



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 1 of 1998

REPUBLIC..... PROSECUTOR

VERSUS

KENNEDY OTIENO OCHUNG

JOHN OTIENO OWUOR

PETER OTIENO MICHAEL

OSCAR JUMA WILLIAM OMBALA

COLLINS AWANDA WASONGA

BENJAMIN OTIENO ODHUONGO

MICHAEL ODUOR OKUMU..... ACCUSED

RULING

In this case there were originally seven accused persons who were jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 8th day of August, 1997 at Central Park, Nairobi within the Nairobi Area the seven accused persons jointly with others not before the court murdered Gilbert Ahanya Simiyu. The seven accused persons were:-

1. Kennedy Otieno Ochung
2. John Otieno Owour
3. Peter Otieno Michael
4. Oscar Juma William Ombala
5. Collins Awanda Wasonga
6. Benjamin Otieno Odhuongo
7. Michael Oduor Okumu

When this matter came up before this court on 8th June, 1998, the court was informed that the 1st accused had been admitted at Mathari Mental Hospital. The case was adjourned to the following day (9th June, 1998) when an order was made to the effect that the trial of the six accused persons (Accused Nos.2-7) would proceed separately from the trial of the 1st accused (Kennedy Otieno Ochung). The trial of the six accused persons then commenced on 10th June, 1998.

Prosecution called a total of 23 witnesses and at the close of prosecution case Hon. Orengo who appeared together with Mr. Weda for all the six accused persons made a submission of no case to answer. He pointed out that applying the test in the case of R. Bhatt V.R (1957)E.A 332 none of the accused had a case to answer since no single witness had pointed at any of the accused persons. It was Hon. Orengo's contention that identification of the accused persons was not properly conducted and hence the six persons should be acquitted at this stage.

In this case it cannot be denied that the deceased Gilbert Ahanya Simiyu died as a result of the injuries received on 8th August, 1997 when he was assaulted by some of those who had attended a political rally at the Central Park Nairobi. Evidence was given to the effect that the deceased was one of the Security Officers at the rally and he was set upon by those in the crowd who suspected him to be a spy.

Inspector John Mungai (PW1) testified that on 8th August, 1997 at about 11.00 a.m. he was at the Central Park, where he witnessed the deceased being assaulted. PW1 testified that he recognised one of those who assaulted the deceased but that man was not one of the accused persons.

Inspector Wilson Cheruiyot (PW2) was at the Central Park on the material day and his evidence was to the effect that he witnessed the incident in which the deceased was assaulted. He was able to identify 4th accused.

Senior Sgt. Bernard Simiyu (PW3) testified that he was at the Central Park on the material day and he to witnessed the incident. He said that he identified the 4th accused among those who were assaulting the deceased. But when cross examined PW3 was not sure about the identity of the 4th accused. Actually, in the end PW3 was totally confused in this aspect of identification, since he was talking of Collins and Okumu who incidentally is not the same person.

Cpl. Jacob Wamalwa Makhanu (PW4) was another witness who was on duty at the Central park on the material day (8th August, 1997). In his evidence in court he testified that he was able to identify 4th, 5th and 7th accused among those who were assaulting the deceased.

Cpl. Jane Mathenge (PW5) was also on duty at the Central Park on 8th August, 1997. This witness was very detailed in her description in what she saw that morning. She explained in details about those on the platform like Hon. Orengo, Hon. Raila and Prof Kibwana and how Prof. Kibwana tried to intervene by telling the crowd to leave the deceased alone. Cpl. Mathenge (PW5) stated that she was able to identify 4th, 5th and 7th accused among those who assaulted the deceased. But on being cross-examined this witness (PW5) said inter alia:-

"I did not indicate that I had seen one of those people. I omitted it in my statement. I have not indicated in the statement that one of them was active. I did not say in the statement that I saw one of them slap the deceased".

So, we had only PW2, PW3, PW4 and PW5 who testified that they were able to identify some of those who assaulted the deceased. Hence, the evidence connecting the accused persons and the offence is that of identification by those who were at the Central Park.

I must quickly deal with the other aspects of this case which are not in dispute. The deceased as I have already said died as a result of injuries received at Central Park on 8th August, 1997. The deceased was assaulted by some of those who had attended a political rally on that day. The deceased was an officer attached to Security Intelligence. He was on duty to cover the proceedings of this political rally. There was a commotion which resulted into the death of the deceased. The accused persons were arrested when

there was a general operation to round up all those who were suspected to have been involved in this unfortunate incident in which the deceased died. Various police officers testified how they rounded up people and arrested them. Many people were arrested but after thorough investigations only seven people were charged with this offence. But now we are left with six people as the 1st accused was admitted at Mathari Mental Hospital.

In this case we have the evidence of PW2, PW3, PW4, and PW5 as regards identification. 4th accused was identified by PW2, PW3, PW4 and PW5. The 5th accused was identified by PW4 and PW5. The 7th accused was identified by PW5.

Looking at the above it should be clear that there was no evidence of identification connecting 2nd, 3rd and 6th accused with this offence. But there could be some other evidence against them. I have perused the evidence on record but I find no evidence against 2nd, 3rd and 6th accused.

Before I conclude this ruling, we must consider the issue of a prima facie case. I have already summarised the crucial evidence against the accused persons. This is evidence of identification. The law is clear when it comes to prima facie case. At the close of prosecution case there must be sufficient evidence upon which this court would convict the accused if no explanation is given. It must be remembered that at the close of prosecution case an accused person has the right to keep silent in his defence. An accused person is brought to court by the prosecution. It is upon the prosecution to prove a case against an accused person beyond reasonable doubt. An accused person is under no obligation to prove his own innocence. The burden of proving his guilt lies on the prosecution. Can it be said that in this case each of the accused persons has a case to answer? The leading authority on this issue is the case of R. Bhatt V R (1957) E.A 332 in which it was stated.

"Remember 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 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 any amount of worthless discredited evidence. It is true as WILSON J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a prima facie case but 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".

In the present case we have evidence of identification by PW2, PW3, PW4 and PW5. That evidence does not however touch on all the accused persons. At this stage, one wonders why 2nd, 3rd and 6th accused persons were brought to court. If there was any witness who had evidence against these three accused persons then that witness was not called to testify. The three accused persons (i.e. 2nd, 3rd and 6th accused persons) have no case to answer and these are acquitted. They are to be set free forthwith unless otherwise lawfully held.

This now leaves 4th, 5th and 7th accused persons in the dock. The evidence connecting them with the offence is that of identification. We must however consider the quality of this evidence of identification. We now know that the incident took place in a political rally which was highly charged. The crowd became unruly and violent on discovering that the deceased was a Security Intelligence Officer. The mob descended on him and kicked him to the ground. It was during this commission that the three accused persons (4th, 5th and 7th accused) were identified. From the evidence we know that identification parades

were conducted in respect of the suspects in this case. It was as a result of these identification parades that the three accused persons find themselves in the dock. There was a complaint that some photographs were used by the witnesses, Inspector Obed Isanda Kibiego (PW7) was one of the inspectors who conducted identification parades. On being cross examined, Inspector Kibiego (Pw7) stated inter alia:-

"I am not aware whether the witnesses looked at the photographs. I did not know that there were photographs at Kilimani Police Station. I never came across the photographs. I did not ascertain whether the witnesses looked at the photographs. I cannot tell if they looked at photographs. If they looked at the photographs, they would be able to identify the suspect".

According to Inspector Kibiego (PW7) he was not sure whether witnesses looked at some photographs.

Inspector Philista Wagura (PW12) testified to the effect that on 19th August, 1997, she conducted identification parade in which the suspect was Benjamin Otieno. On being cross examined this witness (PW12) stated:-

"I did not see photographs in the office. I knew later that there were photographs I cannot tell whether or not the witnesses were using photographs.

Hence, here is another Police Officer who conducted identification parade and according to her (PW12) she came to know later that there were photographs.

Inspector Christopher Kiplimo (PW13) testified that on 19th August, 1997 he conducted identification parade in respect of the suspect Michael Oduor where there were five witnesses. On being cross-examined on the issue of photographs this witness (PW13) stated;-

"I saw some photographs with the investigating officer. I had no interest in the photographs. If the photographs were shown to the witnesses that would not be in order".

Supt Daniel Cheptigen (PW16) testified to the effect that on 8th August, 1997, he was instructed to assist D.C.I.O Central in this matter. His role was to go and look for suspects who had murdered a Police Officer known as Simiyu. Supt Cheptigen (PW16) went on to testify how he and his men went to the City Centre and arrested a number of suspects and that after investigations some of the suspects were taken to court while some were released for lack of evidence. On being cross-examined this witness (PW16) stated inter alia:-

"There were photographs at C.I.D Offices Kilimani. The photographs were used by the witnesses during identification parade. The witnesses would look at the photographs and then identify the suspect on the parade. As far as I know there were photographs. Apart from the photographs I did not have any other material. It might have been oversight if I said in my statement that there were no eye witness".

From the above, we note that Supt. Cheptigen (PW16) was quite emphatic that photographs were being used by the witnesses in identifying the suspects. Even Supt. Samuel Githui Mithamo (PW20) in his evidence in chief said:-

"There were photographs which were used but actual identification parade was held. The photographs were obtained from the media".

What can we say about these identification parades? These Senior Police officers have admitted that photographs were used in identifying the suspects. We heard and saw the witnesses who claimed to have identified the accused persons but on being cross-examined these witnesses emerged as not being sure of who they identified at the identification parade. That has adversely affected the quality and value of the evidence of identification. That being the only evidence against the three remaining accused persons, it cannot be said but such evidence can pass the test of prima facie case as stated in Bhatt's case (Supra). The result is that the three remaining accused persons have no case to answer. This was unfortunate case in which an innocent Police Officer died at the hands of unruly mob. It was difficult to state with any

degree of certainty as to who were the culprits.

The upshot of the foregoing is that all the six accused persons (Accused 2-7) are to be acquitted and set free forthwith unless otherwise lawfully held. Order accordingly. Delivered at Nairobi this 3rd day of December, 1998.

E.O O'KUBASU

JUDGE

3.12.98

Coram: E. O'Kubasu, J

Mr. Bwomongo for state

hon. Orengo with Mr. Weda for accused persons.

All 6 accused present.

C/clerk - Njehia

Assessors

1. Anne Ndegwa
2. Joel Wanyaga
3. Michael Ouma

Order: Ruling delivered.

E. O. O'KUBASU

JUDGE