



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

**Criminal Case 14 of 2009**

**REPUBLIC .....PROSECUTOR  
VERSUS**

**LUKA ING'ORI KITHINJI ..... 1<sup>ST</sup> ACCUSED  
MARTIN MUREITHI KARIUKI ..... 2<sup>ND</sup> ACCUSED  
JOHN GITONGA MWANGI ..... 3<sup>RD</sup> ACCUSED  
DANIEL KIMANI NDERITU ..... 4<sup>TH</sup> ACCUSED  
JOHN GITONGA MAMBO ..... 5<sup>TH</sup> ACCUSED  
MICHAEL MUTHEE NYARWAL ..... 6<sup>TH</sup> ACCUSED**

**JUDGMENT**

The 6 accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They are charged that on 19<sup>th</sup> day of January 2009 at Mathagi village Antubamwitu Location, Ontulili Division North Imenti District within Eastern province murdered David Nguhi Mwangi. This case begun before Justice Ouko who heard the evidence of PW1 to PW6. I received the evidence of PW7 and PW8, that is, the doctor and the investigating officer. The case has been fast tracked because some of the accused persons are minors. The prosecution's case is that the deceased was attacked by the accused who were disciplining him for having been rude to either some of them or his parents. The evidence was not very clear as to whom the deceased was said to have been rude. Accused number 3 to 6 were circumcised together with the deceased in hospital. The incident relating to this case begun on 19<sup>th</sup> January 2009. The four accused, that is, accused number 3 to 6 went to the deceased house which was separate from his parent's house without the knowledge of the deceased parents. According to PW1, the four accused persons entered the deceased house then left at about 12.30pm. The deceased told PW1 that the four accused persons wanted him to go with them for a walk. He declined. On refusing to go with them, the four accused persons left him. PW1 who is the mother of the deceased said that the deceased was resting in his house. At 5.30pm of that day, the four accused persons returned. They went to the deceased house and they asked the deceased to accompany them but he declined. PW1 heard the deceased screaming. She said that the four accused attacked the deceased by kicking him. The deceased called out to his father, PW2. PW2 inquired what the accused were doing with the deceased. They did not respond and he therefore ordered them to leave the deceased alone. They left. On the same day, at 8pm, the 2<sup>nd</sup> accused went to PW1's house. It was said that

the 2<sup>nd</sup> accused had been given the role of being a guardian to the deceased during his circumcision period. The 2<sup>nd</sup> accused said to PW1 and 2 that the boys had complained to him that they had been insulted, chased away and threatened. PW1 and 2 requested him to confirm who the boys were complaining had done that to them. 2<sup>nd</sup> accused left the house. PW1 later in the evening took dinner to the deceased at his house. She found that he was not inside the house and his door had been bolted from the outside. PW1 called to her husband PW2 and another man called Kirimi, PW3, and they went looking for the deceased. They went to the 2<sup>nd</sup> accused house. They were not there but the mother of the 2<sup>nd</sup> accused told them that he had left in the company of some boys that had been circumcised with him. The mother of the 2<sup>nd</sup> accused gave them his telephone number. From there, they next went to the 4<sup>th</sup> accused house. He too was not at home. The 4<sup>th</sup> accused parents telephoned the 2<sup>nd</sup> accused. He confirmed that he was with the deceased and his co-accused and he was asked to take the deceased to the 4<sup>th</sup> accused parent's home. One hour later, they arrived, that is, accused 1 to 6 in the company of the deceased. That was 11pm. There was a hurricane lamp on the table. PW1 noted that the deceased was limping. The deceased told her that he was feeling pain all over the body in the hand and inside the body. As they left to go home with the deceased, the deceased fell down. He was unable to walk. He was carried home by his father, PW2 and PW3. PW1 said in evidence that the deceased had worked for the 4<sup>th</sup> accused father, Nderitu, for one year and was dismissed without pay. The following day, PW1 said that she went to the 2<sup>nd</sup> accused home to ask him to see the deceased. She also reported to the assistant chief. The deceased was taken to hospital 3 days after the incident but died on 27<sup>th</sup> January 2009. PW1 explained that they had not taken him to hospital for 3 days because of lack of funds. PW2 stated that on 19<sup>th</sup> January 2009 he was at home when the four accused persons went to see the deceased at home at 12.30pm. They asked the deceased to accompany them but he refused. At 4pm, they returned home with 3 other boys whom he could not identify. They entered the deceased house and requested the deceased to go for a walk with them. He heard the deceased scream and chased them away. The deceased told him that they had attacked him with shoes. Later, they returned in the company of the 2<sup>nd</sup> accused. 3 boys went to the deceased house whilst the 2<sup>nd</sup> accused went into PW2's house. He too confirmed that the 2<sup>nd</sup> accused was the guardian of the deceased. He also stated that the 2<sup>nd</sup> accused complained that the boys had been insulted and chased away. The 2<sup>nd</sup> accused left PW2's house and as they went they left with the deceased. At 9.30pm, PW1 realized that the deceased was not in his house. It was at that time that they went looking for the deceased. He too confirmed how they looked for the 2<sup>nd</sup> accused at his home and did not find him and how they eventually went to the 4<sup>th</sup> accused parent's home. He was present when the 2<sup>nd</sup> accused was telephoned by Nderitu and the 2<sup>nd</sup> accused confirmed that he and his co-accused were in the company of the deceased. When those accused arrived at the 4<sup>th</sup> accused parent's home, PW2 noted that the deceased was limping. The deceased complained to him that he had been viciously attacked. He complained of pain all over the body, the leg and his

hand. As they went home, the deceased collapsed. He was carried home. The deceased complained that he had been attacked by the accused. He too said that they were unable to take the deceased to hospital immediately because of lack of money. PW3 accompanied PW1 and 2 to look for the deceased. He was there when the deceased came into the fourth accused father's home in the company of all the accused persons. The deceased seemed to be well according to him. The deceased spoke in Kikuyu which this witness did not understand. He noticed that the deceased as he left the 4<sup>th</sup> accused home lost balance and fell down. The deceased said he was unable to walk and was carried by PW2. The assistant chief was PW4 who confirmed having been informed by PW2 that the deceased had been attacked by 8 boys whom he named who included the accused in this case. He summoned those boys and their parents and the deceased's parents to his office. The deceased parents did not attend the meeting. PW5 is the sub area who on 21<sup>st</sup> January 2009 received a report from PW1 that her son, the deceased, had been beaten. He accompanied her to the deceased's house. The deceased told him that his leg had been injured. This witness then said:-

***“I did not ask the deceased many questions because he was sick.”***

PW6 was the brother of the deceased. He said that on 20<sup>th</sup> January 2009 at 8am he was informed that the deceased had been assaulted. The deceased had told him the previous day that he had been assaulted by some boys whom he had been circumcised with. Deceased had told this witness that the boys wanted him to go for a walk with him but he declined. They then beat him. The deceased complained to this witness of pain in the leg and all over the body. According to this witness, the deceased could not walk. This witness said that the deceased on 19<sup>th</sup> January 2009 was of good health. This witness had spent the whole day with the deceased but he later stated that by 5.30pm when he left the accused persons had been to see the deceased. The deceased had given him names of those who attacked him but this witness only repeated names of Kimani and Martin Murithi. PW7 was Doctor Macharia who carried out the post mortem. The report revealed that the deceased body had dislocation of the neck, bruising of the front part of the abdomen and there was internal bleeding in the chest. The cause of death was stated to be bleeding in the chest and dislocation of the neck, spine. That report showed that the deceased suffered bleeding on the front part of the abdomen, that is between the chest and the pelvis. The doctor then said:-

***“The exact place of bleeding was pleural place. That is, space between the lung and the ribs. In that space, normally has fluid for lubrication of the lungs to reduce friction between the lungs and the ribs. The lungs has blood vessels. The organ bleeding could be from the ribs, muscles of the ribs or lungs. The dislocation of the neck spine is at the back of the neck.”***

He then indicated that the bleeding and the spine dislocation caused the death. At the end of the prosecution's case, the court found that the accused had a case to answer. All the accused gave sworn testimony in their defence but did not call any witnesses. First accused described himself as a builder. The deceased and him worked together for his uncle who he called Joseph Nderitu. Joseph Nderitu is the father of the 4<sup>th</sup> accused. They lived in the same area. On 19<sup>th</sup> January 2009

at 8pm all his co-accused went to his house in the company of the deceased. He asked the deceased where he had been since he had not seen him for 3 days. The deceased said that he had not left home because he had been beaten by his father PW2. A short while later, the 2<sup>nd</sup> accused was called on telephone by Nderitu. He was requested by Nderitu to go with all the accused and the deceased to his home. Shortly afterwards, the 1<sup>st</sup> accused was called by Nderitu and requested to do likewise. This accused confirmed that all his co-accused and the deceased were in his house. On arriving at the home of Nderitu, this witness said that he inquired from PW2 why he had assaulted the deceased. PW2 asked him to keep quiet. PW1 then said that it was the accused persons who had attacked the deceased. First accused said that as PW1 and 2 and the deceased were leaving Nderitu's house, he saw PW2 slap the deceased. On being slapped, the deceased fell down. He confirmed that on 23<sup>rd</sup> January 2009, he together with his co-accused were summoned by the chief but because the deceased parents did not attend the meeting, they were told that they would be summoned another time. On 27<sup>th</sup> January 2009, the first accused went to the house of Nderitu to inquire about some job he was to do for him. At 10pm, the police came and arrested him and his co-accused. They were arrested, according to this accused, for having assaulted the deceased who had later died. On being cross examined on why his co-accused had gone to his house on 19<sup>th</sup> January 2009, he said that the 2<sup>nd</sup> accused had gone to find out about a job. That he had been the guardian of 4<sup>th</sup> accused when he was circumcised. The other accused said they were just visiting. On that day 19<sup>th</sup> of January, the deceased told him that he had been injured by his father on his leg. He stated that he had inquired from PW2 why he had attacked the deceased and that even other elderly people who were present at Nderitu's house had asked him the same question. He also said that he saw PW2 slap the deceased whilst they left the deceased house. The 2<sup>nd</sup> accused confirmed that he was a guarding to the deceased during circumcision. He confirmed that on 19<sup>th</sup> January 2009 while at his home at about 6 pm the 3<sup>rd</sup> to the 6<sup>th</sup> accused went to his home and told him that the deceased was in pain and wanted to see him. He went to the deceased in the company of those co-accused and on reaching the homestead, he entered the deceased parent's house whilst his co-accused went into the deceased house. He informed the parents of the deceased that the deceased was unwell. PW1 told him that the sickness of the deceased was not normal but was due to his quarrels with PW2 over the sale of a sheep. PW1 told him that the deceased had wanted to sell the sheep whilst his father did not. This accused person said that he saw at that point PW2 slap PW1. At that point, PW1 suggested that they collude with the 2<sup>nd</sup> accused to blame the assault on the 4<sup>th</sup> accused because the 4<sup>th</sup> accused father owed the accused his salary. The 2<sup>nd</sup> accused refused to be party to such fabrication. He then said that he got Vicks and Panadol from PW1 and took them to the deceased house. He applied the Vicks and gave him the medicine. This accused said that the deceased confirmed that he had been attacked by PW2 on 17<sup>th</sup> January 2009. The deceased was injured on his left leg which he said was painful and that he had pain in the chest. This accused noted that the leg was swollen. The deceased was happy to have

been visited by the 2<sup>nd</sup> accused but when they were leaving, he wanted to walk with him. They went together and they passed by the 1<sup>st</sup> accused house. The 2<sup>nd</sup> accused said that the purpose of visiting the 1<sup>st</sup> accused was to inquire about a job. They were served with tea at the 1<sup>st</sup> accused's house. This accused heard the deceased tell the 1<sup>st</sup> accused that he had been assaulted by his father and as a result of the assault he had been unable to leave his house for 3 days. He also confirmed that he was called by Nderitu whilst they were in the first accused house. He confirmed to Nderitu that he was in the company of all accused and the deceased. They went to Nderitu's house where they found PW1, 2, 3 and the 4<sup>th</sup> accused parents. They were told by Nderitu that PW2 had alleged that they had assaulted the deceased. They denied assaulting the deceased. The 2<sup>nd</sup> accused did hear the first accused ask PW2 why he had assaulted the deceased. He heard PW1 warn the first accused against saying that unless he wanted trouble. PW2, according to this accused person, said that the deceased was his son and that no one should interfere. As PW1, 2, 3 and the deceased left Nderitu's house, the 2<sup>nd</sup> accused who was behind them saw PW2 slap the deceased until he fell down. When PW2 tried to hit the deceased again, this accused restrained him. The following day, PW2 went to this accused house early in the morning. In the presence of the 2<sup>nd</sup> accused father, he asked the 2<sup>nd</sup> accused to agree to fabricate evidence to implicate the 4<sup>th</sup> accused as having assaulted the deceased. PW2 stated that if this accused refused to fabricate the evidence, he would have himself to blame of what would follow. 2<sup>nd</sup> accused declined to be party to such fabrication. The 2<sup>nd</sup> accused offered to take the deceased to hospital but PW2 declined the assistance. PW2 confessed to this accused that he did not know what to write in the P3 since he was the one who had assaulted the deceased. PW2 continued to insist that they fabricate the evidence that the 4<sup>th</sup> accused had assaulted the deceased at 12.30pm on 19<sup>th</sup> January 2009 and that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused further assaulted the deceased. The 3<sup>rd</sup> accused in his defence said that he was a friend of the deceased. On 19<sup>th</sup> January 2009 in the company of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused they visited the deceased. They found him sleeping. The deceased said he had been assaulted by his father. The deceased requested that they massage him with hot water on his wounds. It should be noted that the 2<sup>nd</sup> accused had said that he did not see any visible wounds on the deceased. PW1 boiled some water to use on the deceased. When they used it to clean the wound the deceased cried in pain. It was at that point that PW2 chased them away. They went to the 2<sup>nd</sup> accused house and told him that the deceased was unwell. They returned back to the deceased home with the 2<sup>nd</sup> accused and they entered the deceased house whilst the 2<sup>nd</sup> accused went to the deceased parent's house. The 2<sup>nd</sup> accused later came with Vicks and other medicine. As they left the deceased's home, the deceased went with them. This accused said that the deceased walked slowly not as he usually did but said to them that he wanted to take a walk since he had not left the house for 2 days. The deceased told them that he had been assaulted by his father. Later, a telephone call was made by Nderitu to the 2<sup>nd</sup> accused and they all went to Nderitu's house. On being cross examined, this accused said that they would frequently visit each other, that is,

the deceased and the accused. When they went to the deceased house on 19<sup>th</sup> January 2009, it was because they had not seen the deceased for 2 days. This accused person then said:-

***“I had not known why he (deceased) had not visited me for 2 days.”***

Later, this accused said:-

***“Before 19<sup>th</sup> January 2009, we had never visited the deceased. It was the deceased who used to come to our house and not us visiting him.”***

This accused also confirmed that they massaged the deceased with hot water which made him yell and this he attributed to the fact that the deceased felt pain. Accused number 4 said that at 6pm on 19<sup>th</sup> January 2009, in the company of the 3<sup>rd</sup>, 5 and 6<sup>th</sup> accused went to visit the deceased. They found the deceased sleeping. The deceased said he had not gone to see them because he had been assaulted by his father after a quarrel over a sheep. He also confirmed that the deceased asked for water to clean his wound which led to the deceased father asking them to leave. On being chased away, they went to the 2<sup>nd</sup> accused house to report that the deceased had injuries. They returned to the deceased home in the company of the 2<sup>nd</sup> accused. When they were leaving the deceased home, the deceased insisted on walking with them to the main road. Later, they were called to Nderitu's home. When they arrived at Nderitu's home, this accused said that the deceased on being asked said that no one had hurt him except the beating he had received from his father. Accused number 5 said that he too was a friend of the deceased and had visited the deceased on the material date in the company of 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused. When they visited the deceased, he complained of the pain in the leg and hand because of the assault by his father. He too confirmed that they were chased away by the deceased father when they tried to clean the deceased wound. They returned later with the 2<sup>nd</sup> accused. The deceased went with them when they left his home. On being cross examined, this accused said he got to know the deceased in May 2008. He then said:-

***“We were not visiting each other. On 19<sup>th</sup> January 2009, I went to visit since I heard he (deceased) was sick.”***

On further being cross examined, this accused denied that they had disciplined the deceased. The accused number 6 said that he knew the deceased since the year 2008. He also was in the company of the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused when they visited the deceased. They found the deceased sleeping and he had a swollen leg and painful chest. Deceased confirmed that he had been attacked by his father over a quarrel regarding a sheep. He said they were chased away when they cleaned the deceased with hot water. They returned with the 2<sup>nd</sup> accused who brought Vicks and applied it on the deceased. On being questioned he said that the deceased did not feel pain when Vicks was applied. They left with the deceased and went to first accused house. He also confirmed that they eventually went to the Nderitu's house. At the end of that evidence, counsel for the accused submitted that the prosecution had not proved its case on the required standard of proof. The accused in submissions pointed to what they said was contradiction in evidence between PW6 and PW1 and 2. PW1 and 2 talked of accused number 3, 4, 5 and 6 initially entering the deceased house. They heard the deceased

scream. This led to PW2 chasing the accused away. I find that PW6 did not wholly contradict the evidence of PW1 and 2. Contrary to what was stated by the accused in submission, PW6 stated that by the time he left the home at 5.30pm on 19<sup>th</sup> January 2009, the accused had come to see the deceased. The prosecution has proved that the deceased was together with the 3<sup>rd</sup> to the 6<sup>th</sup> accused persons at that initial stage. It is clear from the evidence that all the accused persons did not ordinarily visit the deceased but for some reason on 19<sup>th</sup> January 2009, the 3<sup>rd</sup> to 6<sup>th</sup> accused persons went to see the deceased. They gave contradictory reasons for seeing him. The 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused said that they went to see the deceased because they had not seen him for some days. The 6<sup>th</sup> accused said that he visited the deceased because he had heard that he had been unwell. When he was pushed to reveal his source of that information, he was unable to reveal. So we have those accused persons who ordinarily did not visit the deceased and had never been to his home yet all at the same time on 19<sup>th</sup> January 2009 visited him. During that visit, PW1 and 2 heard the deceased scream. Although 3<sup>rd</sup> to 6<sup>th</sup> accused said that the deceased screamed because he felt pain when they washed him with water, the 2<sup>nd</sup> accused said the deceased did not have a visible wound. The other question that begs an answer is why did the deceased not scream when Vicks was applied to him. Could it be that the deceased screamed because he was being attacked by accused No. 3 to 6. Deceased did tell PW6, his brother, that those accused persons had attacked him with shoes. Accused number 2 gave evidence of how PW2 tried to persuade him to agree to fabricate evidence against the 4<sup>th</sup> accused. It is noteworthy that the allegations against the 2<sup>nd</sup> accused whether to do with the allegation of him assaulting the deceased or to do with him persuading the 2<sup>nd</sup> accused to fabricate evidence was not put to PW2 when he gave evidence. Even when PW1 gave evidence, she was not questioned about the assault between the deceased and PW2. I find that the defence of the accused that the assault was by PW2 to be an afterthought otherwise it should have been put to the prosecution witnesses when they gave evidence. PW2 was not even asked about the P3 form that he sought advice from 2<sup>nd</sup> accused. It is anyway common knowledge that P3 forms are filled by police and the doctor. Even the allegation that at Nderitu's house PW2 confirmed assaulting the deceased was not put to PW3 who was present and who can be said to be an independent witness in this matter. PW3 confirmed that as they left the home of Nderitu, deceased lost balance and fell down. It is clear and there is no doubt that the deceased was very seriously attacked on 19<sup>th</sup> January 2009. Deceased told PW2 that he was vicariously attacked by the accused persons. Those injuries outlined in the post mortem were so severe that a person causing them must be taken to have known or ought to have known that the injuries would in the very least cause grievous harm and injury to the deceased. The deceased suffered serious injuries to the leg, hand and had a dislocation of the spine. The doctor found he died due to bleeding in the chest and due to the dislocation of the spine. The first accused in his defence said that he and the deceased used to visit each other. It should however be noted that the 3<sup>rd</sup> accused in his defence did say that they never visited the deceased apart from 19<sup>th</sup> January 2009. The 3<sup>rd</sup> accused said that it was the

deceased who normally visited them. 3<sup>rd</sup> accused said before 19<sup>th</sup> of January 2009, it was the accused who used to visit them at their homes. Despite that evidence, the 19<sup>th</sup> of January 2009 saw a lot of activity with the accused persons in particular accused number 3 to 6 visiting the deceased house more than once. When accused number 3 to 6 visited the deceased it is said that he yelled. Later when the 2<sup>nd</sup> accused applied Vicks to deceased, there was no report of him yelling. As correctly stated in the submissions of the accused, the prosecution's evidence is circumstantial. The Court of Appeal in the case of **Ndunguri Vs. Republic** [2000] 1 EA stated:-

***“In order for circumstantial evidence to form the basis of a conviction, it had to point irresistibly to the guilt of the accused, exclude any other reasonable hypothesis than that of guilt as well as exclude co-existing circumstances which would tend to weaken or destroy such as inference; Musoke V. R. [1958] EA followed. In this instance, there was sufficient evidence to justify the trial court's findings that the appellant was seen with the deceased on 18<sup>th</sup> July 1990 and that the deceased's body was indeed recovered from the appellant's latrine. The appellant's denial of that fact was an attempt to mislead the court and avoid the onus of explaining the circumstances under which he and the deceased had parted. Since this knowledge was peculiarly within his knowledge, the court was entitled to make a rebuttable presumption of fact that he knew the circumstances under which the deceased died. There was therefore no doubt regarding the appellant's guilt and the appeal would be dismissed.”***

In our case, I find that the evidence points irresistibly to the guilt of the accused excluding any other reasonable hypothesis than that of guilt of the accused. The deceased was taken from his house by accused number 2 to 6 on 19<sup>th</sup> January 2009. He was taken to the 1<sup>st</sup> accused house. Both first accused and 2<sup>nd</sup> accused confirmed this to Nderitu. PW6 said that he had noted the deceased was in good health on the 19<sup>th</sup>. The deceased was attacked by his co-initiates together with first and 2<sup>nd</sup> accused. When the deceased arrived at Nderitu's house he was limping and it was very obvious that he was seriously injured. The presumption that I make is that the accused persons who confirmed they were in the company of deceased viciously attacked him and the injuries were noticeable when they arrived at Nderitu's house. Those injuries caused the death of deceased. In making that assumption, I am guided by S. 119 of the Evidence Act. It provides:-

***“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

I find that the charge of murder was sufficiently proved against all the accused and I convict all the accused of the charge of murder of David Nguhi Mwangi.

Dated and delivered at Meru this day of 19<sup>th</sup> March 2010.

**MARY KASANGO  
JUDGE**