

**IN THE COURT OF APPEAL
AT KISUMU
(CORAM: MUSINGA (P), KIAGE & ODUNGA
JJA.) CRIMINAL APPEAL NO. 189 OF 2020
BETWEEN**

REPUBLIC.....APPELLANT

AND

**BONIFACE ONYANGO ADUOL alias BONNY.....1ST
RESPONDENT RONALD ODUOR ADUOL alias RONNIE.....
.....2ND RESPONDENT CAROLINE ATIENO NGESO alias
CARO.....3RD RESPONDENT CHRISTINE APONDI alias
TINA.....4TH RESPONDENT GILBERT ODHIAMBO
ONONO alias
ODHIAMBO **MECHANIC.....5TH
RESPONDENT****

(An Appeal from the Ruling of the High Court of Kenya at Busia (Hon. Kiarie Wa Kiarie J.) dated 4th August 2020

in

Criminal Case No. 26 of 2019)

JUDGMENT OF THE

COURT

1. The burial ceremony of a deceased person is usually a solemn occasion when people gather to pay their last respects to the deceased. It is usually an occasion when people place aside their differences, whether with the

deceased or the deceased's family, in order to give the deceased what is often referred to a "a befitting send-off". This expectation, however

was not realised on 15th November, 2019, when the loved ones of Johannes Okoth Oria (the deceased) and the villagers of Masebula village, in Butula sub-County within Busia County gathered at Masebula Primary School to pay their last respects to the deceased before sending him to the next world. It was hoped that the occasion would result in the deceased eventually resting in peace. Things, however, did not go as scripted.

2. According to the deceased's wife, **Mercy Awuor** (PW1), on that day at about 6 pm, while seated next to the coffin together with her sister, Maureen Atieno (PW2), just before a mob, comprising 80 people caused mayhem, she heard murmurs from the deceased's family members to the effect that the Kisumu people should be killed for being behind the death of the deceased. PW1 saw "Joseph Aduol, Odhiambo, a mechanic at Jirongo Aduol, Awino Aduol, and Caroline Anyango". Amongst those being beaten with pieces of firewood and stones were William Oriwa, her brother David Okeyo and Kaisee. In the process, David Okeyo was killed

while, PW2 suffered injuries when she tried to intervene. PW1 was also assaulted by one Karen, on the head. In that melee, as confirmed by PW2, 6 people lost their lives. It was her evidence that while Joseph Aduol, Jorongo Aduol, Awino Aduol, Karen Aduol, and Risper Anyango were not in court, the 3rd and 5th respondents were amongst the accused. She insisted, in cross-examination, that the only people she saw beating David Okeyo and William Oriwa were 3rd and 5th respondents, but admitted that she was not on friendly terms with 3rd respondent.

3. **PW2, Maureen Atieno**, confirmed that she was with PW1 although according to her, the attackers were forty in number, in a crowd that comprised many people in the school field. Amongst the dead, according to her, were her uncle William aka Cisco and her brother David Okeyo. Amongst those who were involved in the attack, according to her were the 5 respondents, Oria, Shem, Jirongo, Roonick, Sabina, Phelgona, Janet, Awino, Nyarwer, Achieng, Nyapwoyo, and others whose names she did not know who

were in possession of pieces of firewood. She was also assaulted by Achieng, Jirongo and Nyapwoyo. The genesis of the assault, according to her, was the accusation levelled against her family that they were responsible for the death of the deceased.

4. In cross-examination, she stated that, four minutes before the commotion, their attention to the presence of suspicious people was drawn by the 1st and 4th respondent, Oria and Awino, who informed them about the presence of some suspicious people in the crowd. At that time there were many people queuing to view the body, though they were not orderly.
5. **Gideon Ochieng**, PW3, was in the school compound, where there was no commotion, when he heard shouts of “kill, kill” coming from the direction of the deceased’s homestead. He took 4 minutes before proceeding to the scene where he saw many people beating a person whom he recognized as William Oriwa. When his cousin, David Okeyo, went to intervene, he was similarly assaulted by

the people and fell

down. He however, only recognized the 2nd, 3rd and 5th respondents amongst the assailants.

6. **PW4, Charles Odhiambo Otega**, was at the scene, viewing the body of the deceased, which had arrived at the homestead at 4pm, when, at 5pm, he sensed some tension and called the OCS Bumula requesting for security, but the police officers did not come. According to him, the fight was started at about 5 pm by Oria although he could not see whom Oria fought. In his evidence, the 5 respondents, whom he knew, were not present at the scene when the fight started. He left the scene soon after the fight started.
7. **No. 78872 Cpl Paul Ngesa (PW5)** accompanied the OCS to the scene where they found a crowd of people who fled as they approached. They found six bodies of men who had been killed and observed their physical injuries. They also found pieces of firewood that had been used. On 16th November 2019 they established from witnesses that several people, some of whom were in court, were seen

attacking the six who were suspected to have gone to the scene with bad intentions.

He established that there were family differences between the immediate family of the deceased and that of PW1. He disclosed that the cause of death of the deceased was under investigation by the DCI, Ugenya.

8. This was the evidence upon which the 1st to 5th respondents were charged with 6 Counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars were that on 15th November 2019, the respondents at Masebula village in Butula Sub-County within Busia County, jointly with others not before the Court, murdered William Omondi, David Okeyo Odhiambo, Philip Kwach Omware, Elvis Otieno, Nickson Adera and Evans Onyango. They all pleaded not guilty.
9. At the conclusion of the evidence outlined above, the prosecution closed its case.
10. In his ruling holding that the prosecution had failed to establish a prima facie case to warrant placing the respondents on their defence, the learned Judge found:

that

given PW2's evidence that the noise started behind them, it was doubtful whether indeed the two witnesses (PW1 and PW2) recognized anybody in the melee that followed, given the big crowd of mourners present; that the evidence regarding the recognition of the 2nd and 3rd respondents was doubtful; that PW3's evidence that David Okeyo was beaten when he lay on William Oriwa to shield him was not supported by the evidence of PW1 and PW2; that, appreciating that there is no law prohibiting relatives being witnesses in the same case, when the animosity is as clear as in this case, the investigating officer ought to look for independent witnesses to avoid a scenario where one may be implicated by reason of belonging to the other divide of the feuding family; that in this case, the only independent witness who was called was PW4, whose evidence was that the respondents were not at the scene when the fight started; and that this evidence introduced further doubts in the prosecution case.

11. The learned Judge concluded that if the respondents opted to exercise their constitutional right to keep silent, he could not enter a conviction based on the evidence on record. The result was that the prosecution failed to establish a prima facie case against any one of respondents, hence his decision to acquit the respondents of the offence of murder under section 306 (1) of the ***Criminal Procedure Code***.

12. Dissatisfied with the above decision, the State, which is the appellant, vide the Memorandum of Appeal dated 29th August 2025, contends that:

1. The Learned Trial Judge erred in law and fact in finding that the Prosecution had not established a prima facie case against the Respondent contrary to the principles laid down in Bhatt v Republic [1957] EA 332, despite credible eyewitness testimony placing some of the accused at the scene of the crime.

2. The Learned Trial Judge misapprehended the standard of a prima facie case, by requiring a level of proof akin to that needed for conviction at the close of the prosecution's case.

3. The Learned Trial Judge erred in law by applying an excessively high evidentiary threshold at the no case to answer stage.

4. The Learned Trial Judge misdirected

himself by placing undue reliance on the testimony of PW4, while unjustifiably discrediting the

consistent and corroborated evidence of PW1, PW2, and PW3, whose testimonies identified specific accused persons as part of the mob responsible for the killings.

5. The Learned Trial Judge placed undue weight on the inconsistencies and family relationships of the witnesses, thereby unjustly discrediting their testimonies without sufficient legal basis.

6. The Learned Trial Judge erred in law and fact by acquitting the accused persons under Section 306 (1) of the Criminal Procedure Code, when the evidence on record was sufficient to require the accused to be placed on their defence.

7. The Learned Trial Judge failed to consider the cumulative effect of the Prosecution evidence, which, taken as a whole, was sufficient to establish a prima facie case against the respondents.

8. The Learned Trial Judge prematurely invoked the Respondents' constitutional rights to remain silent under Article 50 (i) of the Constitution, thereby misapplying its protective scope at the no case to answer stage.

13. When the appeal came for virtual hearing of the appeal on 4th September 2025, learned counsel, **Ms. H. Mutellah**, appeared for the appellant while learned counsel, **Ms. Ida Anyango**, appeared for the respondents. Both counsel relied on their written submissions which they briefly highlighted.

14. On behalf of the appellant, it was submitted: that the trial court applied an overly stringent standard at the no case to answer stage contrary to the threshold set in the case of ***Bhatt v Republic [1957] EA 332***; that PW1, PW2 and PW3

having placed the respondents at the scene of crime and described their involvement in the mob violence, the learned Judge misapplied the legal standard for a *prima facie*; that the learned Judge erred in dismissing the evidence of PW1 to PW3 merely on the basis that they had family ties with the deceased, yet their testimonies were consistent and corroborated each other and their identification of the accused was direct and specific; that the over reliance on the testimony of PW4 ignored the broader evidentiary context and amounted to a selective evaluation of the evidence; that the learned Judge for failed to appreciate that the presence of multiple eyewitnesses, even if related to the deceased, was sufficient to place the accused persons on their defence; that the trial court failed to consider the totality of the

circumstantial evidence and failed to explore whether the

respondents participated in a mob attack, the effect of which constituted their collective culpability; that the learned Judge evaluated the evidence on a beyond a reasonable doubt threshold as opposed to whether the evidence warranted the placing of the respondents on their defence.

15. According to the appellant, the testimonies of PW1, PW2 and PW3 were consistent in identifying the respondents and describing the chaotic events and that whereas minor discrepancies are expected in eye witnesses' accounts, especially in traumatic situations, such inconsistencies do not necessarily render the entire evidence unreliable, especially where the core facts remain intact. It was the appellant's view that the acquittal of the respondents under **section 306(1)** of the **Criminal Procedure Code** was premature. To the appellant, the learned Judge placed undue emphasis on the lack of independent witnesses and inconsistencies in the testimonies, thereby usurping the role of the defence and prematurely assessing credibility.

16. Although in their written submissions the respondents had taken issue with the competence of the appeal, during the plenary hearing, their learned counsel, **Ms Anyango**, rightly so in our view, abandoned that ground. It was however submitted: that owing to the inconsistencies in the testimony of PW1, 2 and 3, the learned Judge was right in acquitting the respondents under **section 306(1)** of the **Criminal Procedure Code**; that there were too many gaps at that stage which the prosecution was hoping that the respondents would fill up for it; that whereas the appellant prayed that the matter be referred back to the trial court for the purpose of defence hearing, this Court lacks power to do so, based on **section 379(5)** of the **Criminal Procedure Code**; that, on the authority of **Republic v Ayienga & 5 Others (2023) KECA 2023**, the best that this Court can do is to issue declaratory judgement.

17. We have considered the grounds of appeal, the evidence on record, and the respective submissions. The mandate of this

Court sitting as a first appellate Court is provided for under rule 31(1)(a) of the Rules of this Court as follows:

“(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—

(a) to re-appraise the evidence and to draw inferences of fact; ...”

- 18.** That this Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record was emphasised by this Court of Appeal in **Okeno v Republic (1972) EA 32** and **David Njuguna Wairimu v Republic [2010] KECA 495 (KLR)**.
- 19.** The issues that fall for our determination in this appeal are: the circumstances under which a trial court finds that a prima facie case has not been made out; and whether those circumstances prevailed in the case before the trial court.
- 20.** A *prima facie* case is not expressly defined in the ***Criminal Procedure Code***. However, **section 306(1)** and **(2)** of the Code provides 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.

21. According to the case of **Republic v Abdi Ibrahim Owl**

[2013] eKLR:

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with.”

22. On the circumstances under which a court may arrive at

a finding that a prima facie case has been made out, it
was held

in **Ramanlal Trambaklal Bhatt v R [1957] E.A 332**, a decision cited in **Republic v Abdi Ibrahim Owl** (supra) at 334 and 335, 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 is 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.”

23. Similarly, in **Anthony Njue Njeru v R [2006] eKLR**, it was

held that:

“Was there a Prima facie Case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of

law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case

is not 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'

Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a Prima facie Case as settled in Bhatt's Case (supra), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case."

24. Therefore, the question that the learned Judge was called upon to deal with at the stage when the proceedings were terminated was, whether based on the evidence before him, he ***could***, as opposed to ***would***, after properly directing his mind to the law and the evidence, convict if the respondents chose to give no evidence. It was therefore held in ***Ronald Nyaga Kiura v R [2018] eKLR*** at paragraph 22:

"It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure

Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an

accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT - VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.

25. That there is a lurking danger in making definitive findings at this stage, was appreciated by **Trevelyan** and **Chesoni, JJ.** in **Festo Wandera Mukando v The Republic [1980] KLR 103** in which it was held that:

“...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”

26. In our view, where the prosecution’s case as presented, even if it were to be taken to be true, would still not lead to a conviction, such as where an accused has not been

identified or recognised and there is absolutely no evidence, direct or circumstantial, linking him to the offence it would be

foolhardy to place him on his defence. A finding of a case to answer ought to be arrived at only where the prosecution's case, on its own, may possibly, though not necessarily, lead to a conviction. An accused person should not be put on his defence in the hope that he may, in his defence make a slip and thereby prop up or give life to an otherwise hopeless case. Defence hearing is not a resuscitation procedure for a case that is in the ICU. This was the position adopted by this Court in the case of **Anthony Njue Njeru v Republic [2006] eKLR** where it was that:

“Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case..., we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused.”

27. In the Canadian case of **Republic v P (M.B) 1994 ISCR 555, 579**, a decision cited in **Republic v Ayienga** (supra) the

Supreme Court of Canada expressed itself as follows:

“perhaps the single most important organizing principle in c

28. The reasoning in that case finds support in the decision of **Field, J**, in **Baker v Brown 44 N.E. 1120 (N.Y. 1896)**, also cited in **Republic v Ayienga** (supra) to the effect that:

"The essence and inherent cruelty of compelling a man to expose his own guilt is obvious to

everyone, and needs no illustration, it is plain to every person who gives the subject moment's thought. A sense of personal degradation in being compelled to incriminate oneself must create a feeling of abhorrence..."

29. We agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution v Zainal Abidin B. Maidin & Another**

that:

"It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:

'It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.'"

30. We have set out the prosecution's case as presented through the witnesses called by the prosecution. It is true that there are some discrepancies in their evidence. However, the stage at which those discrepancies would be subjected to detailed scrutiny in order to determine

whether they were material or not and what weight to attach to them had not yet reached.

The Nigerian Supreme Court decision ***Tongo v Cop. 2007***

12 NWLR comes to mind. In that case, the Court held as follows:

“Therefore, when a submission of no prima facie case is made on behalf of an accused person the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. If the submission is based on discredited evidence that discredit must be apparent on the face of the record, if such is not the case, then, the submission is bound to fail.”

31. Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution failed to prove its case beyond reasonable doubt, that is not the same thing as saying that a *prima facie* case has not been made out. As has been said time and again, a *prima facie* case does not necessarily mean a case which must succeed. In other words, despite finding that a *prima facie* case has been made out, the court is not necessarily bound to convict an accused person if the accused decides to maintain his silence. At the conclusion,

the Court will still

evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, as well as the demeanour of the witnesses, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a *prima facie* case for the purpose of a case to answer. The operating phrase, we emphasize, is “could convict” as opposed to “shall convict”. In other words, what is being considered at the stage of no case to answer is the possibility of a conviction as opposed to its certainty. We are persuaded by the decision of the Court of Appeal of Uganda in **Semambo C. & Anor v. Uganda (Criminal Appeal No. 76 of 1998) [1999] UGCA 7 (29 July 1999) [1999] UGCA 7** to the effect that:

“There can be no doubt that the trial Judge went far beyond what was required when she held that the appellants had committed the murder when considering whether they had a case to answer or not. It is trite law that the onus is on the prosecution to prove its case beyond reasonable doubt when all the evidence has been heard. At the close of its case the prosecution need not have proved the case beyond reasonable doubt, but must have established a prima facie case. A prima

facie case means a case sufficient to call for an answer from the accused person. At that

stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence. It may be a strong case or it may be a weak one. At that stage of the proceedings the court is not required to decide whether the evidence, if believed, proves that the accused is guilty of the offence charged.”

32. In **May v O’Sullivan [1955] 92 CLR 654** it was therefore

held that:

“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”

33. The test in such matters as laid down in **Republic v Galbraith [1981] WLR 1039** is as follows:

**“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
(2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with**

other evidence:

(a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed

could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

34. This Court grappled with circumstances that would deserve the return of a verdict of no case to answer in **Republic v Ayienga & 5 Others** (supra) where it held that:

"We have read through the ruling by the trial court, and pose the question that if the respondents had been placed on their defence, and opted to remain silent, what would have been the outcome bearing in mind that the burden of proof remains the duty of the prosecution? Would the trial court have sent them home or to the penal institution? Would it have been tantamount to asking the respondents to accuse themselves? We note that indeed, the learned Judge delved into a thorough evaluation of the evidence, discounting it for lack of corroboration; though she did not address the question of voice identification. These are activities which in our view, could have been pragmatically dealt with at the

close of the entire case, upon evaluating and analyzing the evidence; and appraising herself on the applicable law. It is our considered view that the learned trial Judge erred in fact and on principle, when she delved into the details

of the matter before her at the stage of making a ruling, and made a finding that the respondents had no case to answer.”

35. In this case there was some evidence that the respondents were present during the commotion and may have played some part in the infliction of injuries that led to the death of the deceased. What role they exactly played and the believability of the prosecution witnesses as well as the weight to be attached to their testimonies could only be determined at the conclusion of the case. PW1, PW2 and PW3 stated that they saw the respondents beating William Oriwa and David Okeyo, thus not only placing the respondents at the scene, but also disclosing their roles. In our view, and while eschewing falling into the trap of purporting to analyse the evidence, we are satisfied that the prosecution established a prima facie case and the respondents ought to have been placed on their defence, not with a view to filling the gaps or reconciling the contradictions in the prosecution’s case, but in order for the case to be considered holistically.

36. The respondents submitted that pursuant to **section 379 (5) and (6)** of the **Criminal Procedure Code**, this Court has no power to remit the mater back to the trial court for defence hearing. The said provisions provide:

(5)Where a person has been acquitted in a trial before the High Court in the exercise of its original jurisdiction and the Director of Public Prosecutions has, within one month from the date of acquittal or within such further period as the Court of Appeal may permit, signed and filed with the Registrar of that court a certificate that the determination of the trial involved a point of law of exceptional public importance and that it is desirable in the public interest that the point should be determined by the Court of Appeal, the Court of Appeal shall review the case or such part of it as may be necessary, and shall deliver a declaratory judgment thereon.

(6)A declaratory judgment under subsection (5) shall not operate to reverse an acquittal, but shall thereafter be binding upon all courts subordinate to the Court of Appeal in the same manner as an ordinary judgment of that court.

37. In **Republic v Ayienga & 5 Others** (supra) this Court was of the view that the effect of the above provisions:

“...is that we do not have the liberty to reverse the acquittal, nor can we order that the criminal case against the respondents be re-opened. We can only make a declaration, which we hereby do, to the effect that the

learned Judge misdirected herself and fell into error in how she arrived at

her ruling that the respondents had no case to answer.”

38. **Section 5**, in our understanding applies to situations where, following an acquittal of the accused by the High Court exercising its original jurisdiction, the Director of Public Prosecutions holds the view that the trial involved a point of law of exceptional public importance and hence it would be in the public interest that a determination by this Court be made on that point. In that event, this Court would be exercising the jurisdiction in the nature of review, of the case generally or such part of it as may be necessary. Upon conclusion of those proceedings, the Court issues declaratory orders. This is a special appellate jurisdiction of this Court, distinct from the normal appellate jurisdiction.
39. In the former case, the Court is concerned more with setting straight the law as opposed to the reversal of the acquittal. In the latter case, the Court’s determination stems from alleged errors or misdirection by the High Court. While the remedy in the former is a declaratory

order, in the latter case,

the remedy is to be found in rule 33 of this Court's Rules which provides that this Court has the jurisdiction— (a) to confirm, reverse or vary the decision of the superior court; (b) to remit the proceedings to the superior court with such directions as may be appropriate; or (c) to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.

40. It is therefore our view that since this appeal was not commenced by the procedure set out in **section 379(5)** of the **Criminal Procedure Code**, we have power to remit the matter back to the trial court.

41. In the absence of evidence whether or not the provisions of **section 5** above, with regard to the procedure and timelines for the execution and filing of a certificate contemplated thereunder were complied with in **Republic v Ayienga & 5 Others** (supra), we will say no more on the ultimate determination by this Court in that case.

42. Having considered the material placed before us, we accordingly find merit in this appeal, which we hereby allow. We set aside the ruling of the learned Judge acquitting the respondents on grounds of the failure by the prosecution to establish a *prima facie* case. We remit the matter to the High Court for the purposes of the defence case.

43. We so order.

Dated and delivered at Kisumu this 30th day of January, 2026.

D.K. MUSINGA (PRESIDENT)

.....
**JUDGE OF
APPEAL**

P.O. KIAGE

.....
**JUDGE OF
APPEAL**

G.V. ODUNGA

.....
**JUDGE OF
APPEAL**

I certify that this is
a true copy of the

original.

DEPUTY REGISTRAR