



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL GITAU MAINA alias STRANGER.....1ST ACCUSED

STEPHEN WAWERU NDUNGAI alias STEVO.....2ND ACCUSED

ANTHONY KAMWENJI NDUNGU alias IBRAHIM.....3RD ACCUSED

STEPHEN MWANGI MUTHONI alias ARSHVIN.....4TH ACCUSED

MICHAEL THUO GIKARU.....5TH ACCUSED

RULING

The five accused persons face two charges of murder contrary to section 203 as read with section 204 of the Penal Code. In count 1 it is alleged that with others not before the court they jointly murdered Johnson Kiruthu Kagio on 23rd December 2012 at Mathare 3C in Starehe District within Nairobi County. In the second count it is alleged that on the same date and place as in count 1 with others not before the court they jointly murdered David Njoroge Kiige. All the five accused persons denied committing the two offences.

As at the time the hearing of this matter commenced before me on 14th March 2016, the case had taken over three years without taking off for trial. The 1st and 2nd accused persons are the first ones to be arraigned in court on 14th January 2013 in Criminal Case No. 9 of 2013. Later the 3rd accused was charged in Criminal Case No. 26 of 2013 and the 4th accused was charged in Criminal Case No. 33 of 2013. The prosecutor applied for consolidation of the three files. This was allowed on 13th March 2013 and the plea taken afresh. The court file remained No. 9 of 2013. On 19th November 2013 the prosecution brought to court the 5th accused in Criminal Case No. 103 of 2013 and sought to consolidate this file with No. 9 of 2013. This was allowed and again the plea was taken afresh. For reasons appearing in the court file records including these consolidations, this trial has delayed.

When finally the trial commenced before me on 14th March 2016 it took the court three consecutive days to hear nine prosecution witnesses after which the prosecution closed its case. The 1st and 2nd accused persons are represented by Mr. Jumba; the 3rd accused person is represented by Ms Omung'ala; the 4th

accused by Mr. Oundu and the 5th accused by Mr. Tanui. This is a ruling to determine whether the evidence tendered by the prosecution establishes a prima facie case against the accused persons in order to put them on their defence.

The evidence by the prosecution is that following the death of one Michael Ndonye in Mathare 3C Nairobi in the early hours of 23rd December 2013 his mother accused the deceased Johnson Kiruthu Kagio (deceased in Count 1) of involvement and threatened the deceased and his family with death. Later that day in the evening, about 8.00pm some young men including the accused persons started stoning the business premises of the deceased situated at Mathare 3C and the deceased's car parked outside the bar. They poured some inflammable liquid on the car and set it ablaze. The fire spread into the building housing the bar and butchery. The deceased tried to intervene but was overpowered and pushed back into the burning building. Inside the building was his friend David Njoroge Kiige (deceased in Count 2). Both died inside the building after burning beyond recognition.

The five accused persons were arrested at different times and all were charged with two counts of murder. The doctor who examined the remains of the deceased persons confirmed the cause of death as 100% 3rd degree burns.

A "prima facie case" has been defined in **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332** to mean **a case 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** (emphasis added). In the same case (**Ramanlal**) the court held the opinion that at this stage of the trial when the court is required to determine whether a prima facie case has been made out against the accused person, the court is not required to decide with finality whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively. This final determination can only properly be made when the case for the defence has been heard.

My careful analysis of the evidence by the prosecution therefore leads me to hold the view that the prosecution has established a prima facie case against each of the five accused persons. Consequent to that view I make a finding that each of the five accused persons has a case to answer. I will and do hereby proceed to put each of the five accused persons on his defence. I take this chance to inform them of their rights under section 306 (2) of the Criminal Procedure Code to inform this court whether they will give a sworn or unsworn defence and whether they are calling any witnesses to their defence. It is so ordered.

Dated, signed and delivered this 11th day of April 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Onunga for the prosecution

Mr. Jumba for the 1st and 2nd accused persons

Ms Omung'ala for the 3rd accused person

Mr. Oundu for the 4th accused person

Mr. Tanui for the 5th accused person

All the five accused persons

Mr. Daniel Ngumbi, the court clerk