



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Case 60 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. DORCAS NDUKU**

**2. JOSEPH MUTUKU WILLY**

**3. ANDREW MUTHIMBO alias DRO ..... ACCUSED**

**J U D G M E N T**

The three accused **Dorcias Nduku**, **Joseph Mutuku Willy** and **Andrew Muthimbo** alias **Dro** stand charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on 1<sup>st</sup> May 2006 at **Mutituni** village, **Mutituni** location in **Machakos** District within Eastern Province murdered **Onesmus Kiilu**. The accused, who were charged in 2008 after previous proceedings against them were terminated, pleaded not guilty.

The prosecution called a number of witnesses. PW1 was **Benedict Wambua Kaloki** a driver with **Machakos** Municipal Council. It was his evidence that he was a brother of the deceased. On 30/4/2006 he and the deceased and the 1<sup>st</sup> accused **Dorcias** were taking drinks at **Kavandani** pub. The 1<sup>st</sup> accused was a wife of the deceased. While the witness and the deceased drank Montana beer, the 1<sup>st</sup> accused took soda.

By 4 p.m. the deceased got very drunk and was persuaded to carry one bottle of **“Montana”**, home though he wanted to drink more in the bar. He left with his wife the 1<sup>st</sup> accused, but both returned to the bar at 5.30 p.m., and they wanted to continue drinking. However, the deceased’s wife 1<sup>st</sup> accused left immediately. At 6.30 p.m., the witness who was also very drunk, left the bar and went home.

At about 1.30 a.m. that night, a cousin **Mutie Makali** informed the witness that there were robbers at the deceased’s house which was situated about 500 – 600 meters away. He rushed there with **Makuthu** and a watchman from a nearby school. On arrival, the wife of the deceased (1<sup>st</sup> accused) was screaming. The door was locked from outside. A neighbour brought a hammer which they used to break the door. They entered the house and found the 1<sup>st</sup> accused seated on a chair, where she was tied using strings. The 1<sup>st</sup> accused told them that the deceased was in the bedroom. When he entered the bedroom, he saw the naked body of his brother (the deceased) on the bed with a wound in the stomach. He did not wish to observe the body further. He was not present when the ropes on the 1<sup>st</sup> accused were untied.

The witness testified that the police were informed in the morning. At about 8 a.m. the police took the body away. He did not know whether anything was stolen from the deceased’s house. He did not

know the other two accused persons.

In cross-examination, he stated that the deceased had another wife **Jackline Nduku** with whom they had two sons. The deceased also had a daughter with the 1<sup>st</sup> accused. The deceased had a concubine at **Eastleigh** Machakos called **Wavinya**. He did not know whether there was bad blood between the 1<sup>st</sup> accused and the deceased.

PW2 was **Jennifer Syemenze**, the mother of the deceased. It was her evidence that she did not know the 2<sup>nd</sup> accused 3<sup>rd</sup> accused persons.

On the night of the incident at 3 – 4 a.m., she was informed by **Wambua** PW1 that the deceased had been killed. She ran to the house of the deceased and found the 1<sup>st</sup> accused screaming. The deceased was lying on the bed in a pool of blood, with the intestines projecting out. She asked the 1<sup>st</sup> accused what had happened and when she explained, she asked her why she did not scream. She left and went back home before the police arrived.

It was her evidence that the deceased and the 1<sup>st</sup> accused had one child, but did not have a good relationship. As a result the 1<sup>st</sup> accused often slept away from home. It was also her evidence that after the deceased's death, the clan took away the personal belongings of the 1<sup>st</sup> accused and returned the same to her parents.

In cross examination, she stated that the deceased had only two wives. She did not know anything about a 3<sup>rd</sup> wife. She stated that **Jackline Nduku** had left the deceased 6 – 7 years earlier, but later returned. She admitted that the deceased was a heavy drinker. She insisted that though she found the 1<sup>st</sup> accused screaming, it was her position that she did not scream during the incident. She stated that no meeting was held before the deceased died to reconcile him with 1<sup>st</sup> accused. She stated that she was present when the belongings of the 1<sup>st</sup> accused were sorted out for return to her parents' home.

PW3 was **John Muai Mbingu**. It was his evidence that he had been employed by the deceased at **Kyamuli** Engineering School as a cook in 1988. The 1<sup>st</sup> accused was the deceased's wife. The deceased had another wife and a concubine.

On 30/4/2006 at about 4 p.m, the 1<sup>st</sup> accused called him when her husband had gone out of **Mutituni** bar. She told him to tell her husband that she had gone for a women's meeting and then gave her Kshs.10/=. He then joined the 1<sup>st</sup> accused's husband, who is the deceased in the bar. The deceased ordered a beer which they shared and the deceased left at 5.30 p.m.

That night as he slept, **Wambua** (PW1) came and informed him that the deceased had been killed. This was about 4 a.m. He went to the deceased's house and found the 1<sup>st</sup> accused sitting outside while the deceased was lying inside the house dead. He did not know why the 1<sup>st</sup> accused gave him Kshs.10/=. He knew that the 1<sup>st</sup> accused belonged to a women group, but the group was not meeting that day. He was aware that the relationship between the deceased and the 1<sup>st</sup> accused was not cordial.

In cross-examination, he stated that the deceased had two children with his other wife **Jackline Nduku**. He had one child with the 1<sup>st</sup> accused. Though the deceased had a concubine called **Jennifer**, they did not have a child. He stated that the 1<sup>st</sup> accused ran the engineering school for the deceased. A number of times, the deceased and the 1<sup>st</sup> accused used to quarrel and the 1<sup>st</sup> accused ran away to her parents' home.

In re-examination, he reiterated that the 1<sup>st</sup> accused gave him Kshs.10/= and told him not to tell the deceased where she was going to. He stated that the deceased had a nickname – **'too hot to handle'** – and his vehicle was inscribed with those words.

PW4 was **Francis Mutie Makali**. It was his evidence that he used to live at **Mutituni** and worked as a machine operator at **Kapa Oil Refinery**. He was a cousin of the deceased and knew the 1<sup>st</sup> accused. He did not know whether the 1<sup>st</sup> accused was the wife of the deceased.

On 1/5/2006, as he was sleeping, he was called by neighbours **Muia Makau** and his brother who told him that they heard screams indicating that there were robbers at the deceased's home. They went and woke up **Bernard Wambua** (PW1) a younger brother of the deceased and proceeded to the deceased's home. There they found 4 watchmen from **St. James** Secondary School, who had also responded to screams.

The 1<sup>st</sup> accused informed PW1 to break the door using a jembe. He tried to do so but was not successful. A lady brought a hammer and they managed to open the door. Inside the house, they found the 1<sup>st</sup> accused tied to a wooden chair facing the door. The 1<sup>st</sup> accused informed them that the deceased was in the bedroom. The witness used a torch, and in the bedroom found the deceased naked on the bed with his legs hanging with a cut wound in the abdomen.

He got shocked and called the deceased's mother and relatives and made a report of the death to the chief who came to the scene with Administration Police officers. When they came back to the house, the 1<sup>st</sup> accused had been untied. The police came in the morning, carried out investigations and took the body to the mortuary.

In cross-examination, he stated that he did not know that the 1<sup>st</sup> accused was married to the deceased. He only knew **Jackline Ndulu** as the wife of the deceased. He did not know that the deceased had a wife at **Eastleigh**. He stated that the 1<sup>st</sup> accused was tied using telephone wires on the hands and the waist.

PW5 was **Regina Nduku**. It was her evidence that the deceased was her husband's nephew. She stated that the 1<sup>st</sup> accused was the wife of the deceased. On 1/5/06 at 5.00 a.m. she was at home when she heard noise from the deceased's home which was 600 meters away. She proceeded to the scene and found the 1<sup>st</sup> accused seated on an armchair with her hands tightly tied to the chair. Her waist was also tied. When she asked the 1<sup>st</sup> accused what had happened, she told her that thieves had struck at their house. She untied the 1<sup>st</sup> accused alone as other people were outside the house. This was before the police came. She was not present in the clan meeting which was held after the burial of the deceased.

In cross-examination, she stated that the deceased had another wife **Jackline Nduku** with whom they had 2 sons. The deceased had 1 daughter with the 1<sup>st</sup> accused. She did not know the person who had tied the 1<sup>st</sup> accused.

In re-examination, she stated that she could not say whether the 1<sup>st</sup> accused tied herself, though in her opinion that was possible.

PW6 was **Jackline Nduku Kiilu**. It was her evidence that she lived at **Mumbuni** while the deceased lived at **Mutituni**. She testified that she was married to the deceased in 1989 and they had two male children. The deceased was running **Jamhuri** Engineering Driving School which they started together. She was aware that the deceased died in 2006. She did not know any of the accused persons.

In cross-examination, she stated that she was living with her parents. She did not know how her husband died.

PW7 was **Daudi Maingi Mbuvi**. It was his evidence that he was working at **St. James** Secondary School as a watchman and a neighbour of the deceased. The school where he lived was near the home of the deceased. On the fateful day at 4 a.m., he heard screams and went to the home of the deceased.

When he arrived, a woman told him to get into the house and untie her. However, the house was

padlocked from outside. The woman then told her to go and call family members. He went and woke up **Mukuthu** and went back to the scene and found that same people, who had heard the screams, had started arriving. The door was forced open and he went into the house with others. He saw a woman tied with ropes, who was untied by members of her family. He saw the deceased lying dead on his bed. He identified the woman (1<sup>st</sup> accused) in court. He did not know the two other accused persons.

In cross-examination, he stated that he had known the deceased for 4 years. He stated that the person who was screaming was saying that they had been attacked by robbers; though he did not inform the police so. He stated that the 1<sup>st</sup> accused's arms were tied with sisal ropes to the armchair's rest. He however did not observe the 1<sup>st</sup> accused properly. Though he saw the deceased in the bedroom, he did not observe the body closely to see injuries. He did not know whether the 1<sup>st</sup> accused had problems with her husband (the deceased).

PW8 was **Regina Nzilani Kaloki**. It was her evidence that she was a sister of the deceased. The 1<sup>st</sup> accused was one of the two wives of the deceased.

It was her evidence that on 30/6/2006 at 10 a.m., members of her clan, many of whom she did not know, told her that they wanted to take away what belonged to the 1<sup>st</sup> accused. Her mother was present. The 1<sup>st</sup> accused was in custody and the clan wanted to take the things to her ancestral home. She went into the house of the deceased with only one person called **Katwaa**. From the wardrobe they pulled a green trouser of the 1<sup>st</sup> accused which had a lot of blood stains. There was also a knife with blood stains. She gave these items to **Katwaa**. It was her evidence that the beddings and the floor under the bed had a lot of blood stains. She identified a green pajama trousers which was torn. She stated that the trousers they recovered did not appear like the one she saw in court. The one she saw in the wardrobe had blood stains on the straps and bottom and back. Though she handed over a pillow case to the police, she did not see it in court.

In cross-examination she stated that she had not been to the deceased's house after burial until 30/6/2006. She stated that **Katwaa** got the key to the deceased's house from her mother, but she was not there then. She maintained that the pajamas trouser belonged to the 1<sup>st</sup> accused because she saw her wearing it in October 2005. She stated that the 1<sup>st</sup> accused and **Jackline Nduku** were wives of the deceased. The last time the 1<sup>st</sup> accused was at the deceased's house was the day the deceased's body was taken away.

PW9 was **Joyce Kiloko Kaloki** a sister of the deceased. It was her evidence that one month before the death of the deceased, the 1<sup>st</sup> accused went and informed her that the deceased had a disagreement with her and told her to go back to her ancestral home. She advised her to go and sort out the issues and to involve the mother of the deceased. The 1<sup>st</sup> accused did not do so.

After the deceased died, a mobile phone belonging to him was recovered. It was a **Samsung X480** model and she knew it. She stated that it was bought in her presence and she retained its box. She retained the phone and the box after recovery of the phone, and handed it over to **PC Wanyonyi** who was investigating the case. She identified the phone, the box and charger in court. She also identified another phone make "**Sendo**" which she said belonged to the deceased. It was her evidence that the deceased complained to her that the 1<sup>st</sup> accused never used to cook for him and also used to come home late, forcing him to go and take meals at his mother's house.

In cross-examination, she stated that the deceased had two wives. The first was **Jackline Nduku** with whom they had two children and had separated. However, **Jackline** came back after being called back by the family and was running the deceased's school. She stated that the mobile phone of the deceased was recovered by the police. She did not know anything about the charger which she identified in court. She stated that the 1<sup>st</sup> accused was arrested one day after the deceased's death, but she was not the one who caused her arrest.

In re-examination, she stated that the serial number on the telephone box was the same number on the phone.

PW10 was **Joseph Mutuma** a pathologist doctor. In 2006, he was a pathologist at **Kemri**. Previously between 1993 – 1996, he worked at **Machakos** General Hospital with **Dr SMO Mutunga** and knew his signature and handwriting. He produced the postmortem report signed by **Dr Mutunga** with the consent of the defence. The body was identified by **PC Wanyonyi**. There was a deep wound across the loins and a gaping wound on the right loin. The abdomen was cut and intestines were perforated. The cause of death was cardiopulmonary arrest due to bleeding. Some organs were taken to the Government Analyst for analysis.

In cross-examination, he stated that no family member came during postmortem which was unusual.

PW11 was **Rose Muthoki Philip**. It was her evidence that 1<sup>st</sup> accused was married to her cousin the deceased. On 30/4/2006 at 6.30 p.m. at **Mutituni Kangundo-Machakos** road, she saw the 1<sup>st</sup> accused stop and board a motor vehicle. The vehicle was heading to **Machakos**. The next day, when she went to church, she was informed that the deceased had been murdered. She went to the home of the deceased. She informed the sisters of the deceased that she had seen the 1<sup>st</sup> accused the previous evening.

PW12 was **PC Laban Wanyonyi**. It was his evidence that on 1/5/2006 at 5 a.m. he was called by the OCS **Machakos** Police Station who informed him that there was a murder report from **Mutituni**. He booked the report and proceeded to the scene with Chief Inspector **Cheres** and arrived there at 5.30 a.m. They found two houses and a crowd which had gathered. They found the deceased lying on a bed. He had 3 stab wounds on the abdomen. The body was naked and there was no evidence of a struggle. Blood was on the blanket and pillow. There was a long trouser in a polythene paper and a pillow case. He testified that he took possession of the green trouser and old clothes found under the bed. He did not have the pillow case which was eaten by rats in the police store. He took possession of the items as exhibits.

In the nearby house, they found chewed **miraa** twigs and chewing gum. They also recovered empty bottle of alcoholic spirit. They called the deceased's wife and interrogated her at the police station.

One window of the main house was broken. The main door was not broken. They took the deceased to **Machakos** Hospital Mortuary. When they went back to collect the exhibits, the public were very tense and animosity against the deceased's wife (1<sup>st</sup> accused) had increased. The mother of the deceased and the third wife had recorded statements that the 1<sup>st</sup> accused had threatened to eliminate the deceased and the other wives.

He later learnt that the phone of the deceased and his wife had been stolen. He tried to trace the phones through **Safaricom** Ltd. He tracked the sim card and traced the phone of the deceased to the 3<sup>rd</sup> accused who was arrested in a kiosk at **Kileleshwa** Nairobi where he sold **miraa**. It was his evidence that the 3<sup>rd</sup> accused told him that a witchdoctor had given him the phone in exchange for **miraa**. The 3<sup>rd</sup> accused took him to **Machakos** then to **Malindi** to trace the witchdoctor, but they did not get him.

On the second phone, it was his evidence that he traced it to one **Maingi** who sold milk at **Machakos**. **Maingi** took him to the 2<sup>nd</sup> accused, who said that he had picked the phone, but later changed and said that he had been given the same by his wife. It was his evidence that another witness called **Kimeu** was not brought to testify in court.

It was his evidence also that the 1<sup>st</sup> accused was initially arrested and released because there was no evidence against her. She was only arrested after incriminating evidence was given by the wife of the deceased that she had given someone Kshs.10,000/= to participate in the murder.

He took blood samples of the 1<sup>st</sup> accused and the deceased and sent the same to the Government Chemist. He produced the Government Chemist's report by consent of the defence. The witness also produced the Samsung phone, charger, the phone box and the **Sendo** phone as exhibits. He produced a pajamas/trouser and blanket as exhibits.

In cross-examination, he stated that he did not have handwritten witness statements. He stated that the statement dated 18/9/2006 neither bore his signature nor was it certified. He did not have a statement of Chief Inspector **Cheres**. The 1<sup>st</sup> accused was initially released but was re-arrested on instructions of the OCS. He reiterated that the second house was occupied because there was **miraa** and other items found therein. He admitted that he did not include recovery of the green trouser and blanket in his statement. He admitted that he recovered them later after a sister of the deceased called him on 30/6/2006. That was also the time he recovered the pillow case. He took possession of the items from **Regina Nzilani Kaloki**. **Regina** brought the items to the **Machakos** Police Station on 30/6/2006 and said they were hidden under the bed. He stated that according to the Government Analyst's report, bloodstains of the deceased's group were found on the green trousers.

He insisted that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were in the group of murderers. Though he was told that the 1<sup>st</sup> accused was found tied to a chair, he did not believe her.

Though the 3<sup>rd</sup> accused told him how he acquired the mobile phone, he did not believe his story. He also recovered a Nokia phone from the 3<sup>rd</sup> accused, which was not produced as an exhibit. He did not get the name of the witchdoctor referred to by the 3<sup>rd</sup> accused. He stated that the original police file was lost.

He stated that he went to **Safaricom** Ltd alone. He stated that he was given the telephone box at the house of the deceased by the 1<sup>st</sup> accused after arrest between 30/6/2006 and 5/7/2006. The 1<sup>st</sup> accused also identified the **Sendo** phone before arrest. However, **Daniel Maingi**, was the one who had the **Sendo** phone. The 2<sup>nd</sup> accused said that he had sold the phone after picking it on the ground, but did not say where he found the phone. The witness also arrested **Kimeu** and **Maingi** who led him to the 3<sup>rd</sup> accused. These two were released by the OCS. He admitted that there was tension between the family and the 1<sup>st</sup> accused, and that she was not present during his 10 or so visits to the scene.

He did not pick the **miraa** or alcoholic spirit drink from the other house, as he thought that it was not important evidence.

In re-examination, he stated that the green trouser was brought to him by **Regina** at the **Machakos** Police Station on 30/6/2006. He searched the house when he first went to the scene, but did not find the green trouser.

Though the State indicated that they wanted to call the Government Analyst, and recall **PC Wanyonyi** to produce the medical report on the mental status of the accused persons, they later changed their mind and closed their case.

The 1<sup>st</sup> accused **Dorcus Nduku** gave a sworn defence. It was her evidence that she was married to the deceased under **Kamba** customary law in 1992. She stated that the deceased had married a total of four (4) wives including **Jackline Nduku** who was the 2<sup>nd</sup> wife. The first wife was **Eunice Kalondu** who had re-married. The fourth wife was **Jennifer Wavinya**. However, all these women were not living with the deceased at the time of death. The 1<sup>st</sup> accused and the deceased had a daughter aged 16 years.

It was her evidence that they were at home with the deceased on 1<sup>st</sup> May 2006 at night, when assailants came and called him by the nickname "**too hot to handle**". The deceased wrapped himself with a towel, came out of bed and went and opened the door. She wrapped herself with a lesa and followed. She observed the intruders push the door with a lot of force and the deceased, who was drunk, was pushed backwards. Though she had put alight a hurricane lamp, they took it away and started

flashing two torches.

When the deceased went to the bedroom to take a sword, one of the intruders followed him. Another hit the witness and tied her with electric wires on the hands and the waist. The hands were tied at the back. She tried to scream but was ordered to keep quiet. In less than 5 minutes, the deceased screamed saying he was being killed. The intruders then left. They took her cellphone, TV, radio, the deceased's cell phone, speakers, cooking pots and pans. They also took mattresses. They also took things from the other main house which was under construction. She then screamed and many people came.

When people came, they found the door locked from outside. She was tied to a chair and **Musyoki Makau** untied her. After she was untied, she was prevented from seeing her husband. She learnt later that he had died. She was taken by the police to **Machakos** Police Station on 1<sup>st</sup> May 2006 and detained for 1 month and 24 days, but was not taken to court. She was then released on 24/6/2006. After release, she went to her parents' home.

After 6 months, she was re-arrested. She saw the 2<sup>nd</sup> accused for the first time in February 2007. She had already been brought to court before then. She also did not see the 3<sup>rd</sup> accused on the day of the incident. She denied agreeing with anybody to kill the deceased.

It was her evidence that on 30/4/2004, they went for a funeral with her husband (the deceased). After the funeral, they went to a nearby bar with a cousin of the deceased called **Kasyoka**. They left the bar at 7.30 p.m., went home and she cooked supper. They ate and went to bed. Her husband, who was a very strong man, was very drunk that night. She denied hiring anybody to kill her husband. It was her evidence that there was a grudge between her husband's family and her. According to her, when he married her he was living at his mother's house and she was staying at their school at **Kathiani**. The deceased's family was not happy with the arrangement. It was her evidence that a month before the death, a brother of the deceased called **Wambua** came armed with a knife and provoked a fight with the deceased.

In cross-examination, she stated that she did not give **Muya** Kshs.10/= that day. She only told him to go and carry grass, since he was their worker. She denied seeing **Rose** (PW11) that day. She went home with her husband between 4 – 5 p.m. She denied that she boarded a vehicle at 6.30 p.m. to **Machakos**. She stated that the people who attacked her husband had overalls and masks on the faces. She stated that when her husband entered the bedroom, she screamed for about 1 minute. She heard as if there was a struggle in the bedroom. She maintained that even if **PC Laban Wanyonyi** (PW12) stated that there was no evidence of a fight, her position was that there was banging of the door in the room, which was a very small room. She denied that blood was only on the bed. Though she was assaulted, she neither had a P3 form nor was she treated by a doctor. She was however, given medication by the police. She denied that she had fights with the deceased and used to sleep out.

In re-examination, she stated that she was not involved in the recovery of the items that were alleged to have been blood stained. She stated that her relationship with her mother in law was not cordial.

The 2<sup>nd</sup> accused **Joseph Mutuku Willy** also gave sworn defence testimony. It was his defence that he used to work at **Machakos**. He was arrested in **Machakos** on 29<sup>th</sup> July at 3 p.m. at the market where he worked selling water using a handcart.

He was arrested by police officers in civilian clothes and locked up in the cells. The police did not recover a phone from him. He was later charged with an offence of killing someone. It was his evidence that he did not know the other two accused persons before. He met the 1<sup>st</sup> accused for the first time in court on 31/1/2007. As for the 3<sup>rd</sup> accused, he met him for the first time at **Kamiti** Prison.

He denied killing the deceased. He stated that he was not arrested in possession of any property of the deceased.

In cross-examination he stated that he was arrested on 29/7/2006. He denied having been found with a mobile phone then. He was initially charged with three other people. On 30/4/2006, he was working at **Burma Hotel Katangi**. He however, did not wish to call any other co-workers as witnesses.

In re-examination he stated that he did not know the deceased nor the date he was killed. He stated that he was not given back his identity card which was taken by the police, nor was it produced in court as an exhibit.

The 3<sup>rd</sup> accused **Andrew Muthimbo** also gave sworn testimony. He stated that he was married. At the time he was arrested he was a **miraa** businessman having a shop at **Nairobi, Machakos and Samburu**. He was arrested on 9/8/2006 at noon at **Majengo in Nairobi** at a shop where he sold **miraa** and other retail products. He knew one of the people who arrested him as a policeman who was his **miraa** customer. He was arrested and taken to **Machakos** Police Station. He gave the police his Nokia mobile phone 6611 worth Kshs.17,499/=. His Nokia mobile phone was produced as an exhibit.

On 15/8/2006, he was brought to court. It was then that he was informed the reason for his arrest. He was charged with robbery and murder. He was brought to court alone but charged with 3 other people. One of those people was the 2<sup>nd</sup> accused. The 1<sup>st</sup> accused was not present in court then.

On 20/12/06, they were brought to court and the two other people were released. That was in Magistrate's Criminal Case No. 50 of 2006. On 31/1/2007, himself and the 2<sup>nd</sup> accused with whom they were in the magistrate's case, were brought to the High Court. That was the first time he saw the 1<sup>st</sup> accused.

He denied killing the deceased or knowing him. He could not remember where he was on the date of the incident or offence. He was however not with the two accused persons.

He stated that he sent for one of his workers to bring a mobile phone **Samsung X48. PC Wanyonyi** called that worker on the phone. The said phone was not his. It belonged to **James Kaindi** who pledged it for **miraa** worth Kshs.500/=. The police asked for that phone because they said his sim card was used therein. He stated that the said phone did not have a sim card when it was left with him. He put his sim card in that phone for testing and the card remained therein for some time. It was his evidence that there were a number of people present when the phone was left with him. One of the people was present and he proposed to call him as a witness. He denied killing the deceased.

In cross-examination, he stated that in the magistrate's court they were four accused. In the High court they are 3 accused. The police showed him the print card from **Safaricom** indicating that the phone was used. He was aware that the police looked for **James Kaindi** but did not find him. That is why they charged him. He was aware that people who were present when he was given the phone recorded statements. He knew at least one of them who recorded a statement with the police. He insisted that he could not remember where he was on 30/4/2006. Since he was brought to the High Court, he had not been taken back to the Chief Magistrate's Court.

In re-examination, he stated that the victim in the case in the Chief Magistrate's Case was the deceased in this case. When questioned by court, he stated that he did not know where the other two accused in the case before the Chief Magistrate had gone to.

This accused person called one defence witness DW4 **Jeremia Kailemia Karuti**. It was his evidence that he had come to give evidence on behalf of the 3<sup>rd</sup> accused. One day in June 2006, at 4 p.m., the 3<sup>rd</sup> accused was selling **miraa** at his shop in **Machakos**. A customer by the name **James Kaindi** came and was sold **miraa** worth Kshs.500/=. He chewed the **miraa** but did not have the money to pay. He requested to be allowed to pay later. The 3<sup>rd</sup> accused was not happy and there were screams and people, including the witness, went there. Ultimately, the customer left his Samsung mobile phone and promised to bring the money the next day.

When the 3<sup>rd</sup> accused was arrested, **PC Wanyonyi** and the witness and other police officers, tried to trace the customer in vain. Later, the 3<sup>rd</sup> accused was charged in court. He did not know whether the 3<sup>rd</sup> accused killed the deceased. Did not know where he was arrested.

(The State Counsel did not cross-examine the witness.)

After the close of the prosecution and the defence case the counsel for the accused and the State Counsel filed written submissions. I have perused the submissions.

This is a case of murder facing the 3 accused persons. In a criminal case, the burden is always on the prosecution to prove the case against an accused person beyond any reasonable doubt – See **Leonard Aniseth –vs Republic (1963) EA 206 at page 208** where the Court of Appeal for **East Africa** stated:-

**“Since the well known decision in Woolmington –vs DPP (2) (1935) AC 462, it is well settled that subject to the defence of insanity and to certain statutory exceptions which are not relevant to the present case no burden rests upon an accused person to establish any defence.”**

In our present case, there is no dispute that the deceased was killed at his home at night on 30/4/2006. He was there in the house with his wife the 1<sup>st</sup> accused. Some assailants came from outside. They made him open the door. They stabbed him in the abdomen. They left him dead on the bed in the bedroom. They left after taking a number of items from the house including mobile phones. They locked the door from outside. The 1<sup>st</sup> accused was found tied to a chair in the house when the door was forced open. Nobody saw or identified the people who killed the deceased. After investigations, the 3 accused were charged.

This is a case based on circumstantial evidence. In **Kariuki Karanja –vs- Republic (1986) KLR 190, at page 193**, the Court of Appeal stated:-

**“Secondly, circumstantial evidence, to sustain a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts. R –vs- Kipkering Koske 16 EACA 135”**

Having considered all the evidence on record, I find that the 1<sup>st</sup> accused was charged with this offence because there was animosity between her and the family of the deceased. The recovery of blood stained clothes from the house was highly suspect. There is a great variation in the testimony of **PC Wanyonyi** PW12 and **Regina Kaloki** PW8 on how, where and when these items were recovered. Her version of the events in the bar agrees with those of the brother of the deceased (PW1 **Benedict Wambua**) with whom they visited the bar. The deceased and the 1<sup>st</sup> accused left the bar at 4.30 p.m. They however came back and were there until about 6.30 p.m. The evidence of (PW11 **Rose Muthoki**) the witness who said that she saw her board a matatu to **Machakos** at 6.30 p.m is highly suspicious. Even if it were true, it does not lead to the irresistible conclusion that the 1<sup>st</sup> accused killed or arranged the killing of the deceased. One has to appreciate that **Mutituni** is also in Machakos area, and there is nothing in the evidence that could lead to the irresistible inference that the 1<sup>st</sup> accused killed or arranged the killing of the deceased. According to PW1 in fact, the discourse between the deceased and the 1<sup>st</sup> accused that day was quite cordial. The evidence of PW3 **John Mbingu** that he was given Kshs.10/= by the 1<sup>st</sup> accused does not add anything. Firstly, he was an employee in the family. Secondly, he does not give any indication that the money was given for a bad motive. There is no evidence that the money was given to facilitate the killing. This accused will have to be acquitted.

The 2<sup>nd</sup> accused was even more distant from the events. It is not clear how he was charged. The evidence does not connect him to the offence except for an allegation that he handled a mobile

phone. That alone cannot be a basis for connecting someone to a criminal offence.

The 3<sup>rd</sup> accused was charged because of his connection with a mobile phone said to belong to the deceased. He stated that he was given the mobile phone by a person who pledged it as security for a **miraa** debt. The use of the mobile phone *per se* does not connect him to the crime, which had been committed earlier. Though one can talk of the doctrine of recent possession, this accused called a witness DW4 **Jeremia Karuti** who testified that the phone was pledged in his presence. The State Counsel did not even put a single question to this witness, which leaves the defence position unshaken. It is therefore clear that this accused also gave a reasonable explanation for the possession of the phone. That explanation removes the applicability of the doctrine of recent possession that can connect a possessor of recently stolen items with commission of the offence. The result is that the prosecution also failed to prove that the possession of the phone had anything to do with the commission of the crime.

The case of the prosecution is based on evidence of suspicion. Such evidence cannot be a basis for a conviction in a criminal case – See **Sawe –vs Republic (2003) KLR 364 at pg. 375** where the Court of Appeal stated:-

**“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt.”**

In totality, I find the prosecution has failed to prove any of the three accused guilty as charged. I therefore, find each of the accused not guilty of the charge. I acquit each of the accused of the offence charged under **section 215** of the **Criminal Procedure Code**.

Orders accordingly.

Dated and delivered at Machakos this **13<sup>th</sup>** day of **December** 2012.

**George Dulu**  
**Judge**

**In presence of:**

N/A for the State  
Mr Konya for all Accused  
All three Accused present  
Mutinda – Court clerk