



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 42 of 2006**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

- 1. JOSEPH NDIRANGU NUNGARI .....1<sup>ST</sup> ACCUSED**
- 2. STEPHEN IRUNGU NUNGARI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

JOSEPH NDIRANGU NUNGARI and STEPHEN IRUNGU NUNGARI are brothers. Both of them were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The incident giving rise to the charge took place on 19<sup>th</sup> October, 2005. As at that date, Stephen Irungu Nungari, the 2<sup>nd</sup> accused, was said to have been 17 years old.

During the trial, the prosecution called nine witnesses. Thereafter, each of the accused persons gave unsworn testimonies in their respective defences. Having now given due consideration to all the evidence on record, together with all the submissions made before me, I do now hereby set out my judgment. As is required of a trial court, I will evaluate all the evidence on record.

PW 1, JAMES MURUIKI MBUTHIA, was a young man aged 18. He used to attend tuition at the Thika Stadium, alongside other youngsters who were called the "Moyo Children."

On the material day, the youngsters had attended tuition. Amongst them were PW 1, James Wainaina Ngugi (who is the deceased in this case); Ali Mohamed; and Daudi Kanyeri.

Whilst on their way from the stadium, PW 1 and his friends met the 1<sup>st</sup> accused at the Kandara Stage.

According to PW 1, the 1<sup>st</sup> accused, together with another person, were beating up Mzee Kuria. PW 1 and his friends asked those two people why they were beating up the old man. In response, the other person, who was with the 1<sup>st</sup> accused, held PW 1 and threw him down.

That person then hit the deceased, and also drew a knife. PW 1 and his friends took-off. But even as they ran away, the 1<sup>st</sup> accused and his partner chased after the deceased.

Later, PW 1 learnt that the deceased had been stabbed, and that he was lying down near the Sky Motel.

Although PW 1 and his friends went to the place where the deceased was said to have been lying down, they found out that he had already been moved to the police station.

During cross-examination, PW 1 explained that the deceased was a goal-keeper, in their football team and he had been

injured on his foot. Consequently, the deceased was using a stick to support himself whilst walking. He was not therefore able to move fast.

PW 1 also said that it was the 2<sup>nd</sup> accused who drew out a knife. And he explained that the knife was one that was used for cutting pineapples. He knew that fact because he knew that the 2<sup>nd</sup> accused used to sell pineapples. Indeed, it is because he and his friends knew exactly where the 2<sup>nd</sup> accused used to sell pineapples, that the police told them to go and arrest the person who had stabbed the deceased.

PW 1 and his friends then proceeded to arrest the 2<sup>nd</sup> accused, and they then took him to the police station.

PW 2, SIMON KURIA KIMANI, is also known as "Wa-robi" or "Baba Robert."

He testified that he was a friend of the 1<sup>st</sup> accused. Both he and the 1<sup>st</sup> accused used to operate their respective hand-carts in the same place.

On the material day, 19<sup>th</sup> October, 2005, both PW 2 and the 1<sup>st</sup> accused, Ndirangu, were at their place of work. A customer then called out to PW 2, but the 1<sup>st</sup> accused responded quickly, by going over to the said customer, who needed someone to carry his bananas.

The customer told the 1<sup>st</sup> accused that it is PW 2 whom he wished to assign the task. That did not please the 1<sup>st</sup> accused, and he expressed his displeasure by insulting PW 2.

When PW 2 had been insulted three times, he got angry and boxed the 1<sup>st</sup> accused on the cheek. The said accused got very angry and threatened to teach PW 2 a lesson.

According to PW 2, he went ahead to deliver the customer's goods, whilst the 1<sup>st</sup> accused rushed to the 2<sup>nd</sup> accused, to enlist assistance.

By the time PW 2 had reached the place where he was to deliver the customer's goods, but before he could off-load the goods, the two accused persons arrived there. The 1<sup>st</sup> accused had a large stone in his hands, and he invited PW 2 to "the show".

When PW 2 pleaded for mercy, the 2<sup>nd</sup> accused held the 1<sup>st</sup> accused, telling him not to fight.

It was the evidence of PW 2 that many members of the public gathered at the scene. He said that their number exceeded ten. He also said that some street boys who knew him, also came to the scene.

According to PW 2, one of the street boys who came to the scene was James, the deceased.

When the deceased asked PW 2 what was happening, PW 2 told him that it was finished.

But the 1<sup>st</sup> accused is said to have challenged the deceased, asking;

*"Well- what could you have done?"*

At that point, PW 2 took his hand-cart, and returned to his station. But after about 10 minutes Mama Wambui told PW 2 that the people he had left, had stabbed a young man.

PW 2 went to the place where he had earlier been encountered by the accused, but he found that the deceased had already been taken away to hospital. PW 2 then went back to his hand-cart.

In his assessment of the 1<sup>st</sup> accused, the latter was very worried and unsettled. PW 2 took him to the police station because PW 2 thought that it was the 1<sup>st</sup> accused who had stabbed the deceased.

Soon after PW 2 reached the police station, with the 1<sup>st</sup> accused, the street boys arrived at the station, with the 2<sup>nd</sup> accused.

During cross-examination, PW 2 said that the 1<sup>st</sup> accused was not drunk at the material time.

PW 3, MARION MUTHONI NGANGA was a business lady who sold milk. On the material day, she was at the Sky Motel Stage, Thika, when she heard people saying;

*“Shika Yeye! Shika Yeye!”*

She then saw the 1<sup>st</sup> accused holding another person. Behind the 1<sup>st</sup> accused, PW 3 saw another man, who was holding a knife. The man with the knife stabbed the person whom the 1<sup>st</sup> accused was holding; and the person fell down in the corridor of Sky Motel.

The 1<sup>st</sup> accused and the person with the knife then ran away, carrying the knife.

PW 3 then talked to the victim of the stabbing, who confirmed that he had been stabbed by the 1<sup>st</sup> accused together with his accomplice. The victim was then rushed to hospital.

It was the testimony of PW 3 that she did see who stabbed the deceased. It was also her testimony that the deceased fell just “in front of my feet”.

PW 4, DAVID NGANGA WAINAINA, is the father to the deceased. He is a farmer.

On 19<sup>th</sup> October, 2005, at about 12.00 noon, PW 4 received a phone-call, informing him that his son, James, had been stabbed. The person who phoned him is Amos, who died before the trial herein.

Amos told PW 4 that James was rushed to the Thika District Hospital. PW 4 rushed to the hospital, where he found that his son was at the theatre. PW 4 was with his wife together with some friends and some teachers of James.

After some time, PW 4 was informed that his son, James, had died.

PW 4, therefore, never got the opportunity of talking to his son before the son died.

Later, PW 4 identified the body, for purposes of post mortem.

PW 5, DR. JOSEPH NDUNGU, is a pathologist. He conducted the post mortem examination on the body of JAMES WAINAINA NGUGI, on 26<sup>th</sup> October 2005.

The body had a stab wound which extended through the abdominal wall, into the abdomen.

In his professional opinion, the cause of death was the perforated abdominal organs, secondary to sharp object trauma to the abdomen. During cross-examination, PW 5 said that there was only one stab wound, on the left upper part of the abdomen; just below the chest.

PW 6, STEPHEN MBURU, is also referred to as “Wamugoiri”.

It was his evidence that on the material day, he was in Thika town, where he had gone to sell bottle-tops. As he was near

the roundabout, he heard;

*“Shika huyo, Shika huyo.”*

He turned around and saw three people. The first person was being held on the shoulders, by the second person, whilst the third person stabbed the first person. He said that he knew one of the people to be a fruit seller, but he did not know his name.

During cross-examination, PW 6 said that it is the 2<sup>nd</sup> accused whom he had known for a short while.

He also said that he did not personally witness the stabbing incident. He had been about 20-30 metres from the scene when it happened.

PW 7, PC JAMES WACHIRA, was a police officer who was attached to the Thika Police Station.

On 19<sup>th</sup> October 2005, he was on duty at the police station when members of the public arrived there, with two suspects, who had allegedly stabbed another person. The two suspects were the accused persons herein.

PW 7 and PC Nyandiga interrogated the accused persons, whereupon the 2<sup>nd</sup> accused agreed to take the police to the place where they had kept the knife used in the stabbing.

The 2<sup>nd</sup> accused took PW 7 and PC Nyandiga to the Thika Bus Stage, which is located 500 metres from the police station.

The 2<sup>nd</sup> accused showed the police where the knife was hidden, under an old sack. The police took possession of the knife and they later handed it over to the Investigating Officer.

At the time the knife was recovered, it had blood stains near the tip.

PW 8, PC JAMES KARUGU, was a police officer attached to the Thika Police Station, Crime Branch.

At about 3.00p.m., on 19<sup>th</sup> October 2005, he was in his office at the station when two suspects were brought there. PW 8 was told that the suspects had stabbed James Wainaina, the deceased in this case.

PW 8 was also told that the victim had been taken to the Thika District Hospital.

Later, on the same day, PW 8 was informed that the victim had passed away. PW 8 then commenced investigations.

On 26<sup>th</sup> October 2005, PW 8 attended the post mortem examination at the City Mortuary. PW 8 also took the accused persons to Thika Hospital, for age assessment.

As a result of his investigations, PW 8 concluded that it was the 2<sup>nd</sup> accused who stabbed the deceased with a knife, when he found the deceased fighting with the 1<sup>st</sup> accused.

When PW 8 was given the knife by PW 7, he noted that the knife had blood stains on the tip.

During cross-examination PW 8 said that he did not take the knife to the Government Chemist for the analysis of the blood on it.

And whilst he admitted that there were many knives which had wooden handles such as the one on the knife before the court, PW 8 said that the knife before court was the same one which he received from PW 7. And after receiving it, PW 8 kept the knife as an exhibit.

After PW 8 testified, the accused persons prosecuted a constitutional application, through which they sought the termination of the trial. That application was premised on the contention that the constitutional rights of the accused had been infringed, when they were held in custody for more than 14 days before they were first brought to court.

The application was dismissed, and the court ordered that the trial should proceed to completion.

PW 9, DR. JOHN IRUNGU KAMAU, was a medical doctor, attached to the Thika District Hospital. He carried out an age assessment on the 2<sup>nd</sup> accused, and determined that the said accused was under 18 years of age.

PW 9 also examined the 1<sup>st</sup> accused, whom he ascertained to be over 18 years of age.

During cross-examination, PW 9 explained that a more precise determination of the age would have required a radiological examination.

After PW 9 testified, the prosecution closed its case. And when the trial Judge had given due consideration to the evidence adduced, he placed the accused persons on their defence.

Each of the accused persons opted to give unsworn defences.

DW 1, JOSEPH NDIRANGU NUNGARI, confirmed that at about 12.00 noon, on 16<sup>th</sup> October 2005, he was at his place of work. He used to work as a hand-cart "driver", who ferried luggage for customers.

Although DW 1 gave the date as 16<sup>th</sup> October 2005, it is noteworthy that prior to the stage when he was defending himself, he had never raised any issue about the date which had all along been cited as 19<sup>th</sup> October 2005.

To my mind, the reference to the date 16<sup>th</sup> October 2005 was an inadvertent error, on the part of DW 1. I shall therefore treat it as being a non-issue. The reason for my said decision is that, apart from the date, both DW 1 and DW 2 largely corroborated the evidence tendered by the prosecution. Furthermore, DW 2 even confirmed that the events in issue took place on 19<sup>th</sup> October, 2005.

DW 1 confirmed that both he and PW 2 used to pull their respective hand-carts. On the day in question, a customer called out to PW 2, but DW 1 thought that it is he who had been called.

As a consequence, DW 1 and PW 2 fought over the customer's luggage. In the course of their fight, PW 2 slapped DW 1, and there developed a fight between the two.

DW 1 attributed his actions to his being drunk.

DW 1 also recalled that DW 2 appeared from within the crowd, and asked him what was wrong.

Eventually, the fight stopped and DW 1 as well as PW 2 went their separate ways. But soon after that, DW 1 saw five young men talking to PW 2. Those five young men are said to have followed DW 2, as DW 1 walked in the opposite direction.

Later, DW 1 heard people saying;

*"Shika! Shika!"*

But DW 1 says that he did not stop, nor go back to the place where he had fought with PW 2. Instead, DW 1 went to the place where he used to wait for customers.

DW 2, STEPHEN IRUNGU NUNGARI, told the court that he used to sell pineapples at the Thika Bus Stage.

On the material day, DW 2 was at his place of business when he noticed a crowd forming. As he approached the crowd, which was about 30 metres from his place of business, DW 2 noticed DW 1, in the crowd. DW 2 also heard DW 1 telling “the old man”,

*“Nigonge Tena.”*

DW 2 noted that DW 1 was fighting with the old man. And in the assessment of DW 2, his brother (DW 1) was drunk. Therefore DW 2 asked “the old man” to explain to him what had happened.

It was the evidence of DW 2 that PW 2 told him exactly what that witness said during his testimony before his court. DW 2 even confirmed that the fight between PW 2 and DW 1 had ended.

That notwithstanding, some five young men arrived on the scene, and insisted on asking the two accused if the accused knew who they were.

According to DW 2, he, (DW 2) and PW 2 then each left for his place of work.

However, at about 3.00 p.m. about ten men came up to DW 2 and they beat him up. They searched his stall, where he used to sell pineapples, and took away the knife which he was using when peeling pineapples.

Having perused the evidence on record, it is evident that there is a lot of convergence between the prosecution and the defence.

In his submissions, Mr. Odiwuor, the learned advocate for the accused, said that the 1<sup>st</sup> accused was intoxicated, and that he therefore had a diminished control over his temperament.

He also pointed out that when the deceased and his four young friends confronted the accused, the deceased had a stick. In those circumstances, the accused are said to have believed that the deceased was ready to join in the fight between the two accused and PW 2.

But the accused then changed their submissions, when their attention was drawn to the fact that by the time the five young boys, (including the deceased), arrived on the scene, the fight between PW 2 and the accused had ended.

The new line of defence was that the accused were provoked by PW 1 and the deceased. But the accused did not give any particulars of the alleged provocation.

If anything, the accused persons seem to have changed tack yet again, when their advocate submitted that the presence of the deceased at the scene was purely coincidental.

The accused contended that the fight between them and the deceased was not pre-meditated.

In their view, the accused's emotions were “built-up”, because they were being confronted a second time. Therefore, the accused say that they did not have a chance to re-compose their temperaments.

It was the submission of the accused that they cannot be said to have had malice aforethought. In effect, this court was told that if the accused were guilty, then they could only be said to be guilty of manslaughter; but not murder.

To my mind, the submissions by the accused are not in consonance with their respective defences. I say so because in the defences, they appear to be denying any involvement in the killing of the deceased, yet in the submissions, their advocate appears to be saying that although his clients were involved, they had no control over their temperament.

But in law, the accused do not have any obligation to prove their defences. Indeed, they could have chosen to say absolutely nothing; And if the prosecution had not proved its case against them or either of them, beyond any reasonable doubt, they would be acquitted. Therefore, regardless of the inconsistency, if any, within the defences or as between the defences and the submissions, this court must first ask itself whether or not the prosecution discharged the onus of proof.

That the two accused persons were at the scene of crime was proved. PW 1, PW 2 and PW 3 testified that the accused were at the scene. And both accused confirmed that they were at the scene.

PW 2, testified that he disagreed with the 1<sup>st</sup> accused, who was his friend. That fact was conceded by the 1<sup>st</sup> accused.

PW 2 also testified that the 1<sup>st</sup> accused sought the help of his brother, the 2<sup>nd</sup> accused. However, the 1<sup>st</sup> accused testified that the 2<sup>nd</sup> accused appeared on the scene, as a matter of share coincidence. In other words, it is not the 1<sup>st</sup> accused who sought the help of the co-accused.

Regardless of whether or not the 2<sup>nd</sup> accused only went to the scene when he was called upon by the 1<sup>st</sup> accused, the proven fact is that the two accused were both at the scene.

It is also the evidence of the prosecution that PW 1, the deceased and three other boys arrived at the scene, after the disagreement or fight between PW 2 and the 1<sup>st</sup> accused had ended. That fact was also conceded by both accused, and is therefore taken as having been proved beyond any reasonable doubt.

PW 3 testified that it was the 2<sup>nd</sup> accused who stabbed the deceased with a knife. After stabbing the deceased, the 2<sup>nd</sup> accused is said to have gone away with the knife.

Although the 2<sup>nd</sup> accused denied stabbing the deceased, he confirmed, in his defence, that he had a knife which he used in peeling the pineapples that he was selling.

The 2<sup>nd</sup> accused said that it is that knife which was recovered from his stall. PW 7 is one of those who recovered the knife.

At the time when PW 7 and the others recovered the knife, they say that it had blood on its tip. But the 2<sup>nd</sup> accused neither denied the presence of blood on the tip of the knife, nor did he explain how the knife which was ordinarily used to peel pineapples came to have the blood on it.

Having given due consideration to all the evidence on record, I have come to the following conclusions;

- (i) The deceased, James Wainaina Ngugi died due to perforated organs secondary to the stab wound to his abdomen.
- (ii) That PW 3 positively identified the 1<sup>st</sup> accused as the person who held the deceased, whilst the 2<sup>nd</sup> accused inflicted the fatal stab. After stabbing the deceased, the 2<sup>nd</sup> accused ran away with the knife he had used.
- (iii) The knife was later recovered at the stall where the 2<sup>nd</sup> accused was ordinarily using it to peel the pineapples for sale.
- (iv) The deceased had a stick at the time that he and his friends confronted the accused persons. However, as PW 1 explained, the reason for the deceased having the stick

was to support himself whilst walking, because the deceased had been injured during a football match. Indeed, the two accused caught up with the deceased because the deceased could not run away as fast as his friends did.

- (v) As the deceased and his friends were running away from the two accused, they cannot be said to have invited upon themselves, the attack which was visited on the deceased.
- (vi) Although the 1<sup>st</sup> accused asserted that he was drunk, that was disproved by his ability to run fast enough to be able to not only catch-up with the deceased, but to also thereafter hold onto the deceased as the 2<sup>nd</sup> accused stabbed him. In other words, I do believe, as PW 1 said in his assessment, that the 1<sup>st</sup> accused was not drunk when the incident occurred.
- (vii) By jointly pursuing the deceased, catching-up with him; holding him and stabbing him with such ferocity as to have perforated his organs, the accused persons intended to either kill the deceased or to, at least, occasion him grievous harm. Therefore, the accused had the requisite *mens rea*.
- (viii) In arriving at that conclusion, I have taken into account the defences, but I find myself unable to believe the same, as the evidence adduced by the prosecution simply overwhelms the said defences.

The incident occurred in broad day-light, as confirmed by both the prosecution and the accused. The persons who saw it happen were not strangers to the accused, and they (PW 1, PW2, and PW 3) were all in close proximity during the happening of one or more aspects of the whole episode. Of course, it is true that PW 3 was the only person who was an eye-witness to the actual stabbing.

But I am satisfied that there was no possibility of error in both her identification of the accused persons, as well as in the fact that she saw the 2<sup>nd</sup> accused stab the deceased. I say so because the incident happened so near her, that the deceased fell right at her feet.

In the result, I find both accused guilty of the offence of murder; and I do hereby convict them accordingly.

Dated, Signed and Delivered at Nairobi, this 16<sup>th</sup> day of February, 2010.

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FRED A. OCHIENG  
JUDGE