



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Criminal Case 81 of 2008**

**REPUBLIC.....PROSECUTOR**  
**VERSUS**

**SIMON NGAHU NJUGUNA.....1<sup>ST</sup> ACCUSED**

**JOHN MUNYAO MAKUA.....2<sup>ND</sup> ACCUSED**

**RULING**

The accused persons are charged in this court on the allegations that on the night of 1<sup>st</sup> and 2<sup>nd</sup> June, 2008 at Bondeni area, they jointly murdered the deceased, Charles Waithaka Tarira.

The only relevant evidence presented at the close of the prosecution case is that on the night in question the deceased had dinner with his brother, Gerald Ngichu (Gerald) at a local trading centre before the deceased left for his parent's home at 9.00p.m. Later Gerald also went home but found that the deceased had not arrived. The following morning a neighbour, Geoffrey Kariuki while on his way to Bahati forest stumbled on the body of the deceased. The family was alerted and the matter reported to the police. I pause here to clarify that the evidence of Gerald was expunged from the record after the prosecution failed to procure his attendance to complete his testimony after he had been stood down. Geoffrey Kariuki who is said to have come by the body of the deceased was not called.

Having said that, the prosecution called a cousin of the deceased, Anne Wanjiku (Anne) whose evidence was to the effect that one (1) month after the death of the deceased, she overheard the 1<sup>st</sup> accused person explaining to his employers, Mama Ciku and Mama Jose how the deceased met his death. Anne alerted other members of the family who arranged for the arrest of the 1<sup>st</sup> accused person.

The 2<sup>nd</sup> accused was arrested but it is not clear why he was arrested. However, based on the information allegedly received by the police from the accused persons, Monica Wanjiku, Daniel Gacheru and Peter Wambui were arrested but released. One suspect was, however, not traced. The investigating officer charged the accused persons for the reason that the 1<sup>st</sup> accused person confessed to the killing of the deceased and at the strength of Anne's evidence.

At the close of the prosecution case, the court must determine if that evidence on record constitutes a *prima facie* case. A *prima facie* case is made out if on the evidence the court can convict if the accused person does not call evidence in rebuttal. See **Ramanlal Trambaklal Bhatt V. Republic** (1957) EA 332.

While it is common ground that the deceased died as a result of severe hypoxia (suffocation) due to strangulation on the neck region there is no direct evidence as to who did it.

The prosecution case is therefore based on circumstantial evidence. On the authorities of **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715 it is now settled that a conviction can only be based on circumstantial evidence if that evidence points irresistibly to the guilt of the accused and only if there are no co-existing factors that would weaken or destroy the inference of guilt.

What Anne alleged to have heard the 1<sup>st</sup> accused person say has no effect on the admissible evidence. The exact words or the effect of the words were not disclosed. Yet it is that evidence that the police relied on to charge the accused persons. Again the police said they relied on a confession by the 1<sup>st</sup> accused but

admitted that the 1<sup>st</sup> accused person denied any knowledge as to how the deceased died when presented to an inspector of police. There was no confession.

Finally, it was conceded by the police that the “*prime*” suspect in this matter, by the names Kang’ethe and Maina disappeared. There is no evidence linking any of the accused persons with the death of the deceased. They are acquitted and shall accordingly be set at liberty forthwith unless lawfully held.

**Dated, Signed and Delivered at Nakuru this 27<sup>th</sup> day of July, 2012.**

**W. OUKO**

**JUDGE**