



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE 42 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KIARIE NGURE.....1<sup>ST</sup> ACCUSED**

**QTONNE GITAU THUO.....2<sup>ND</sup> ACCUSED**

**JOHN NGANGA NDUATI.....3<sup>RD</sup> ACCUSED**

**ZABLON WACHIRA KIAI.....4<sup>TH</sup> ACCUSED**

**JUDGMENT**

-

**Peter Kiarie Ngure, Qtonne Gitau Thuo, John Nganga Nduati and Zablun Wachira Kiai (1<sup>st</sup> to 4<sup>th</sup> Accused persons)** are charged with the offence of murder contrary to **section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on night of 25<sup>th</sup> and 26<sup>th</sup> April 2009, at Nyondia village, Karate Location, in Naivasha District, jointly with others not before the court, murdered **Simon Mwangi Kamwano**. They denied the charge. The prosecution called a total of 5 witnesses in support of the charge. All the 4 accused gave sworn statements in their defence but did not call any other witness.

The first prosecution witness James Mbugua Kibe (PW1) recalled that on 26/4/2009, he was asleep in his house at Karate Naivasha, about 7.30 a.m., when his son, Harrison Maina woke him up and informed him that he had seen a shoe near the door to the cow shed and it had blood stains. PW1 went and saw the shoe, next to it was a pool of blood. He called his immediate neighbours, Kamau and Jona but they did not

recognize the shoe. He enquired from Daniel and his wife who were passing by and Daniel recognized the shoe as belonging to Simon. He later saw a group of people including Daniel Mwangi searching for Simon in the bushes next to his house while he went to report to the area chief who in turn referred him to the chief's camp. While at the AP Chief's camp, John Irungu, a brother of the deceased reported that Simon was missing. The next day, the searchers decided to look in boreholes and the deceased's body was found inside PW1's borehole. When it was removed, PW1 noted that the body had cut wounds on the forehead and behind the ears. PW1 explained that the deceased's home is a home away from his, his home is fenced but the gate was only closed using a chain but not locked. The shoe was about 40 metres from his house but he never heard any noise during the night. He did not know who committed the murder.

**Francis Nganga Kinyuru (PW2)** is a neighbour of the deceased at Karate. He recalled that on 25/4/2009 about 9.30 p.m., he heard somebody calling Simon Mwangi from his house. He addressed Simon as **Wa Carol**, the name of Simon's first born daughter. He heard Simon respond. He then heard two people talking. On the next day, about 5.00 p.m., Kuresoi and Njoroge informed him that Simon could not be traced and he joined the search team in the bushes, then in the boreholes. The body was recovered on 27/4/2010 and he saw that it had cut wounds behind the ears. He did not know who murdered the deceased.

**John Irungu Kamwano** is the brother of the deceased. He recalled that on 26/4/2009, he went to Simon's house about 8.00 a.m. Their houses are about 800 metres apart. He found it locked with a padlock. At about 1.00 p.m., he was informed of some blood stains being found on the road. He called Simon's wife Anette Wangari, who was away on a journey and informed her that Simon could not be traced. On Monday, the body was retrieved from PW1's home. He noted the deceased was injured on the back of the head. PW3 did not know who murdered the deceased. He knew Accused 1, 3 and 4 who hail from the same village but did not know Accused 2.

**James Wachira (PW4)** is a Councilor, Malewa East Ward, Naivasha. He knew the deceased for long (20 years) while Accused 1 and 4 are his neighbours. He received a call from the deceased's wife informing him that the deceased could not be traced. He later informed the chief who already had the report. He went to the deceased's home on 27/4/2009 and found many people searching for the deceased. After a short while, he was informed that the body had been found in Kibe's borehole (PW1). He saw the deceased body had injuries to the head. **Peter Mwaniki Ndegwa (PW5)**, is a pathologist and he remembered that on 30/4/2009, at Naivasha District Hospital, he performed a post mortem on the body of Simon Mwangi Kamwano, after it was identified by John Irungu and Sgt. Obae. Externally, he found there to be a deep incisive wound above the left ear 5" long, palms of both hands were mottled which was signs of immersion in water. Internally, the lungs were over inflated, a sign of drowning, food and water in the stomach, a depressed fracture of the temporal skull bone with intracranial haemorrhage on left side of the head. He formed the opinion that the cause of death was drowning with head injury due to sharp force. The Post mortem form was produced as **P.Exh.1**.

Accused 1, **Peter Kiarie Ngure (DW1)** in his defence said that he was arrested on 26/4/2009 for no apparent reason. On 25/4/2009, he had left his place of work, gone to take chang'aa where there were many people and went back home. The 2<sup>nd</sup> Accused, **Qtonne Gitau (DW2)** told the court on oath that he is a disc jockey. On 25/4/2009, he visited his cousin John Nganga (Accused 3) in Naivasha, Karate. His cousin was selling chang'aa and many people came there for chang'aa. On 27/4/2009, he was asked to go and record a statement which he did. He denied knowing who the deceased was.

**DW3, John Nganga Nduati** told the court that he lives at Karate. He was at his house on 25/4/2009, serving his clients with drinks. He was arrested on 27/4/2009 and told to go and write a statement and he was locked up and charged. He denied any knowledge of the charge. He admitted that Accused 2 and the deceased were at his house on 25/4/2009 but could not recall if the deceased was in his house at the time Accused 1 and 2 were there.

**Zablon Wachira Kiai**, Accused 4 (DW4), told the court that he works as a mechanic at Karate in Naivasha. On 25/4/2009, he left work at 6.00 p.m. and on the way home he passed by a drinking place for

15 minutes and then went home. He denied having known Accused 2, Qtonne but he knew the other accused persons and Simon who was also at the drinking place.

It is the opinion of the doctor (PW5) that the deceased was injured and then drowned. PW1 to 4 saw the deceased's body when it was recovered on 27/4/2009. It had injuries on the head. PW2 was the last person to hear the deceased talk to persons who called him. PW2 did not see the people. The Accused 3 and 4 also saw the deceased at Accused 3's house where they were taking chang'aa. After that, nobody seems to know what happened to the deceased. It seems that he was murdered on the same night of 25<sup>th</sup> and 26<sup>th</sup> April, 2009.

The only question is who murdered the deceased and was there malice aforethought. So far, there is no evidence linking the Accused persons with the murder save that they were some of the last people seen with the deceased at the home of Accused 3. For them to be arrested, somebody must have talked to the police but that person has not come to tell the court what he saw or heard. The evidence that connects the accused persons to the murder of the deceased is that the deceased was at the house of Accused 3 where Accused 1, 2 and 4 drunk changaa on the evening of 25/4/2009. The prosecution evidence did not link the accused persons with the death of the deceased save that in his defence Accused 3 said that the deceased was at his house taking changaa amongst many other people on the evening of 25/4/2009 and that the other accused persons were also there but he could not recall whether the deceased was in his house at the same time as Accused 1 and 2. The deceased's body was not recovered at Accused 3's house nor is there evidence that he was murdered there. The deceased's body was found dumped in PW1's borehole. The court was not told how far the accused 3's house is from the place where the body was found but PW1, a neighbour of the deceased lived about 400 metres from accused 3's house. There is only circumstantial evidence against the accused persons as nobody witnessed the murder or saw any of the accused injure the deceased or that they were in a disagreement with him before his murder. Accused 3 has said that he was busy serving his customers with 'changaa' on that night and that the deceased went there, drunk 'changaa' and left. He did not know when the deceased left his house. In the case of **Peter v R (1952) AC at Pg 489**, Lord Marned said this of circumstantial evidence:-

**“circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another .... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

In **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15, EACA 15**, the Court of Appeal of East Africa had this to say:-

**“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”**

Indeed the accused persons having been in the same drinking place with the deceased when he was last seen alive, needed to explain what may have happened to him. The evidence on record does not point to the accused persons alone to the exclusion of others. There were other people at accused 3's house that night. There is no evidence that linked the accused to the murder to the exclusion of the others present at the said drinking place.

The four accused are prime suspects in the murder of the deceased but this court cannot base a conviction on mere suspicion. In criminal cases, the standard of proof is beyond any reasonable doubt. That threshold has not been attained by the prosecution. For that reason, the accused persons must be given the benefit of doubt and are hereby acquitted of the charge of murder under **Section 322 of Criminal Procedure Code**.

**DATED and DELIVERED** this 25<sup>th</sup> day of May, 2012.

**R. P. V. WENDOH**

**JUDGE**

-

**PRESENT:**

Mr. Omari for State

Mr. Ombati for Accused 1 & 2

Ms Lagat for Accused 3 & 4

All accused persons present

Court Clerk – Kennedy Oguma