REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 13 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JACOB KITHOME.....1ST ACCUSED

FRANCIS NGUI.....2ND ACCUSED

R U L I N G

1. **Jacob Kithome** and **Francis Ngui Mwenga,** herein after the 1st and 2nd Accused respectively are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya.** Particulars of the offence are that on the **6th** day of **April, 2008** at **Nzikani Village, Musavani Location** in **Kyuso District** within the **Eastern Province** jointly murdered **Enoch Mutemi Maithya** (Deceased).

2. Brief facts of the case are that on the **5th** day of **April, 2008,** PW1 **Solomon Mwendwa** accompanied his father, the Deceased to **Kaningo** where elders were to arbitrate upon a land dispute between the Deceased and his cousin one **Mwangangi.** The case was adjourned as some elders were absent. On their way home they encountered both Accused. PW1 left the Deceased with the two. Thereafter PW2 **Justus Mulanga Musyoka** and PW3 **Muthui Musyoka** went on a drinking spree with the Deceased and both Accused. Having consumed alcohol to their satisfaction they left going home. However, the Deceased did not reach home. His body was found on a path where PW1 left him with the two Accused. Some shoe prints were noted which led them to the home of the 2nd Accused. Some tyre sandals popularly referred to as 'Akala shoes' were subsequently recovered hidden in a box. The Accused were arrested.

3. A postmortem conducted on the body of the Deceased revealed that the cause of death was asphyxia secondary to strangulation.

4. To be put on their defence, the Prosecution had a duty of establishing a *prima facie* case against the Accused. In the case of **Republic vs. Jagjvan M. Patel and Others, TLR 85** the Court stated thus:

> ***"All the court has to decide at the close of evidence of the charge is whether a case made out against the Accused just sufficiently requires him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively beyond reasonable doubt. A ruling that there is a case would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the Prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."***

5. At the close of the Prosecution's case evidence adduced by the Prosecution witnesses was sufficient to require the Accused to be put on their defence. I therefore call upon them to defend themselves pursuant to the provision of **Section 306** of the **Criminal Procedure Code.**

6. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **20th** day of **April,** 20**17.**

L. N. MUTENDE

JUDGE