



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI  
Criminal Case 59 of 2008

REPUBLIC.....PROSECUTOR

*Versus*

DANIEL HEHO MWANGI  
DENIS MUHORO MUGECI.....ACCUSED

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

By information filed by the Attorney General dated 29<sup>th</sup> October, 2008 and filed in court on the same day, the accused, **Daniel Heho Mwangi** and **Dennis Muhoro Mugeci** were charged with murder contrary to *Section 203* as read with *Section 204* of the penal code. It was alleged in the information that “....On the 12<sup>th</sup> day of October, 2008 at Kiangoru village, Kimathi location in Murang’a District within Central Province, they jointly murdered Gilbert Githongo Maina.....” The accused both entered a plea of not guilty and their trial ensued before me in earnest.

The prosecution called a total of 13 witnesses. In summary their evidence was in the following terms:-

PW1, **Festus Mwangi Heho** was a minor. Following Voire Dire

examination, I allowed him to testify without being sworn. He stated that on 12<sup>th</sup> October, 2008 whilst asleep with his mother, **Winnie Gituto**, someone came and hit their door and it caved in. That person entered the house. **Winnie Gituto** asked him to leave the house three times but the person refused to budge. **Winnie** then told the witness to go and call his father and her husband who was sleeping in a different house. He did so. His father, the 1<sup>st</sup> accused came and ordered that person to leave as well but the person refused. He even challenged the 1<sup>st</sup> accused to a fight. The 1<sup>st</sup> accused then sent him to go and call his brother, the 2<sup>nd</sup> accused. When the 2<sup>nd</sup> accused came by, he also asked the person to leave the house. That person again refused to comply with request. Instead he confronted the 2<sup>nd</sup> accused, held him by the neck in an attempt to strangle him. That person who turned out to be the deceased then knocked down the 2<sup>nd</sup> accused. A free for all fight ensued. The accused were hitting the deceased with sticks as he fought back. **Joseph Irungu**, a paternal uncle of the witness intervened and stopped the fight whereupon the deceased left staggering but he fell by the roadside where he remained until the following morning when he was taken to hospital. The witness later learnt that the deceased had passed on.

PW2, **John Mwangi Thairu** testified that on 12<sup>th</sup> October, 2008 at about 6.30am he was called by his mother, **Mary Njiru Githinji** and told that she

had received information from **Kamau Njoroge** (PW6) and **Gitau Wachira**, (PW7) that the deceased had been found lying on a path leading to the main road. He went to the scene and found the deceased conscious who then told him that he had been assaulted by the 1<sup>st</sup> accused. He called for a motor vehicle and they took the deceased to Kabuta police post where they reported the matter. Subsequently they were issued with a note to take the deceased to Murang'a District Hospital. However he passed on as he underwent treatment. Later he gave the names of the accused to the police and they were arrested.

Cross-examined by **Mr. Muchiri**, learned counsel for the accused, he stated that he never found the accused at the scene. There were no blood stains at the scene either. The deceased mentioned the name of the 1<sup>st</sup> accused.

PW3 was **Teresiah Wanjiru**. She is the wife of PW2. The deceased was her brother in law as he was a cousin to his husband. He followed her husband to the scene and saw the deceased on the ground unconscious. She screamed and upon talking to the deceased, he said that he had been beaten for nothing. Later a vehicle came by and the deceased was taken to hospital. At about 3p.m on the same day, the deceased passed on.

Cross-examined by **Mr. Muchiri**, she stated that she did not notice any injuries on the deceased but his clothes were soiled with sand. The deceased stated that he had been beaten for nothing.

**Mary Wanjiru Githinji** was PW4. She testified that on 12<sup>th</sup> October, 2008 between 6 and 7 a.m, she received information from PW6 and PW7 that the deceased had been badly beaten and was lying by the roadside. She rushed to the scene together with her son (PW2). They found the deceased in tatters and was bleeding from hands, head, legs and chest. He was unconscious. He murmured though that he had been beaten like a child by the 1<sup>st</sup> accused. They called for a motor vehicle and took the deceased to hospital via Kabuta police post. However the deceased passed on at about 4p.m on the same day. The deceased was her nephew.

PW5 was **Dr. Chris Kimathi Mugambi**. He conducted the post mortem on the body of the deceased. Upon examination, he formed the opinion that the cause of death was as a result of severe head injury, subdural haematoma with multiple injuries. On being cross-examined he stated that the injuries were caused by a blunt object.

PW6, **Duncan Kamau Njoro** testified that on 12<sup>th</sup> October, 2008 at about 6a.m he was on his way from place of work in the company of **Clement Gitau** (PW7) whilst riding bicycles. They came across a person whom they knew as the deceased lying besides the road. He had been beaten on the head, hands and legs. He was unconscious. They decided to inform his aunt (PW4). There were homes nearby at the place they found the deceased. The homes belonged to the 1<sup>st</sup> accused. PW7 **Clement Gitau** testified along the

same lines as the PW6.

PW8, **John Njagi Njiru** testified that he was a businessman operating a bar, butchery and a shop at Kimathi in Murang'a District. On 11<sup>th</sup> October, 2008 at about 2p.m whilst in his bar, the deceased walked in and started drinking. At about 11 p.m he left. The following morning he was informed by PW4 that the deceased had been taken to hospital. In the evening he received information that the deceased had passed on. On 15<sup>th</sup> October, 2008 at about 7 a.m, he was sitted outside his business premises when the 2<sup>nd</sup> accused alighted from a motor vehicle from Murang'a and came and sat with him. He then started talking about the death of the deceased. The witness then arrested him and took him to Kabuta police post.

Cross-examined by **Mr. Muchiri**, the witness responded that PW4 did not tell him why the deceased had been taken to hospital. The deceased had taken 4 bottles of Cane Extra and left at about 11 p.m.

**Dr. Samuel Owino Ong'ang'a**, Consultant Psychiatrist (PW9) conducted mental evaluation of both accused. He formed the opinion that both were fit to plead and face trial.

PW10 **Dabton Kihunyu Maina**, a brother of the deceased identified the body to PW5 for purposes of post mortem.

PW11, **Elias Kamau** tesitified that on 5<sup>th</sup> October, 2008 whilst in a plot at Kabuta, the 2<sup>nd</sup> accused came and bragged to him that he could knife someone

the way he had done with the deceased. The witness was in the company of PW8. It was then that they arrested the 2<sup>nd</sup> accused and took him to Kabuta police post. Cross-examined he stated that they arrested him because of what he had said. They did not however see the knife.

**PC Kennedy Mungai** testified as PW12. His evidence was that on 12<sup>th</sup> October, 2008 whilst on duty at kabuta police post, he received information that the deceased had been assaulted and later passed on. The following day they proceeded to Kabuta village and commenced investigations in the company of **Ag I.P. Akinyi**. According to their investigation, the deceased had entered 1<sup>st</sup> accused house for shelter as it was raining. The wife of 1<sup>st</sup> accused demanded to know why he had entered her house. The deceased failed to explain but tried to force himself into the bedroom. She then asked her son PW1 to call his father. When the 1<sup>st</sup> accused came, he tried to force the deceased out of the house, but he resisted. The 1<sup>st</sup> accused then sought the assistance of 2<sup>nd</sup> accused. The deceased still resisted from getting out of the house. Infact he threatened the 2<sup>nd</sup> accused with a panga. The deceased was eventually forcefully removed from the house having been beaten, was carried and dumped outside the accuseds' home. Later he passed on. The two accused were arrested and charged.

Cross-examined by **Muchiri**, he responded that the deceased had

threatened the accused with a panga in their house. In the course of their investigations they came across information that the deceased had in fact grabbed the 2<sup>nd</sup> accused and wrestled him to the ground. The deceased had pushed the door open. The deceased had actually forced himself into the house and when asked to leave he had resisted. PW13 **Ag.I.P. Lensah Akinyi** testified along the same lines as PW12 though she was the investigating officer.

With that the prosecution closed their case. In a ruling delivered on 29<sup>th</sup> September, 2009 I formed the opinion that the accused had a case to answer and proceeded to put them on their defence. Both elected to give sworn statements of defence but called no other witnesses.

1<sup>st</sup> accused testified that on 11<sup>th</sup> October, 2008 at night whilst sleeping in his house, his son, **Festus Mwangi** PW1 came and told him that a stranger had entered their house and had refused to get out. He took a stick and went to the house. Enroute he called for support from 2<sup>nd</sup> accused. The two found the deceased in the house. They ordered him out but he refused to comply. He was armed with a panga. The deceased then attacked them. Using his stick he hit the deceased and he dropped the panga. They tried to push him out of the house but he attacked the 2<sup>nd</sup> accused by suffocating him. The accused hit him again and he ran out of the house towards the road. Thereafter he did not know what became of the deceased.

Cross-examined by **Mr. Orinda**, learned Senior Principal State Counsel, he responded that he surrendered to the police on hearing that the deceased had passed on. The deceased had ran away in darkness.

2<sup>nd</sup> accused testified on oath that on 11<sup>th</sup> October, 2008 whilst asleep in his house at about midnight, he was called by PW1 who told him that he was required by his uncle, 1<sup>st</sup> accused. He accompanied PW1 to the house where he found 1<sup>st</sup> accused struggling with the deceased. The deceased was resisting to leave 1<sup>st</sup> accused's house. When he intervened, the deceased attacked him and attempted to suffocate him. 1<sup>st</sup> accused hit him twice. He released him and thereafter he fled. He never saw him again.

Cross-examined he responded that he found 1<sup>st</sup> accused who is his uncle struggling with the deceased. He was arrested in the plot. This was after the death of the deceased. They had reported the incident to the police earlier in the day. That marked the close of the defence.

In his final submissions, **Mr. Muchiri** stated that no malice aforethought was established. The events clearly showed that the accused had not planned to kill the deceased. In the premises the accused should never have been charged with murder, perhaps manslaughter.

In response, **Mr. Orinda** conceded that this was more of a case of manslaughter than murder. On this account he agreed with the submissions of the learned counsel for the accused.

I have carefully read, evaluated and considered the evidence tendered by both the prosecution and the defence, respective oral submissions as well as the law. I have no doubt at all in my mind that the accused ought not to have faced a charge of murder had the police carefully looked at the events preceding the death of the deceased. The evidence on record does not show an element of malice aforethought on the part of the accused. Yet for a charge for murder to hold, the prosecution must prove by cogent evidence, the death of the deceased, that the said death must have been caused by the accused and that it was as a result of malice aforethought. Of course malice aforethought can be inferred from the seriousness of the injuries inflicted on the deceased that led to his death. In the circumstances of this case, the only eye witness to the events culminating in the death of the deceased was a 13 year old son of the 1<sup>st</sup> accused. His evidence and which lend credence to the evidence of the accused is that the deceased went to the house of 1<sup>st</sup> accused and forced himself into it. He refused to leave when requested to by 1<sup>st</sup> accused's wife. He even made for the bedroom. The accused were called and when they asked the deceased to leave he challenged them to a fight. Infact he launched at 1<sup>st</sup> accused with a panga. He also wrestled the 2<sup>nd</sup> accused to the ground as he suffocated him. A fight thereafter ensued leading to the fatal injuries inflicted on the deceased. The events aforesaid which were also confirmed by PW12 and PW13 in the course of their investigations clearly show that the accused had

not planned on killing the deceased. There was therefore no malice aforethought. The injuries sustained by the deceased were as a result of the fight he engaged himself in with the accused which was spontaneous. It cannot therefore be said that they were inflicted with intent to finish off the deceased. It should not also escape our attention that these events were occurring in the dead of night. In my view the deceased was the author of his misfortune. Had he complied with the request of the 1<sup>st</sup> accused's wife and or accuseds and left the house, he could as well be alive today. One could not have expected the accused to leave alone a stranger who had invaded their house, was spoiling for a fight and had even attempted to head for the bedroom. To my mind this was provocation of the extreme kind. What the accused did is what any reasonable person confronted with similar situation would do. They cannot therefore be blamed for the death of the deceased on the ground that they committed jointly murder.

There is no doubt at all however that the deceased died from the injuries inflicted on him by the accused during the fight. Thus this was more of a case of manslaughter than murder. The accused both admit having had an encounter with the deceased. They fought. Manslaughter is about accidental or unintentional killing. The accused did not intend to kill the deceased. Rather it was purely accidental that the deceased passed on following injuries inflicted on him during the fight with the accused.

Considering all the foregoing, I find that the charge of murder cannot hold against the accused. Accordingly I acquit them of the same. However I am satisfied on the evidence on record that the same supports overwhelmingly, the offence manslaughter contrary to section 202 as read together with section 205 of the penal code. Accordingly, I convict each of the accused for the said offence.

Before passing sentence, I will invite the learned state counsel to provide previous records of the accused if any and for counsel for the accused to mitigate.

*Dated and delivered at Nyeri this 25<sup>th</sup> day of January, 2010.*

**M.S.A. MAKHANDIA**  
**JUDGE**