



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

CRIMINAL CASE 35 OF 2008

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**1. RUTH WAMBUA DAVID.....ACCUSED**

**2. ABDENEGO MUTUKU NGOMBA.....ACCUSED**

**RULING**

**Ruth Wambua David**, hereinafter referred to as “*the 1<sup>st</sup> accused*” and **Abednego Mutuku Ngomba** hereinafter referred to as “*the 2<sup>nd</sup> accused*” face the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 30<sup>th</sup> March, 2007 at Kikomba Village, Muthenya Location, Yatta District within the Eastern Province they jointly murdered **David Wambua**. When arraigned before **Lenaola, J** on 2<sup>nd</sup> July, 2008, to take the plea **Mr. Musyoka**, learned Counsel for the accused indicated that he would be opposing the taking of plea. The court then stood over the plea to 14<sup>th</sup> July, 2008 for the objection to be raised. Come 14<sup>th</sup> July, 2008 and the objection was not taken as counsel asked for more time to research. Following 2 further mentions, counsel for the accused then abandoned his objection to the accused pleading to the information and opted to have the case fixed for hearing instead. The hearing commenced before **Lenaola, J** on 10th November, 2009.

PW1, **Patrick Musembi** stated that he was the brother of the deceased. On 30<sup>th</sup> March, 2007 at about 7.30 a.m he was awoken by a student called **Mwendwa Mulwa** who told him that the deceased was lying on the road. He immediately called his wife and his step brother, Kausia Wambua and proceeded to the scene 1½ kms away where he found the body of the deceased. The deceased was a husband of the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused was a neighbor. The body looked as though it had salt on the neck and blood was oozing from the nostrils. There was a broken umbrella next to the deceased. He gave evidence about the deceased’s soiled clothes and generally how the police officers came to the scene and collected the body. He informed the police that the deceased’s wife was the prime suspect. She was accordingly arrested and locked up. The 2<sup>nd</sup> accused was arrested later as he had been seen with the 1<sup>st</sup> accused. The witnesses’ suspicion was aroused because of the domestic problems hitherto prevailing between the 1<sup>st</sup> accused and the deceased. Because of those problems, the deceased had moved from the matrimonial home and was staying with his mother but sleeping in the witnesses’ house. There had been several family and clan meetings to resolve the matter to no avail. The final meeting was held on 16<sup>th</sup> March, 2007 and it was agreed that the two should cease violence towards each other and whoever breached the agreement would pay a cow. The two also resolved to live together again as man and wife. Despite the agreement, the deceased failed to go back to his matrimonial home for 3 days. The witness protested and the deceased warned him that should he go home and die, the witness should bury him decently. He duly went back to his home, and after 1½ weeks, he died.

PW2, one **Richard Kasiu Wambua** confirmed that he was called by PW1 and together they proceeded to the scene where they found the body of the deceased. He confirmed the evidence of PW1 that around the deceased’s neck there was a substance which he thought was salt, the deceased trouser had been lowered to the thighs and that there were foot marks around the surrounding area as it had drizzled. The Shoe marks looked like those of a lady’s rubber shoes. The 1<sup>st</sup> accused came to the scene at about 9.00 a.m and was in a foul mood. PW1 called the accused children and when they came the 1<sup>st</sup> born left her bag with

the 1<sup>st</sup> accused and left for home after talking to the 1<sup>st</sup> accused. The witness followed her and saw her pick some shoes and throw them away. The witness picked and passed them over to the Chief. He did not know to whom they belonged. The girl confirmed nonetheless that the shoes did not belong to her mother. The shoes were rubber and had fresh mud. The witness's brother confirmed that the deceased and the accused had several meetings to iron out their matrimonial problems. Done with these two witnesses, **Lenaola, J** stood over the case to 15<sup>th</sup> October 2010 for further hearing. Come that day and **Lenaola, J** had been transferred from the station and replaced by **Waweru, J** who ordered for the proceedings to be typed. By the time that was done, **Waweru, J** too had been transferred from the station. The case then came before **Dulu, J** on 3<sup>rd</sup> October, 2011 for directions. He directed that the case be set down for hearing. On 28<sup>th</sup> January, 2012, the case was listed before me for hearing. However, **Mwenda**, learned State Counsel applied for adjournment on the grounds that he had no witnesses to call. The application was strenuously opposed by **Mr. Musyoka** learned counsel for accused and I agreed with him. In the circumstances the State was compelled to close its case. Counsel for the accused then elected to put in written submissions. That was subsequently done and I have carefully read and considered them. The State opted to rely on the evidence on record.

The accused persons were charged jointly of occasioning the murder of **David Wambua** at a location described on the face of the said information. In proving the particulars in the information it was incumbent upon the prosecution to demonstrate that death of the deceased did indeed occur. The prosecution ought to have shown that there was death in the first instance. However, this was not to be as no postmortem report was adduced in evidence. As such death of the deceased has not been proved. In the premises no crime can be said to have been committed by the accused. In any event, even if the death of the deceased had been proved, still no culprit was identified as the perpetrator of the alleged crime. No witness pointed to the accused either individually and/or jointly as the perpetrators of the alleged crime. The evidence of PW1 and PW2 did not either directly and/or circumstantially point at the accused for having taken any part in the alleged offence. PW1 merely suspected accused on account of domestic problems between the deceased and accused. That was just suspicion. A conviction cannot be founded on a mere suspicion.

It is also imperative for the prosecution to show and indeed illustrate by way of cogent evidence the three fundamental elements forming a crime of murder i.e death of the deceased, such death being caused by unlawful act or omission and that the death was accompanied by malice aforethought. The prosecution has been unable to prove either of the aforesaid elements in this instance. No motivate has been put forth by the prosecution in respect to the reasons which could have motivated the accused or either of them to perpetrate the alleged crime. Most importantly, the prosecution failed miserably in establishing *mens rea* on the part of the accused. In the absence of those three branches, a crime of murder cannot be presumed.

Finally, and this is rather unfortunate, it appears that the accused were never called upon to plead to the information. As it is therefore, the accused were tried on an information to which they had not been called upon to plead. The trial was a sham and a nullity.

For all the foregoing reasons, the prosecution case is hopeless and scattered. No case has been made out to warrant the accused being placed on their defence. I will accordingly acquit them at this stage.

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> DAY of JULY 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**