

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 95 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MUSYOKI MWANGANGI.....1ST ACCUSED

JOHN MUTHAMA MWANGANGI.....2ND ACCUSED

RULING

The two accused persons named above are jointly charged with the murder of Mwanzia Mulandi contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the offence was committed on 26th of August 2013 at Huruma Ngei 11 Estate in Nairobi District within Nairobi County.

The prosecution has concluded its case after calling six (6) witnesses. The law requires under Section 306 (1) and (2) of the Criminal Procedure Code as follows:

(1) 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 advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

The analysis of the evidence at this stage of the trial is aimed at informing the decision the court must make in compliance with either of the two sub-sections of Section 306 of the Criminal Procedure Code. This decision will take either of the following routes: that there is no evidence against the accused persons in which case the court must order an acquittal; or that there is evidence against the accused persons in which case the court must place the accused person on his/her defense.

The summary of the evidence is that Mwanzia Mulandi, the deceased, was drinking at White Havana Club in Huruma Nairobi on the evening of 26th August 2013 when he was accosted by the two accused persons. He had arrived at the Club around 7.30pm. The accused persons are brothers. When they arrived at the same Club, they found the deceased already at the Club having been served with keg beer. They sat at a different table and ordered their keg beer. They started to complain against the deceased and attacked him. The 2nd accused who attacked the deceased first claimed that the deceased had taken his woman. The woman referred to is Olivia Nyambura, a waitress at the same Club who had asked the deceased to buy her beer and the deceased had done so. Evidence shows that the two accused kicked and punched the deceased all over his body. The commotion attracted other people from outside the Club. These people joined the two accused persons in the kicking and punching the deceased. Joyce Ndunge, (PW4) one of the waitresses in the Club screamed for help causing the people who had entered to leave. Evidence

shows that the two accused continued assaulting the deceased after the members of public had left. Joyce pleaded with them to stop and they did and then left. The deceased was not able to stand or talk after the assault and in the words of Francis Kitheka (PW1) and Joyce the deceased was foaming in the mouth. He was assisted to the home of the Francis where he spent the night. His brother Justus Mulandi (PW2) was informed of the deceased's condition in the morning. He took him to Matuu Clinic in Huruma where he was referred to Kenyatta National Hospital. He was admitted at Kenyatta National Hospital until 30th August 2013 when he died.

Investigations by the police led to the arrest of the 1st Accused on 2nd September 2013. He was brought to court to answer murder charges in High Court Criminal Case No. 93 of 2013. The 2nd accused was arrested on 29th July 2015 almost 2 years after. He was also charged with murder in High Court Criminal Case No. 76 of 2015. Both cases were consolidated on 1st October 2015 retaining Criminal Case No. 95 of 2013.

Dr. Bernard Midia (PW6) examined the body of the deceased on 3rd September 2013 and formed the opinion that the deceased had died due to severe head injury and massive lung contusions as a result of blunt trauma.

I have examined and analysed all the evidence specifically that of Francis Kitheka and Joyce Ndunge. Both were at White Havana Club the scene of the assault at the time when the assault occurred. They both witnessed what happened and narrated this to the court. It is mentioned in their evidence that other people came from outside the Club and joined the two accused persons in assaulting the deceased. The two accused continued beating, kicking and punching the deceased even when he was defenseless and even after the members of public who had joined them had left.

I have considered this evidence and that of Dr. Midia. The injuries causing death were consistent with injuries caused by blunt force trauma. This is consistent with injuries caused by kicks and blows as was the case in the matter before me. I have taken into account the issues raised by the defense counsels in their respective submissions including lack of nexus between the bar fight and the death of the deceased, lack of proof of *actus reus* and *mens rea*, and contradicting prosecution evidence. I have also considered the authority cited **Republic v. Bernard Obunga Obunga [2015] eKLR**. This case cited with approval the case of **Ramnlal Trambaklal Bhatt v. R [1957] E.A 332**. In reference to the two cases a prima facie case is a case on which a reasonable court, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense. Issues have been raised as I have indicated above whether the fight in the bar can be connected to the death of the deceased. My view after taking into account the evidence, the law and the submissions of counsel is that I am persuaded that the evidence by the prosecution makes out a prima facie case against the two accused persons. The **Obunga case** cited by the counsel for the 2nd accused is differentiated from the current case in that the cause of death in that case was not conclusively determined and this led to the decision that the injuries inflicted on the deceased in that case were not consistent with the injuries the doctor found as the cause of death. Consequent to the finding that a prima facie case has been made out against each of the accused persons, this court makes a finding that each of the accused persons has a case to answer and shall be placed on his defense. This court has informed them of their rights to choose to testify under oath or without taking oath and to call witnesses to the defense. Orders shall issue accordingly.

Dated, signed and delivered this 15th June 2017.

S. N. MUTUKU

JUDGE