**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CRIMINAL CASE NO. 116 OF 2007**

**REPUBLIC……...…….PROSECUTOR**

**VERSUS**

**JOHN KIMITA MWANIKI…….....……...…….ACCUSED**

**JUDGMENT**

The accused John Kimita Mwaniki is charged with the offence of murder contrary to Section 202 as read with Section 203 of the Penal Code *(Cap. 63, Laws of Kenya)* on three counts.

The State's case on the three counts is as follows -

**Count I -** The accused, on the 27th day of November 2007 at Ngarua Location in Molo District of the Rift Valley, jointly with others not before the court murdered R.K;

**Count II** - The accused on the 27th day of November 2007 at Ngarua Location in Molo District of the Rift Valley Province, jointly with others not before the court, murdered S. K, and

**Count III** - the accused on 27th day of November 2007 at Ngarua Location in Molo District of the Rift Valley Province, jointly with others not before the court murdered R. C.

**THE LAW**

Section 203 of the Penal Code is in these terms -

***"203 - Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

Section 206 of the Penal Code provides that malice aforethought shall be deemed to be established by evidence proving any one of the following circumstances.

***(a) an intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not,***

***(b) knowledge that, the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not; although***

***such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused,***

***(c) an intent to commit a felony,***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

This latter provision, 206 (d) has no application to this case as there is no charge of facilitating the flight of any person who has committed or attempted to commit a felony.

It is necessary before examining the evidence to refer to one more provision of the Penal Code in this regard because the accused is charged with three counts of murder, and each of the counts refers to *"the accused jointly with others not before the court"* causing the death of **R.K, S.K and R.C** ***(****collectively, "the deceased").*

Section 20 of the Penal Code which is a cardinal principle of the crime and on offences of joint enterprise says -

***"20(1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it (and these include - every person who actually does the act or make the omission which constitutes the offence (Section 20(1)(a)).***

And Section 21 says of joint offenders in prosecution of a common purpose -

***21 "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

The prosecution called ten witnesses, including the Doctor, who carried out a postmortem on the respective deceased persons, and after considering the prosecution's evidence, the court ruled that the prosecution had established a **prima facie** case against the accused, and put the accused on his defence. The accused gave sworn testimony and pleaded that he was not present at the scene at the time of the commission of the crime, and that if he was present at the scene, he was not properly identified in light of the apparently contradictory evidence of the key prosecution witnesses.

At the conclusion of the accused's evidence, counsel for the accused, and State Counsel respectively, made oral submissions summarizing the position of the Defence and prosecution respectively.

**DEFENCE COUNSEL'S SUBMISSIONS**

Mr. Lawrence Macharia Karanja who appeared for the accused, submitted that the prosecution had not established a case beyond reasonable doubt. He referred to the evidence of PW1 and PW2 as one of recognition and submitted that this recognition must be considered in the context of the principles laid down in the English case of **R vs TURNBULL**.

**Firstly,** counsel for the accused submitted that PW1 had testified that the attackers had applied chalk to conceal their identity and conceded that it is difficult to recognize a person whose face is covered with chalk, but nevertheless said he recognized the accused about 100 metres away, and that he never told the court that he never saw the accused.

Counsel for the accused also attacked the evidence of PW2 and called it contradictory, that the attackers had no chalk on their faces and was able to identify the accused.

Counsel further attacked the delay in recording PW2's statement as he was to be an eye witness and there was no explanation why the recording of PW2's statement was delayed.

**Thirdly** counsel for the accused submitted, Mr. Geoffrey who disclosed the name of the accused, was never called in evidence although he recorded a statement, an inference that if he was called, his evidence would be adverse to that of the prosecution, PW2 had testified that he had known the accused from the time of his birth, and the number of raiders was put at 30, cutting and killing everyone in their sight.

**Fourthly** counsel submitted that under the **Turnbull** principles mistakes are often made of persons known for instance PW5 said, he saw persons coming - "I saw KIMITA *(the accused),* and that he was the one with the gun, and yet PW5 testified that she did not see the accused - the name must have been given to her by Geoffrey who never testified. Counsel submitted that the witness knew the accused and the claim of recognition was worthless.

**Fifthly** counsel also submitted that the conduct of the accused should also be considered by the court because according to the evidence of PW4, the Administration Police Superintendent, the accused was living at home, in his house where he found him, and had him arrested and taken to the regular Police. That is not the conduct of a murderer who has killed people. Counsel contended that this confirms that the accused had nothing to do with the murder of the deceased.

**Sixth** counsel also asked the court to consider the accused's defence. The accused pleaded an alibi, that he was not there at the time of the commission of the offence, and that this is an offence which must be proved beyond reasonable doubt. Counsel relied on the decision of the Court of Appeal in **PAUL VS. REPUBLIC [1990] KLR 10**.

**Seventh** on the conduct of PW1 and PW2, counsel for the accused relied on the case of **NDUNGU KIMANYI VS. REPUBLIC [1976-80] 1 KLR 1442**, that the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness, or do, or say something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

For all those reasons Mr. Karanja urged the court to acquit the accused, and set him free.

**STATE COUNSEL'S SUBMISSIONS**

Mr. Omwenga, Senior Principal State Counsel who appeared for the State, submitted that the prosecution had proved its case beyond reasonable doubt. There was recognition, the accused was known to the witness. There was no mistake, the plea of alibi was displaced by the evidence.

On the question of age, counsel submitted that the issue was brought up by the Defence, that he was born in 1989, and in the year 2000 he had finished school. This was not possible by the age of 11 years.

On the question of recording of evidence on the eve of hearing, counsel submitted that there was no law which prohibits recording of statements on the eve of hearing. The test, State Counsel submitted, is not when the witness statement was recorded, but rather, the credibility of the evidence.

On the question of difficulty in identification or recognition of an attacker in a large group counsel submitted that such difficulty does not inhibit recognition of at least one person among such attackers.

On the question of failure to call one Geoffrey, State Counsel submitted that an adverse inference would only be made if there was no evidence. Counsel therefore urged the court to make a finding that the prosecution had proved its case beyond reasonable doubt, and find the accused guilty.

**THE EVIDENCE**

Having set out the legal provisions under which the accused was charged, including provisions on joint offenders, and having also set out the substantive submissions both for the defence, and the prosecution, I now turn my attention to analysis of the issues raised by this case, and the evidence in relation thereto from the perspective of both the prosecution and the defence counsel.

Indeed as Mr. Karanja learned counsel for the accused put it, this was a case of ethnic clashes before the election of 2007/2008, and that that is the reason why a Rapid Response Unit of the Administration Police was deployed in the area, and it was the duty of the prosecution to avail all witnesses, both favourable and unfavourable. As this was a prosecution and not a persecution of the accused the question or issue therefore is, was there evidence to prove the charges against the accused - this being a criminal trial for an offence whose punishment or penalty is the ultimate penalty of death, that evidence must be cogent, and prove the guilt of the accused beyond reasonable doubt.

The evidence of the prosecution lay basically on the question of whether the accused was identified by recognition.

As already noted, counsel for the prosecution and the defence held different views, counsel for the accused relying upon the principles of identification by recognition enunciated in the English case of **R VS. TURNBULL [1977]Q.B. 224**, as paraphrased in Halsbury's Laws of England, 4th Edition, Vol.II(2) para. 1148, p. 962 that -

***"There is a special risk of mistake inherent in evidence of visual identification. Therefore, whenever the case against the accused depends wholly or substantially on the correctness of one or more visual identifications which are alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of identification. In addition he should instruct them as to the reasons for the need for such warning, and refer to the possibility that a mistaken witness may be a convincing one and that a number of identifying witnesses could all be mistaken. Recognition may be more reliable than an identification of a stranger … where the quality of an identification is good, the jury may be safely be left to assess it.***

***.. A failure to follow above guidelines is likely to result in the quashing of the conviction on appeal."***

As the authors of Halbury's Laws of England *(supra)* observe at p. 963 note 2, the rules laid down in **R vs Turnbull** are intended primarily to deal with the problems inherent in the **"fleeting glance"** identification and not, e.g. with the problem which arises when the question is which number of persons known to have been present at the scene of an offence did a particular act, and again that the rules in **R v. Turnbull** are to be applied flexibly bearing in mind the circumstances of the case - for instance in case of rape, is where the only live issue is identification, the warning in **R v Turnbull** is sufficient, and corroboration is not required.

The circumstances of this case were these. It was the eve of elections and the ritual of tribal clashes had began in earnest. Isolated homesteads of the Kalenjin and the Kikuyu tribesmen and tribeswomen (the protagonists), were most at risk.

PW1 described the scene of the attacks. The time was between 3.00 - 4.00 p.m. The date was 27th November 2007 *(a month or so to the General Elections)*. The area or locality was Ngarua. He first heard screams, and shortly gunshots. He saw the family of Esther Bore and R being chased by a number of people. The distance between his house and Esther Bore's was about 100 metres. He noticed some of the people had applied some white substances on their faces which he thought was chalk. He estimated the group at 20 in number.

The group continued with the chase until they reached the fence of his house. He noticed some had guns, John Kimita - the accused had a gun. One Robert had a panga. He knew the accused, as he was his neighbor of 5 years before the incident. He alerted his mother and wife that they were under attack.

PW1 further testified that the two *(probably the accused and one R)* came and cut his barbed wire, shot in the air. He enlisted the help of one Daniel, another neighbor, and with him helped to repel the attackers with the use of arrows. The attackers retreated to their homes.

The attackers had burned down Esther Bore's house. They found R.K a five (5) years old boy. K had been shot in the legs and had panga cuts. S.K a five (5) year old boy had been cut in the head, both were lying outside their houses, dead. Another person called R *(R. C)* had been injured and died later. She had been cut in the head and also had a gun shot wound in the head.

PW1 testified that he did not know why the attack on Esther Bor's home was carried out, but that after that clashes started in the area.

PW1 reiterated his evidence upon cross-examination by Mr. Karanja that he had known the accused for over 5 years. PW1 and the accused lived in the same Trading Centre. PW1 knew the Centre as **Kenchoket Shopping Centre.** He also knew it as **Mungetho.** The accused had moved to the Centre before 27th November 2007 because of the clashes.

PW1 clarified that he did not recognize the accused at the home of Esther Bore but rather when the accused came towards his homestead. He heard the raiders saying **"Kimita gutha"** which words he did not know what they meant, and that he did not know it was the accused until he came towards his homestead.

PW1 also testified in cross-examination that he heard a gunshot while he saw the accused ran towards a boy called K, and PW1 expressed surprise that his statement did not include the statement that he had recognized the accused when he came towards his homestead.

In re-examination, PW1 maintained that he did not lie to the Police, and he narrated his statement to many officers on 27th November 2007, and that it is the officers who recorded what he said and that he was able to recognize the accused despite the chalk on his face because he was close to him as the accused came towards their compound. He reiterated that the clashes had started earlier, but resumed after the incident of 27th November 2007.

PW2 corroborated the evidence of PW1 but contradicted it by stating that the accused wore no chalk on his face, and added that the raiders wore feathers in their hair.

PW2 corroborated PW1's evidence that the raiders struck at about 3.00 p.m. He heard screams, while in his home and came out to check what was happening and found mama Chemtai's house burning he saw a group of about 30 people going towards PW1's house. Some were armed with pangas and bows and arrows.

PW2 testified that he saw the accused emerge from a maize plantation. **Their eyes met**. They had known each other for over 20 years. The accused knelt down and pointed a gun at him but missed. PW2 also testified that two other persons had guns, he escaped after the accused shot at him twice and missed. An alarm was raised, people responded, and the raiders were repulsed, and they then went to the home of Chemtai and found that one R Too had been killed, a child to Mama Chemtai's sister had also been killed. Mama Chemutai herself had been cut with pangas, and later died under a shade tree where PW2 and others had removed her from the road where the raiders had cut her and left her for dead. Three people were killed that day. The accused wore a long coat known as a *"Macharia"*, but he did go to Chemutai's home, and that he had never seen him again. He himself escaped with his family to *"Tilowa"*, and returned to the area at the beginning of April 2008.

When cross-examined by Mr. Karanja, PW2 testified that he had known the accused for 20 years, he had lived in Ngarua since 1983 and believed he was born "1987?".

The accused used to live in Mungetho but moved out because of the clashes, and that the accused's father had removed the iron sheets from the roof of his house and pulled down the walls of the house.

PW2 testified that he and PW1 together with 8 other people repulsed the raiders and not two as stated by PW1.

PW2 further testified that the raiders stopped when they saw him, and that the accused emerged from the maize plantation with a gun about 100 metres away, and aimed at him at that distance, and that he hid himself behind a tree and ran away after two shots missed him. He sensed danger when he saw the raiders and that he told his children that they had to leave the area and he only returned to the area in March 2008, and that his statement was recorded four days before he gave his testimony, having been called by PW1 to do so.

PW2 confirmed that he saw the people who were killed but he did not see **"those who did the killing"** or the accused do so. He had escaped from the home, hence he did not record his statement.

Under intense cross-examination PW2 admitted that his 1st and 2nd statements were taken on 26th and 27th November 2007, but he never signed any statements that date. He thumb-printed the statement of 5th April 2008, and that what he said in that later statement is the entire truth and not a lie.

On re-examination, PW2 testified that they were interrogated twice on the material day, and that he had narrated the statement of 5.04.2008 and written down by Police Officers. He confirmed that the accused emerged from a maize plantation and that he had no chalk on his face.

PW3 also testified that he too came from Ngarua. He knew the deceased R.K. R his brother, R.C his sister, and S.K his nephew, his sisters son. He identified the bodies of the deceased at Molo District Hospital.

PW4 was a Superintendent of Administration Police **Rapid Response Unit** who were based at Mungetho on 28th January 2007. He was instructed by the Molo District C.I.D. Officer that a complaint had been received that the accused was suspected of having killed someone, and that he should arrest and take him to the CID, offices.

PW4 testified that he and his colleagues who knew the accused went and found him at his house and arrested him at his home, took him to the AP Camp and handed the accused to some GSU officers whom the CID had also sent to look for the accused, and later recorded his statement.

Upon cross-examination, PW4 confirmed that his deployment at Molo was as a result of tribal clashes, and he was aware of killings going on in the area, and that he went to look for the accused upon instructions to do so. PW4 confirmed that the accused was found at his house, he did not try to escape, and he denied killing anyone - the killings were by gangs, and it was not possible to pinpoint anyone.

PW5 was Esther Bore, a house wife who lives in Kericho, but was living in Molo on 27th November 2007. The time, according to her was about 1.00 p.m. She was with her children at home. They were R.C, R.K, J.C and S.C and S.K.

PW5 testified that some people came and killed the three children and that there were very many people, not less than 40 people, armed with pangas, bows and arrows. The accused *(Kimita)* had a gun and confirmed that he is the accused in the dock. He was his neighbor for over 11 years.

PW5 testified that the attackers were spotted by one of the children, who raised an alarm, and as she went outside, the attackers were already on them, burning houses and killing people. They killed R.C, R.K and S.K, and the raiders did not kill anyone else except her children. They were shot at, she was pierced with an arrow, and stabbed all over the body. The arrow was removed later.

PW5 testified that she was able to identify some of the attackers. They were her neighbours. They were Robert, Geoffrey, Super, Mathayo and another whose names she could not remember. There was also Elijah who lived with her neighbor, and Peter who lived in Mengiso.

PW5 testified that she did not see the accused that day. They were rescued and were taken by a Government vehicle to Molo and the bodies of her children were taken to Kericho Hospital Mortuary and were later buried there. She did not attend any post-mortem examination because she was in hospital.

PW5 was not cross-examined by counsel for the accused.

PW6 testified that he was attached to Mungethu A.P. Camp in Molo. With his fellow AP (PW7) they arrested the accused, following an attack at Ngarua the previous day where people had been attacked, injured and some killed. PW6 knew the accused because he used to visit the AP Camp. Neighbours informed him that he had been among the attackers.

PW6 testified that the accused was not around the whole day on 28.11.2007 but he emerged in the evening when he entered a certain house through the window, and they laid an ambush. The accused again came out through the window, and they arrested him, and put him in a vehicle and escorted him to the Molo Police Station. He confirmed that the accused in the dock was the person they arrested.

When cross-examined by counsel for the accused, PW6 confirmed that there was officer SP. Sheikh (PW4) and that some boys, among members of the public who informed him and his colleagues that the accused was among the attackers. He was not given a description of the attackers, and the accused did not resist arrest, but that he tried to run away.

PW7 was Corporal Richard Langat, who was assigned by the in-charge C.I.D. at Molo to proceed to Mungethu to investigate an incident. He proceeded there and at Ngarua Farm in Kuresoi he found a house which had been torched, and two people were lying on the ground dead and he (with PW6) were informed that other people had been injured and had been taken to hospital. They took the body to the mortuary and returned the next day (28.11.2007) to gather evidence in regard to those who attacked the victims.

PW7 testified that they found several youths who said they had seen the attackers. That one, John Kimita, a neighbor of the victims was among the attackers. The accused was not seen that day, he was arrested later by APs and taken to the Police Station, and that one of the injured one Esther Bore later died in the Hospital, and those who died in the attack were her children.

When cross-examined by counsel for the accused, PW7 testified that Kimita's name was mentioned by Geoffrey, and was also informed that the attackers had concealed their faces in order to conceal their identities. The group of attackers were said to be more than 10 people, less than 20, and PW7 would not be surprised if there over 40 attackers. The accused, he was informed, lived at Mungetho Shopping Centre which is about 3 km away from Ngarua. He was told that the accused was arrested the day at Mungetho Shopping Centre in the afternoon.

PW8, was Chief Inspector of Police Sambu Wafula. He was requested to photograph 3 bodies, and he took 11 photographs at the Molo District Hospital Mortuary. The photographs were of the bodies of the deceased R.N, R.C, and a baby boy called S.K, and had them processed at C.I.D. Headquarters under his supervision.

PW9 was Dr. Magdalene Kihimbi, who conducted a postmortem on R.K on 5.12.2007, after the body was identified by D.R, a brother to the deceased. The deceased had gaping wound on the head with missing brain tissue with extensive skull fractures.

PW9 was of the opinion that the deceased died as a result of damage to the brain tissue.

PW9 also carried out a Post Mortem on the body of S.K which was also identified to her by D.R. It was brought to the hospital dead. The injuries were mainly to the head which had extensive linear skull fracture 12 cm from right temporal parietal to occipital left, causing cerebral haemorrhage. PW9 concluded that the deceased died of cardio-respiratory arrest - brain damage which is incompatible with life.

PW9 also conducted a post mortem on the body of R.C who had been attacked by raiders, and taken to the Hospital where she died. The deceased had multiple injuries with intercranial haemorrhage, and concluded that the deceased died of cardio-pulmonary arrest following massive head injury.

The prosecutions evidence was crowned by that of PW10, P.C. Kennedy Nyagwa attached to C.I.D. Office in Molo, performing general investigations. He was in the office but was summoned by Corporal Kemboi who had been assigned duties with P. C. Mwebi and P.C. Langat to join them and proceed to Ngarua, Kuresoi Division *(now Kuresoi District).*

PW10 testified that they found 2 bodies lying dead in a pool of blood and three houses were ablaze, and that victims had been rushed to Molo District Hospital in a serious condition. The two deceased were R.K and S.K, and the victims rushed to Molo District Hospital were R.C and Esther Bore, and Jackline and Sharon Kibet respectively.

PW10 testified that upon interrogating members of the public, including one David Kipkurui Korir (PW2), he was informed that a group of about 20 people raided the home of Esther Bore and caused the damage which was there at the time. PW2 also informed PW10 and his colleagues that he was able to identify some of the raiders, and one of whom was John Kimita - the accused and another one called Robert.

He was informed by PW2 that the accused had been spotted with a rifle and a panga. After those preliminary investigations, he returned to Molo with his colleagues. He visited Molo District Hospital the next day on 28.11.2007 and found R.C had passed away. So they were sent back to Ngarua and look for the accused persons, and that while preparing to go to Ngarua they were informed that the accused had been arrested at a place called **Murianiku** and they proceeded to that place, and re-arrested the accused from the APs who had first arrested him and took the accused to Molo Police Station.

PW10 testified that he telephoned Chief Inspector of Police, Sambu Wafula, the officer in-charge of Scenes of Crime, who photographed the three bodies of the deceased, as the family had decided to carry out a post mortem of 5/12/2007, and he charged the accused.

PW10 also testified that Esther Bore (PW5) came back to the area on 8th July 2008 and was given a P3 Form which she took to Kericho District Hospital where it was filled.

PW10 added that he found three houses had been torched, a living house, a kitchen and the son's house. The three deceased were children of Rose Chemutai, and a grand child of Ester Bore (PW5).

PW10 reiterated his evidence upon cross-examination by counsel for the accused. It is PW2 who informed them that the raiders had smeared their faces with chalk in order to hide their identities, and that the accused was arrested at Mungetho by Administration Police, and stated that tension was high in the area so that the deceased were not even buried at Ngarua area but were taken to and buried in sites in Kericho District.

**DEFENCE EVIDENCE**

When the accused was put to his defence, he opted to give sworn evidence.

The accused confirmed that he lived in Ngarua-Kuresoi before his arrest. He knew PW3 Esther Bore, she was his neighbor and remembered her evidence, that she knew him from his childhood. He denied knowledge of PW2, whom he met at the OCPD's office. The accused testified that he was born on 24.06.1987, and since PW3 said that he was born in 1983, she could not have known him from that date, as he was not yet born as at that date.

The accused testified that he was not at Mungethu on that material day *(27-11-2007).* He had gone to Bomet to sell maize, and that on his return on 28.11.2007, he entered a shop to buy a scratch card, but was arrested and was taken to Rapid Response Unit *(of Administration Police)* where he was given an

AP's uniform, given a rifle put in a Land Rover and driven to Molo Police Station, where the uniform was removed and he was placed into a cell.

The accused testified that on the 2nd day, he was taken to the OCPD's Office where he met PW1 and PW2 but he did not know PW1, and he was charged on 7th December 2007. The accused denied that he was at the scene of the crime, that he had never carried a gun in his life, and that he had no reason to attack the deceased or PW5 whom he regarded as his mother.

When cross-examined by Mr. Omwenga, State Counsel, the accused reiterated that he was born on 24.06.1987 and that he was in Class 7 in 1997 that he never finished school, and that he was 11 years of age in 1997. He denied knowledge of PW2.

The accused testified that he lived in Mungethu until the clashes started in 2006, in their home in Ngarua, when their homes were burnt down by arsonists.

The accused also testified that he attended Keluget Primary School, formerly in Nakuru District, that Molo and Kuresoi are far apart, and that it takes 2 hours by matatu and fare of Ksh 150/= to reach either place.

The accused also testified that he was in **Mungetho**, not Ngarua, on 27.11.2007, and it is quite a distance of 10-12km between Mungethu and Ngarua. The accused confirmed that he knew Esther Bore (PW5).

In re-examination by his counsel, the accused testified that they were chased away from Ngarua and lived in Mungetho, and that on **27.11.2007**, he was in Bomet, but lived in Mungetho Centre, and reiterated that the clashes started in 2006.

**ANALYSIS OF EVIDENCE AND ISSUES**

In a murder trial there is basically, one question, and that is whether the evidence has established a case beyond reasonable doubt upon which the court may safely convict the accused and mete out the appropriate and prescribed punishment.

In the case of **NDUNGU KIMANI VS. REPUBLIC [1976-80] 1 KLR 1442,** the Court of Appeal held -

***"that the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."***

And in **PAUL VS. THE REPUBLIC [1980] KLR 100**, the Court of Appeal said -

***"where the prosecution relies upon circumstantial evidence to establish the guilt of the accused, the inculpatory facts must be incompatible with the accused's innocence and incapable of explanation upon hypothesis other than his guilt."***

And in **MAINA & 3 OTHERS VS. REPUBLIC [1986] KLR 301**, at 305, the Court of Appeal said -

***"The question of importance in this aspect of the case is, whether the evidence led was such as to justify a conclusion that the accused was one of such persons. We think that the evidence must reach a degree of certainty required to sustain a conviction."***

In this case, the evidence of the star prosecution witnesses *(PW1 and PW2)* was that the accused was among the group of warriors *(estimated at 20)* in number (PW1), 30 in number (PW2) and 40 in

number (PW5) and 20 in number (PW7), the accused had a gun (PW1) and he (PW1) heard people calling upon the accused saying, *"Kimita gutha",* (PW1) and that he identified the accused not at Bore's house *(which was about 100 metres from his house),* but at his fence and was surprised that the Police did not record this in his statement.

It was the evidence of PW2 that he saw the accused emerge from a maize plantation, he crouched and fired a gun at PW2, and missed. PW2 testified that his eyes "met", *("locked")* with that of the accused. They had known each other for over 20 years. He and 8 others managed to repulse the attackers.

Although he does not name names, people around R.C's house said *"Kimita was among the raiders",* he could not remember who first mentioned *"Kimita's"* name, but he refers to one *"Geoffrey"* who ascaped.

PW5 names the accused as the one with a gun *"Kimita had a gun"* and pointed at him on the dock. PW5 also identified other attackers who were her neighbours - as *Robert, Geoffrey, Supa, Mathayo, one Elijah, a Peter* a resident of Mengiso, and one other person whom she could not remember - but contradicted herself that she did not see the accused that she did not see Kimita **"herself that day".**

PW6 arrested the accused on *28.11.2007* following the evening after the attack and upon entering his house through a window and again emerging out of it through a window. He was informed by members of the public that included some neighbourhood boys that he was among the attackers.

PW7, corroborated the evidence of PW6, that some youth told them that **"for Kimita a neighbor of the victims was among the attackers",** and that Kimita's name was also mentioned by one **"Geoffrey".**

PW10 summed up the evidence of PW1, PW2, PW5, PW6 and PW7 that one of the person's who raided Esther Bore's home was the accused, and that this information also came from one **"Robert"** that the accused was spotted with a rifle.

In this regard names of this Geoffrey, Robert, Supa, Mathayo, Elijah and a Peter (a resident of Mengiso) were mentioned by PW5, PW7, but the name of the accused kept appearing throughout the evidence of PW6 and PW7 and PW10 as having been among the attackers.

For obvious reasons in this volatile area one coming up to give evidence is regarded as an act of betrayal of the community, those named as informers obviously went and are still underground, and the Police are obviously also keen to keep their channels of communication open, so that even where they could have recorded information from some of the youth, they did not, and went for the one accessible suspect, the accused.

It was not clear whether any statement was recorded from *"Geoffrey"* - if it was, and he was not called to testify it does not mean that he had evidence adverse to that of the prosecution. It was held in the case of **MWANGI VS. REPUBLIC [1984] K.L.R. 595** that-

***"whether a witness would be called by the prosecution is a matter within the discretion of the prosecution and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive."***

The question is whether with this evidence, the defence of alibi adduced by the accused can stand.

The law prior to the repeal of Section 235 of the Criminal Procedure Code required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices.

In this case the evidence of the prosecution is quite clear. The accused was among the group of raiders which attacked the home of Esther Bore, PW5. It is not material that these attackers were in a group of 10, or 20, or 30, or 40 members. It is also not material that some witness did not see the accused. In a crowd not every witness will see an accused, but some or more people will. What is material is that one of them, the accused, John Kimita Mwaniki was identified, and having not made good his escape from the area, like Robert, Geoffrey, Supe, Mathayo, Elijah and Peter *(of Mengiso)* he was arrested and investigations having been carried out by PW10, he was charged with the offence of murder of the three deceased.

The defence of alibi cannot hold in light of the evidence above, and the accused's own evidence. The accused testified that he was born on 24.06.1987 and that by 1997, he had dropped out of Class 7. He must have been an exceptional student to have reached Standard 7, at the age of 10 years as most children would be in their 5th year of Primary School at that age.

The accused testified at one stage that he had gone to sell maize in Bomet on 27.11.2007 the day of the attack, and yet in cross examination stated that he was in Mungetho on 27th November 2007 not Ngarua, a distance according to the accused of 10- 12 km away but only 3km according to PW7. Was the accused in Bomet or Ngarua? It was the evidence of PW1 and PW2 in particular, and later that of PW6 and PW7, that some youth told them that the accused was among the attackers, and would not, at the same time, have been in Bomet selling maize.

The accused testified that he regarded Esther Bore (PW5) as his mother. I doubt that a mother would lie about the presence of her son at a particular time and place. PW5 testified that the accused was one of the attackers.

The evidence of the accused that he was dressed in AP uniform and given a rifle upon arrest by the AP and later re-arrested by the regular Police is pure imagination. If it were true, PW4 a Superintendant of Administration Police and at that, a Senior Officer would have said so, and so would PW6 the arresting officer. The accused is simply not a credible witness on his own account.

The evidence of PW9, the doctor, did not say, or specify the type of weapon which inflicted the injuries upon the three deceased. All the three had deep cuts on the head, R. K, had **"gaping cut wound with missing brain tissue and extensive skull fractures", - looks like multiple merged cuts with loss of tissue".**

S.K had gaping cut 12 cm from right temporal parietal occipital left parietal causing **"extensive linear skull fracture, and cerebral hemorrhage".**

**"R.C"** suffered multiple skull injuries with **"intracranial haemorrhage"** which had been stitched but were so severe that the deceased died of cardio pulmonary arrest following massive head injury.

The star witnesses say that the accused was carrying a gun. The other raiders were carrying pangas, arrows and bows. PW5 received an arrow wound but lived to tell her ordeal. K the 1st victim had gun shots to his legs. Attempts by the accused to shoot PW2 did not succeed. The injuries upon the deceased were inflicted by all those weapons, by other attackers or raiders. But for the accused's name to consistently come up, it must mean that the accused was the leader of the attackers, or that he played a leading or most prominent role with his gun, while his other food soldiers did the actual damage of inflicting injuries upon the three deceased and PW5 who miraculously survived.

The position then is one in which the accused who according to the evidence of the prosecution did not lift a panga or shoot an arrow upon the deceased and injured. He is charged with the murder of the deceased.

Under Section 21 *(supra)* of the Penal Code, when two or more persons form a common intention

to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Further, in this cause the intention of the purpose was to cause the death of or to do grievous harm to any person who was found in that home, the home of PW5, the death of R.K and S.K amd R.C who were overcome and killed. There was clear knowledge that the act of prosecuting the purpose was to cause death and grievous harm, which lead to the death of R. C, for instance, and there was clear intention to commit the felony.

There was thus malice aforethought on the part of the accused. The accused may not have shot the arrow which caused the injury. He may not have lifted the well-sharpened panga that caused the serious injuries shown in the gruesome photographs produced by PW8. The circumstantial evidence, the inculpatory facts are such that they are incompatible with the innocence of the accused, and are incapable of explanation upon any hypothesis other than the guilt for the accused.

For those reasons, I find the accused guilty and convict him of the murder of the three deceased.

The Court of Appeal has recently held that even where the punishment is prescribed, the court should still inquire whether there are special circumstances why the court should not pass or mete out the prescribed punishment upon the accused.

In light of that thinking, I call upon the accused his counsel to give the court any grounds why the prescribed punishment should not be pronounced upon the accused.

**Dated, delivered and signed at Nakuru this 3rd day of June 2011**

**M. J. ANYARA EMUKULE**
**JUDGE**
**Mitigation - Mr. Omwenga:** State Counsel
Accused is a first offender.
**M. J. ANYARA EMUKULE**
**JUDGE**

Mr. Karanja - I apply for mitigation on 6th June, 2011.

**M. J. ANYARA EMUKULE**
**JUDGE**
**3/06/2011**

## SENTENCE

The Accused was on the 27th day of November 2007, under and pursuant to the provisions of Section 203 of the Penal Code *(Cap. 63, Laws of Kenya),* convicted of the murder of -

*(1)* *R.K,*

*(2)* *S. K*

*(3)* *R. C*

Section 204 of the Penal Code provides that any person convicted of murder shall be sentenced to death.

The literal meaning to this provision is clear. The punishment for the offence of murder is death. I think the Section cannot be narrowed into any more construction harsher than it is already. The issue with which the Court of Appeal was confronted with in the case of **GODFREY NGOTHO MUTISO VS. REPUBLIC [2010] eKLR** was both one of interpretation and the larger issue of the imposition of the mandatory death penalty for particular offences such as murder, robbery with violence, and treason. The appellant in that case, argued that -

*(1) the imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of the sentence;*

*(2) a mandatory death sentence is antithetical to the fundamental human rights and there is no constitutional justification for it. Aconvicted person ought to be given an opportunity to show why the death sentence should not be passed against him;*

*(3) the imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum making the sentence mandatory would therefore be an affront to the human rights of the accused;*

*(4) Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively, the word **"shall"** ought to be construed as **"may";***

*(5) there is a denial to a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before the sentence, which is the normal procedure in all other rights for non- capital offences, that sentencing was part of the trial and mitigation was an element of fair trial;*

*(6) Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary. Parliament should therefore only prescribe the maximum sentence and leave the courts to administer justice by sentencing the offender according to the gravity and circumstance of the case.*

The Attorney-General through the learned Director of Public Prosecutions conceded to the above issues in these words -

***"We now concede that notwithstanding the mandatory provisions of Section 204 of the Penal Code, a trial Judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. That is our position. The word "shall" in Section 204 should now be read as "may"."***

The Court of Appeal agreed with concession by the Attorney-General, and stated that Section 204 of the Penal Code which provides for the death penalty is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.

The Court of Appeal also concluded -

***"We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision."***

That court also observed that the arguments concerning sentencing under Section 204 of the Penal Code would also apply to other capital offences, such as treason under Section 40(3), robbery with

violence under Section 296(2) and attempted robbery with violence under Section 297(2) of the Penal Code.

Whilst agreeing with that court's conclusion on the application of the arguments on Section 204, to other capital offences, I would observe that the mandatory death sentence set out in Sections 40(3) *(treason),* 204 *(murder),* S. 296(2) *(robbery with violence)* and attempted robbery with violence *(section 297(2)* of the Penal Code, is underpinned by Section 71(1) of the former Constitution, and Section 26(3) of the current Constitution of Kenya. Section 71(1) of the former Constitution provided that -

***"71(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."***

Section 71(2) of the former Constitution also gives 5 specific instances where a person may lawfully be deprived of his life -

***(1) in defence of person or property,***

***(2) in effecting a lawful arrest, or prevention of escape from lawful custody,***

***(3) in suppressing a riot, insurrection or mutiny,***

***(4) prevention of commission of a crime,***

***(5) death as a result of an act of war.***

Article 26(1) & (3) of the current constitution say -

***"26 (1) Every person has the right to life***

***(2)***

***(3) A person shall not be deprived of his life intentionally, except to the extent authorized by this Constitution or other written law."***

Other than the other five occasions when a person may deprived of his life *(S.71(2) of the former Constitution - which would now constitute extra-judicial killings),* the punishment for capital offences were and are underpinned by the current Constitution, and it would not therefore be either correct or accurate to declare that the Constitution does not say that when a conviction for murder is recorded only the death sentence shall be imposed. If it were not so, what meaning would we give to the current, let alone the former Constitutions when the current Constitution says - **"a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."**

I probably missed some provision but the current constitution specifically allows deprivation of life under some written law in addition specifically, under Section 26(4) ***"abortion"*** to save the life of the mother. Strangely also, life is not one of those fundamental rights which may not be limited under Section 25 of the Constitution. *(the rights to freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to fair trial and the right to an order of habeas corpus).*

The real question, which begs an answer is whether the death penalty underpinned by Article 26(3) & (4) of the current Constitution is consistent with the right to life under Article 26(1). And the Constitutional question would be whether those provisions are consistent with each other? That is a question probably for another forum and for another day. It is not answered by conceding that the word **"shall"** in Section 204 shall mean **"may".** If this be so what would happen to a myriad of other statutes where the expression is deliberately used to express the intention of Parliament?

The statutes that readily came to mind is the Sexual Offences Act, 2006 *(No. 3 of 2006)* where punishment are graduated, not according to the offence, but rather the age of the victim, shall the courts also pun with the words **"shall"** to mean **"may"?** What would one do with war on drugs in the Drugs Narcotics and Psychotropic Substances Act where again the punishment is also graduated in terms of value of the drug, narcotic or psychotropic substance? Will we again pun the mandatory provisions and confer discretion to the courts? Not a bad idea, but can we imagine the chaos it would engender with minimal sentences? It would be a field day particularly in the lower courts which have jurisdiction in these and other statutes. The High Court would simply be inundated with applications for revision.

However back to my case. The accused said in mitigation that he was arrested when he was 20 years of age. He is now 24 years. His parents were displaced in 2006 in the notorious and infamous cycle of ethnic cleansing prior to general elections every five years. His parents are IDPs in some congested camp. He is remorseful. He does not deserve a sentence of death, his counsel Mr. Macharia told the court.

Mr. Omwenga learned State Counsel said, the accused was a first offender, and should be treated as such.

Taking the above submissions into account, and holding the view that Article 26(2) *(on deprivation of life)* is inconsistent with the right to life preserved under Article 26(1) of the Constitution, and sending a deterrent warning to perpetrators of ethnic clashes everywhere in the land, north and south, east and west that we are in this geographic expression called Kenya together and none has any more right to be here than another, I hereby sentence the accused to thirty (30) years imprisonment without an option for parole for the first 20 years.

There shall be orders accordingly, and the accused is reminded of his right to appeal within 14 days on both the conviction and sentence.

**Dated, delivered and signed at Nakuru this 10th day of June 2011**

**M. J. ANYARA EMUKULE**
**JUDGE**