



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**CRIMINAL CASE NO. 10 OF 2006**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**STEPHEN MUKHWANA AMBUA.....ACCUSED**

**R U L I N G**

The accused, Stephen Mukhwana Ambua, was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 28<sup>th</sup> October 2005 at Ebukanga village in Mulwanda Location in Butere District, the accused murdered Lucy Wesonga Makina. The accused was arraigned before this court on 1<sup>st</sup> March 2006 where he pleaded not guilty to the charge. The case was fixed for hearing on several occasions thereafter. For one reason or the other the hearing of the case did not proceed. On 21<sup>st</sup> October 2009, the court was informed that the advocate of the accused had died. A new advocate was appointed to act on behalf of the accused. He is Mr. Elung'ata. The case was fixed for hearing by the court on 28<sup>th</sup> June 2010. On that day, hearing did not proceed because the court was hearing Two Judge Appeals. Hearing was adjourned to 19<sup>th</sup> October 2010. Unfortunately, the court was not sitting on that day. The case was not mentioned before the court until 1<sup>st</sup> February 2011 when the case was fixed for hearing on 16<sup>th</sup> March 2011. On 16<sup>th</sup> March 2011 when the case up for hearing, Mr. Limo for the State informed the court that he had no witnesses in court. He requested for another date. The court granted the prosecution a last adjournment.

Hearing was adjourned to the 22<sup>nd</sup> June 2011. On that day, Mr. Limo again informed the court that he did not have any witnesses to call. He again applied for adjournment. He explained that the OCS Butere Police Station had not brought witnesses to court despite being notified to so avail them. Mr. Elung'ata for the accused opposed the application. He urged this court to discharge the accused since the prosecution had not made any effort to avail witnesses in court despite the fact that they had been granted the last adjournment.

This court has carefully considered the reasons advanced by the prosecution in seeking to adjourn the case to another hearing date. It was clear to the court that the reasons were not tenable. It is the duty of the prosecution to avail witnesses in court when so required by the court. This is more so when the court has granted the prosecution the last adjournment. **Article 50(2)(e)** of the **Constitution** grants an accused person the right to a fair trial which includes the right to have the trial begin and be concluded without unreasonable delay. In the present case, it was clear that the prosecution has infringed the accused's constitutional right to a fair trial. The accused has been in remand custody for a period of more than five years. The prosecution was supposed to take seriously their work by availing witnesses to court when so ordered. When the prosecution was granted the last adjournment, they should have made every effort to secure the attendance of the witnesses in court.

Since no witnesses were availed in court during the date scheduled for the hearing of the case, this court

has no option but to reach a finding that the prosecution failed to adduce any evidence to support the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The accused is therefore acquitted of the charge. He is set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF JUNE 2011**

**L. KIMARU**

**J U D G E**