointing to the identity of the deceased is that of Dr. Ndegwa who testified that before he examined the body of the deceased at the City Mortuary on 3rd July 2015, one Catherine Wanjiku Karumba, a sister to the deceased and Edward Muchoki, whose relationship with the deceased is not given, identified the body as that of the deceased. The doctor said that PC Biko was in attendance. None of these identifying witnesses testified. Since no issues were raised about the identity of the body I have no doubt that it was the body of the deceased.

What happened to Stephen Karanja to lead to his death is in dispute because the evidence on record does not tell the court much on this issue. The two police officers, PW2 and PW3 testified that they received information from an informer. This in itself raises issues. PW2 said when he reached the scene where the body was lying he found a crowd of people but no one was willing to volunteer information to the police. That an informer was available can only mean that the police are contradicting their evidence or someone volunteered the information at a later time. Be that as it may, it is clear to me that the only evidence the police had was based on the statement of a woman called Lillian Nyaboke who was said to have been selling coffee at the scene and who is said to have witnessed what had happened. Lillian did not testify. Police said that they were not able to trace Nyaboke and another witness called Frederick. They did not testify. This makes any information that the police had given to them by Nyaboke hearsay evidence. This evidence is not admissible in court. Secondly the informer did not testify. PW3 said the law allows him not to reveal his informers. This, according to him, means that he could not call this informer to testify.

The issue of the police informers has been discussed in various decisions. In my view, in almost all the cases, especially cases of a criminal nature, police fail to disclose the identity of the informers who tipped them about an accused person and their role in the case under trial. Police normally invoke the law as protecting such informers. On this issue, the Court of Appeal in Joseph Otieno Juma v Republic [2011] eKLR stated that:

“Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution’s other evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public.”

In the above case, the Court of Appeal cited with approval Kigecha Njuga v Republic [1965] EA 773 where it was stated that:

“informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

To my mind, in cases where the prosecution case is weak for lack of sufficient evidence and the evidence of the informer would make a difference in strengthening that case, it would be prudent to call the informer to testify and if it becomes necessary their evidence can be taken in camera. Where there is strong evidence against an accused person so that there is no need to have the informer testify, then the police need not call the informer to testify. The evidence of the informer becomes hearsay evidence and inadmissible unless there is other sufficient evidence to support prosecution case such that the evidence of the informer becomes unnecessary.

In this case, the prosecution evidence is weak. There is no evidence as to how any of the accused persons was identified. There is no evidence, other than hearsay evidence, as to the involvement of the accused persons in beating or attacking the deceased and inflicting injuries on him that led to his death. There is no evidence as to who identified them to the police to be arrested. There are inconsistencies in evidence. This court was told that none of the people found at the scene was willing to tell the police what had happened, yet there is mention of Lillian Nyaboke and Frederick Ndung’u as witnesses, only that they were not traced to come and testify. There is also the mention of the informer who is said to have been a woman.

There are also inconsistencies on the cause of death. There is no evidence that the deceased was strangled or suffocated which would have caused his death by asphyxiation. The evidence shows that the deceased was beaten. Physical injuries were noted by Dr. Ndegwa on the body of the deceased on the upper arm, the eye and the occipital scalp. These were caused by blunt force trauma and according to Dr. Ndegwa these injuries were not significant to cause the death of the deceased.

I believe I have demonstrated that the evidence of the prosecution is insufficient. It does not meet the test in the Ramanlal Trambaklal Bhatt case (supra). It is inadequate to base a conviction on. To place the accused persons or any of them on their defense is akin to hoping that they will fill the gaps left by the prosecution evidence. This would amount to miscarriage of justice. Consequently it is my finding that the prosecution has failed to establish a prima facie case against the accused persons or any of them to require this court to place them on their defense. In compliance with section 306 (1) of the Criminal Code I hereby record a finding of not guilty against Kelvin Kamau Gatora, Ismael Wainaina and Florence Wanjiru Kamau and forthwith acquit each of them. Unless there is any lawful cause to hold them in custody any further, I order that each of them be released from custody and let free to go home. Orders shall issue accordingly.

Delivered, dated and signed this 14th day of May 2018.

S. N. Mutuku

Judge