



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 57 OF 2010**

REPUBLIC .....PROSECUTOR

VERSUS

JOSEPH NJUGUNA WAINAINA .....APPELLANT

**RULING**

1. **Joseph Njuguna Wainaina**, “*the accused*” is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars thereof being that on the 26<sup>th</sup> day of September, 2010 at **Kietini** Village in **Masinga** District within **Machakos** County in **Eastern Province** murdered **Wainaina Gatogo**.
2. Facts of the case are that **Wainaina Gatogo** (*deceased*) who was aged approximately 81 years used to live with the accused, his son. He was ailing and he underwent treatment at **Thika Level 5 Hospital**. Thereafter he was allegedly assaulted whereafter he died on the 4<sup>th</sup> October, 2010. A post-mortem conducted on his body revealed that the cause of death was severe chest injury with haemothorax and fractured ribs, clavicle, secondary to an assault.
3. To prove the case against the accused person the prosecution called six (6) witnesses. **PW1, Peter Njuguna Mwangi** a grandson of the deceased identified his body to the doctor who performed the postmortem.
4. **PW2, Florah Waitherero Macharia** stated that she was told by **Maina Wainaina** that the accused had assaulted her father, the deceased.
5. **PW3, Margaret Wanjiru** a niece to the accused also heard from one of her uncles, **Maina Wainaina** that the accused assaulted the deceased. Later on, in company of other family members she went to see the deceased. She found the deceased naked on the bed. She therefore stayed outside. The police were at the scene. The deceased was taken to hospital for treatment. He was treated as an outpatient. Thereafter he died.
6. **PW4, No. 91942 P.C. Francos Omondi** received a report from **Maina Wainaina** that his father had been assaulted. He booked the report and issued him with a note to go to hospital. A week later **Maina Wainaina** returned to the Police Station. They talked to **Senior Sergeant Omolo** who signed him duties of arresting the accused. He complied.
7. **PW4, No. 78790 P.C. Micah Busienei** investigated the case following an allegation that the accused had murdered the deceased. He got a statement of **Maina Wainaina** recorded by police officers from **Masinga**. He witnessed the post-mortem. He concluded his testimony by stating that **the P.C. Francos Omondi** is the one who investigated the case. On cross-examination he stated that he did not establish for how long the deceased ailed. He denied having interviewed the accused.
8. **PW6, Dr. Antony Murage** conducted the postmortem and opined as to the cause of death of the deceased. The injuries sustained by the deceased per his conclusion, was not consistent with a fall.
9. At the close of the prosecution’s case, **Maina Wainaina** was not called as a witness. No reason

was given why he was not called to testify. This is the person who made a report to **Masinga Police Station**. He was the most important witness who could have told the court as to who in particular assaulted the deceased occasioning the injuries he sustained that caused his death.

10. In the case of *Bukenya and others versus Uganda [1972] E.A. 549* it was held that:-

*“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.*

*Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”.*

11. This is a case where evidence adduced was hearsay. It is trite that a statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and is not admissible.
12. Evidence adduced by witnesses having been hearsay cannot be relied upon by this court. The prosecution having elected not to call **Maina Wainaina** the only inference this court can draw is that his evidence would have been adverse to them.
13. In order for this court to call upon the accused to defend himself; the prosecution ought to have established a *prima facie* case upon which on consideration would be sufficient to sustain a conviction. (see *Ramanlal Trambaklal Bhatt versus Republic [1957] E.A. 332*). This was not the case here.
14. In the premises, the prosecution’s case fails. The accused is acquitted under **Section 306(1)** of the **Criminal Procedure Code**.
15. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21<sup>ST</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**