



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 19 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EDSON HAMISI CHANGILWA.....1<sup>ST</sup> ACCUSED**

**STEPHEN MURAGE ONYARI.....2<sup>ND</sup> ACCUSED**

**JACKSON ONDIEKI MIYOGO.....3<sup>RD</sup> ACCUSED**

**CAROLINE MWANGO OBOKO.....4<sup>TH</sup> ACCUSED**

**RULING**

Edson Hamisi Changilwa, 1<sup>st</sup> accused, Stephen Murage Onyari, 2<sup>nd</sup> accused, Jackson Ondieki Miyogo, 3<sup>rd</sup> accused and Caroline Mwnago Oboko, 4<sup>th</sup> accused, are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence state that on the night of 16<sup>th</sup> and 17<sup>th</sup> January 2013 at Southlands in Langata within Nairobi County jointly with others not before the court murdered Kelvin Omwenga Somoki. The 1<sup>st</sup> and 4<sup>th</sup> accused persons are represented by Mrs. Kinyori, advocate; the 2<sup>nd</sup> accused is represented by Mr. Oundu, advocate and the 3<sup>rd</sup> accused is represented by Mr. Mutitu, advocate. The prosecution was led by Ms Magoma, prosecution counsel.

Hearing of the case for the prosecution commenced on 22<sup>nd</sup> September 2015 and terminated on 19<sup>th</sup> October 2015 when the prosecution closed its case after recording evidence of six (6) prosecution witnesses. We are at the stage where this court must make a determination whether the evidence so far adduced is sufficient to establish a prima facie case against the accused persons to enable this court call upon each of them to give evidence in his/her defence. The onus of proving a criminal charge like this one lies with the prosecution. The prosecution, too, must prove that a prima facie case has been made out against the accused person.

The procedure to be followed after the prosecution has closed its case and before the court calls on the accused person to defend himself/herself is prescribed in section 306 (1) and (2) of the Criminal Procedure Code. For clarity purposes this section states thus:

**306 (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.**

At the close of the prosecution case counsels for accused persons submitted that the prosecution has not established a prima facie case against any of the accused persons. The defence counsels took issue with the evidence on identification of the accused persons and submitted that the accused persons were not identified by any witness and that it is not clear how they were arrested. They further submitted that the evidence does not show how the deceased met his death and that the investigations were not carried out.

Before this court can determine what a prima facie case has been established, I wish to pose this question: what is prima facie case? In [common law](#) jurisdictions of which Kenya is a part, *prima facie* denotes evidence that, unless [rebutted](#), would be sufficient to prove a particular proposition or fact. In [Ramanlal Trambaklal Bhatt v. R \[1957\] E.A 332 at 334 and 335](#), 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, 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 defence is made, but rather hopes the defence 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 defence”. A mere scintilla of evidence can never be enough: nor can 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 defence.” (emphasis added). (See [Wibiro alias Musa v. R \[1960\] E.A at 186](#)).**

Can this court, properly directing its mind to the law and the evidence on record enter a conviction against the accused persons or any of them basing that decision on the evidence so far before it if the no defence is offered?

I think this calls for the analysis of the evidence to guide this court in answering that question.

Senior Sergeant Joseph Mbuthi, PW6, was the first officer to visit the scene of murder at 8.30am on 17<sup>th</sup> January 2013 at Southlands, Langata. He found a crowd of people at the scene where a body of a male person was lying with no trousers. He observed deceased’ shoes lying beside the body and a stab wound on the back. PW6 called scenes of crime personnel to take photographs of the scene after which PW6 removed the body to the City Mortuary. He told the court in cross examination that he did not know how the stab wound was inflicted on the deceased and did not know how the accused persons were arrested.

The photographs of the scene were taken by one PC Muia, who did not testify. Police Superintendent Stephen Kiboi, PW4, testified and produced the photographs on behalf of PC Muia. The photographs showed blood stained clothes, blood on the mouth and nose of the deceased and the body lying facing up. The photographs do not show the stab wound and PC Muia concluded that the body had no visible injuries.

The investigating officer is Corporal Richard Limo, PW5. He testified that he was assigned the case to investigate on 20<sup>th</sup> January 2013; that he recorded statements from the witnesses including PW6 and Kephias Somoki Omwenga the father of the deceased; that Kephias Somoki confirmed having, with help of

the members of public, arrested the 2nd and 3rd accused persons; that he arrested the 1<sup>st</sup> and 4<sup>th</sup> accused. His evidence as to who committed this offence is captured thus:

**“I did not conduct independent investigations to confirm his (Kepha Somoki) statement. He gave us other names of people who could have been involved with the death of deceased. We arrested them and I recorded their statements.”**

On cross-examination PW5 told the court that:

**“Deceased’s father was not at the scene. He was not sure who killed deceased. I am not sure who killed the deceased. I relied on father’s statement. As investigating officer I can say that I am not sure who killed the deceased”.**

Jephitha Motoroki, PW3, learned of the death of the deceased who was known to him on the morning of 17<sup>th</sup> January 2013. He went to the scene and found police had already arrived. He told the court that he rescued the 2<sup>nd</sup> accused person from a hostile crowd after he had been arrested on allegations of having caused the death of the deceased. PW3 said he did not have evidence that the 2<sup>nd</sup> accused had killed the deceased. He said that it was during campaign period and there were nominations that day. He said there were more than 100 people at the scene and that he did not see any of the accused persons at the scene.

PW2, Kepha Somoki, testified that on 17<sup>th</sup> January 2013 he received information from a neighbour that his son Kelvin Omwenga Somoki had been killed at Southlands, Langata; that he went to the scene where he found police and the body of his son beside the road. He said he observed an injury on the head and below the shoulder blade on the right; that the body was removed to the city mortuary and later that day one “Mrefu” told him that one Stephen had fought with deceased. He identified Stephen as the 2<sup>nd</sup> accused before the court. He said he arrested 2<sup>nd</sup> accused and handed him over to Langata Police Station; that at 9.00pm that night “Mrefu” informed him about other suspects; that they arrested the 3<sup>rd</sup> accused.

PW2 was cross-examined and he told the court that he told “Mrefu” to record statement with the police but he did not do so. He said he had no other information regarding the death of the deceased other than what “Mrefu” told him. He said he told police about “Mrefu” whose real name he did not know but could not tell if police recorded “Mrefu’s” statement.

The cause of death was confirmed by Dr. Joel Mungai, PW1. He testified that the deceased had a penetrating stab wound on the right shoulder bone, bruises on the scalp, accumulated blood 2 litres on the right side of the chest and the lung had collapsed. His opinion is that deceased died as a result of massive bleeding from lung and chest injury due to the stab wound. He said that the bruises on the scalp were consistent with blunt trauma but these were insignificant. He said the stab wound had penetrated the chest. The doctor ruled out “mob justice” as the cause of these injuries stating that the injury was localized unlike “mob justice” injury which tends to inflict blunt trauma.

The evidence as captured shows clearly that the person or persons who caused the injuries that led to the death of the deceased have not been identified. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were named by one “Mrefu” whose identity this court does not know. He was not a witness and the evidence from PW5 and PW6 does not mention him. There is no evidence to show if police followed up on “Mrefu” to record his statement. PW2 did not tell the court the real name of this person. All the evidence on the identity of the person or persons who inflicted fatal wound on the deceased shows that no one saw what happened; that PW2 relied on the information given to him by “Mrefu” and believed him; that he informed police including PW5 the Investigating Officer who also believed him. The evidence as to how the 1<sup>st</sup> and 4<sup>th</sup> accused persons were arrested is not clear and their involvement is not shown by available evidence.

Suppose this court went ahead and put the four accused persons or any of them on their defence, what would happen? In doing so, this court would be hopeful that they would admit their involvement and therefore fill the gaps left by the prosecution case. The prosecution evidence establishes that the death of the deceased occurred. That is all it did. There is no evidence to show who caused the fatal injuries on the

deceased and by extension whether that person/persons possessed the intention to kill.

To go back on the question I posed above in this ruling: can this court, properly directing its mind to the law and the available evidence convict if no defence is offered? My answer to that question is in the negative. The evidence falls short of establishing a prima facie case. In my considered view having taken into account the rights of the accused persons and of the victim and his family, and with respect to the prosecution, it would be an academic exercise to proceed to place the accused persons on their defence. The evidence is insufficient to support a prima facie case. For this reason, I do hereby find that the prosecution has failed to discharge its duty to establish a prima facie case at this stage of the trial. Consequently, I find that each of the accused persons, Edson Hamisi Changilwa, Stephen Murage Onyari, Jackson Ondieki Miyogo and Caroline Mwangi Oboko have no case to answer. In compliance to section 306 (1) of the Criminal Procedure Code, I hereby acquit each of them forthwith. They are free to go home unless for any other lawful reason they are held in custody. Orders shall issue accordingly.

**Dated, signed and delivered this 2<sup>nd</sup> November 2015.**

**S. N. MUTUKU**

**JUDGE**

**In presence of:**

Ms Magoma, prosecution counsel

Mrs. Kinyori, counsel for 1<sup>st</sup> and 4<sup>th</sup> accused

Mr. Oundu, counsel for 2<sup>nd</sup> accused

Mr. Mutitu, counsel for 3<sup>rd</sup> accused

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons

Mr. Daniel Ngumbi, court clerk