



## CRIMINAL

- Where prosecution fails to show a *prima facie* case at the end of prosecution's case.

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### CRIMINAL CASE NO. 65 OF 2007

REPUBLIC ..... STATE

VERSUS

GABRIAL MUNENE KWENGA ..... 1<sup>ST</sup> ACCUSED  
JOHN KAMUNDE NKURU ..... 2<sup>ND</sup> ACCUSED  
JAMES MUTHAMIA KAMWARA ..... 3<sup>RD</sup> ACCUSED

### RULING

The three accused persons **Gabrial Munene Kwenga, John Kamunde Nkuru and James Muthamia Kamwara** are charged with three counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the three counts are as follows:-

***“COUNT I: Gabrial Munene Kwenga, John Kamunde Nkuru and James Muthamia Kamwara: On the 20th day of October, 2007, at Karocho Location, Tonya village in Tharaka District within Eastern Province murdered Martin Mutethia Mugambi.***

***COUNT II: Gabrial Munene Kwenga, John Kamunde Nkuru and James Muthamia Kamwara: on the 20th day of October, 2007 at Karocho Location, Tonya village in Tharaka District within the Eastern Province, jointly with others not before court, murdered Michael Ngang'a Kamau.***

***COUNT III: Gabrial Munene Kwenga, John Kamunde Nkuru and James Muthamia Kamwara: on the 20th day of October, 2007 at Karocho Location, Tonya Village in Tharaka District within the Eastern Province, jointly with others not before court, murdered Charles Kariuki Waciuri.”***

After the prosecution's case was closed, the accused counsel submitted that the prosecution had not presented a *prima facie* case which the accused could be called upon to answer. The killing of the three persons named in the particulars of offence was unfortunate and terribly unnecessary. From the entirety of the evidence of the prosecution witnesses, it emerged that the three persons who were killed were friends. The wife of Martin Mutethia Mugambi, deceased (Mugambi) stated in evidence that her father-

in-law had purchased a farm in Tharaka area. Her husband Mugambi decided on 20<sup>th</sup> October 2007 to go and see that farm. He was accompanied by his friends Michael Ngang'a deceased (Kamau). The deceased, Kamau, is the subject of the second count. He was also accompanied by Charles Kariuki Waciuri deceased (Waciuri). The deceased Waciuri is the subject of the third count. The wife of Mugambi stated that later that day she was unable to get her husband on his cell phone. Her husband had travelled in one of his deceased friend's vehicle. It was not until 21<sup>st</sup> October 2007 that this witness learnt that her husband Mugambi had been killed. She saw his body in the mortuary which had sharp injuries on the face, had broken limbs and had been burnt. The assistant chief of Karocho sub location on 20<sup>th</sup> October 2007 at 8pm heard screams and voices of a large group of people coming from Tonya Primary School. That school is near her home. Because it was night and because she did not have security personnel she did not go on the scene. She was unable to get the chief through his cell phone and she therefore decided to call the police. The police came to Rungu Market at 1am. The assistant chief went to the market and saw that there was a burnt vehicle which was still burning. They did not see the occupants of that vehicle. PW7, the chief of Karocho Location, on receiving information that there were screams, called the O.C.S Marimanti Police Station. He too did not go to the scene because he lacked security. The next day at 5am he went to the scene and found a burnt motor vehicle. As he travelled to Marimanti Police Station with the District Commissioner Tharaka, they were informed that there were three bodies which had their hands tied. There was evidence of fire where the bodies were. The bodies were 3kms from where the burnt vehicle was. PW1 stated that on 20<sup>th</sup> October 2007 at 3.20pm, he was at Rungu Market. As he was in the company of others discussing elections, they saw a Toyota Land Cruiser Surf pass by. It travelled towards Tonya about 3kms away. It did not stop at Rungu market. Later, he was informed by another man that those people who were in the Land Cruiser had been caught, tied up and beaten. He went to the scene and this is what he stated in evidence:-

***“When I reached there, I found indeed the three people had been tied with ropes and had been beaten up badly, were bleeding, but was (sic) able to speak to them. I told people to stop beating them up..... They (deceased persons) told me they had come to see a shamba they had bought.”***

This witness said that he saw 50 people at the scene. Although he tried to persuade the group of people to stop injuring the deceased, some of the people in the group told him:-

***“.....There is nowhere we will take these people, we will kill them.”***

This witness was prevented from going to report the matter to the chief. The investigating officer, chief inspector James Rugut who was the O.C.P.D Tharaka Police Station on the material date described the bodies of the deceased as follows:-

***“The nature of the bodies the three people (sic) had all been tied together. They were cut all over the body (sic) and was set on fire using firewood. They all died with visible injuries caused by panga or such object.”***

The investigating officer stated that the deceased were killed by the residents of that area because they were mistaken to be bad people. That they were killed when they stopped to ask for directions. Although the investigating officer stated that in his investigation there was revelation that the accused before court were involved in the killing of the deceased, none of those witnesses testified before court. All the witnesses who testified before court did not state that the accused were involved in the killing. In the case **Ramanlal Trambaklal Bhatt vs. Republic** [1957] E.A. The Court of Appeal at Dar-Es-Salaam had this to say on the burden of prove in criminal cases:-

***“The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is nearly one “which on full consideration might possibly be thought sufficient to sustain a conviction.”***

The learned state counsel Mr. Kimathi stated that the state had laid out a *prima facie* case against the accused persons. On the definition of *prima facie* case, the Court of Appeal at Dar-Es-Salaam in the

above case had this to say:-

***“It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”***

Considering that definition of *prima facie* case, I cannot say that the evidence presented by the prosecution in this case is evidence which can lead this court having properly directed its mind to the law to convict the accused persons if the accused persons did not offer a defence. A case that comes in mind is **Republic Vs. Daniel Timayo Mumeita & 3 Others** Criminal Case No. 58 of 2003 Nakuru where the court held as follows:-

***“Unfortunately, the evidence on record does not prove the required ingredients at all. Admittedly, the prosecution has been hoping that the defence will fill in the gaps in their case. Obviously, the defence is not obliged to do so. Having stated the above, in the event that the accused opt to keep quiet, then no properly constituted tribunal directing its mind judiciously can convict any of the accused for the offence of murder. It is apparent that the investigations were inadequate and shallow. The same raise suspicions on the accused – but cannot provide any basis for any conviction.”***

There is no direct or circumstantial evidence adduced before this court which implicated the accused to the offence of murder in the three counts. It is for that reason that I find that the accused have no case to answer and I acquit the accused namely ***Gabrial Munene Kwenga, John Kamunde Nkuru and James Muthamia Kamwara*** of the charge of murder. I make a finding of not guilty as per section 306 of Criminal Procedure Code. I order that the three accused persons be set free unless otherwise lawfully held.

***Dated, signed and delivered at Meru this 10<sup>th</sup> day of March 2011.***

**MARY KASANGO**  
**JUDGE**