



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 94 of 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER MUNGAI NDUNGU ..... ACCUSED**

**R U L I N G**

The accused, **PETER MUNGAI NDUNGU**, is on trial for the offence of **murder contrary to section 203 as read with section 204 of the Penal Code**. In the Information pursuant to which these proceedings were commenced, the prosecution states that on 5<sup>th</sup> October 2008, at Greystone Trading Centre, in Thika District, the accused murdered **JAMES MURIGI MBURU**.

At the stage when the prosecution closed its case, it had called a total of eight witnesses.

As far as the accused was concerned, the eight witnesses did not adduce sufficient evidence to warrant his being put on his defence. None of the said witnesses saw the deceased being assaulted by the accused or by anybody else.

And even though the deceased regained consciousness briefly, the accused submitted that the deceased was not in so clear a state of mind as to reason rationally. His reason for so saying is that the deceased was weak and in pain. Also the deceased did vomit. Thus, having just regained consciousness, the deceased did not, in the opinion of the accused, have a clear mind.

In any event, the deceased did not give the name or the description of the accused, as the person who had assaulted him.

Mr. Kiriba, the learned advocate for the accused, did submit that although the cause of death was massive bleeding due to a lacerated pancreatic tumour, the doctor who conducted the post mortem examination was not sure if the laceration was due to an assault on the deceased or due to a fall.

The learned counsel also submitted that the deceased could have died due to the cancer which had afflicted him. In the circumstances, this court was invited to acquit the accused, because the prosecution had failed to establish a prima facie case, to warrant the accused being put to his defence.

On the other hand, the prosecution was of the opinion that the evidence adduced did establish a prima facie case against the accused.

In my understanding of the law, an accused person ought only to be put to his defence if the evidence already adduced would be sufficient to have him convicted unless he offered some reasonable defence thereto. Therefore, if there were any gaps in the prosecution case, which gave rise to reasonable doubts about the culpability of the accused person, the trial court should not put him to his defence.

The rationale for that legal position was that at all times in a criminal case, it remained the sole responsibility of the prosecution to prove the guilt of the accused person. The burden of proof never shifts to the accused person throughout the trial. Therefore, unless the evidence on record was sufficient to properly found a conviction, it would be wrong of the trial court to require the accused person to defend himself.

**PW 1, TABITHA NYAMBURA MURIGE**, was the wife to the deceased. She used to reside at her rural home in Gichugu, Maragua, whilst her husband was resident at Greystone Estate, Thika Town.

On 6<sup>th</sup> October 2008, **PW 1** received a phone-call from “Baba Emma”, who told her that her husband had been beaten by one, Mungai Ndungu. Baba Emma told her that her husband had died at the Thika District Hospital, where he had been taken for treatment.

**PW 1** travelled to Thika Town, where she verified, at the mortuary, that her husband was dead. She then went home, and informed their relatives.

On 13<sup>th</sup> October 2008, **PW 1** identified the body of her husband, at the mortuary, for purposes of post mortem examination.

**PW 2, STANLEY MBUTHIA WANDAI**, was at his home in Kabati, when Kamau called him at about 10.30a.m., on 5<sup>th</sup> October 2008.

Kamau informed him that the deceased had been assaulted. Therefore, Kamau requested him to arrange for transport to take the deceased to hospital.

At that stage, Kamau did not disclose to **PW 2**, who had assaulted the deceased.

**PW 2** drove to Greystone Estate, but by the time he got there, the deceased had already been taken to hospital. **PW 2** then went to visit his family within Greystone Estate.

At 2.00p.m. Kamau phoned **PW 2** again. On that occasion, he told **PW 2** that the deceased had passed away. Kamau also asked **PW 2** to go and search for the suspect. When **PW 2** reached the scene, the accused was identified by Gitau. **PW 2** was then assisted by members of the public, to arrest the accused. They tied him up with ropes and escorted him to Ng’ati Police Post, where they were advised to take him to Thika Police Station.

Before going to the Police Station, **PW 2** and the members of the public passed through the Thika District Hospital Mortuary, where they verified the demise of the deceased.

The accused herein was identified by **PW 2** as the person they arrested on 5<sup>th</sup> October, 2008.

**PW 3, IRENE MUTHONI MBUTHIA**, is a sister to the deceased. On 5<sup>th</sup> October 2008, she received a phone-call from Kamau, at about 12.00noon. Kamau informed her that the deceased had been assaulted.

**PW 3** went to Thika District Hospital, where she saw her brother. But whilst she was still at the hospital, her brother passed away.

**PW 3** went to inform **PW 1** about the incident, on 6<sup>th</sup> October, 2008.

**PW 4, HUMPHREY KAMANDE MBURU**, received a phone-call from his wife, on 6<sup>th</sup> October 2008, at about 7.30p.m. He was told that his brother, James Murigu Mburu, had died.

He was one of the people who identified the body, for purposes of the post mortem examination.

**PW 4** noticed, during the said post mortem examination, that the deceased had an injury on his stomach.

It was also his evidence that the doctor who conducted the examination, said that the deceased had cancer; and that its tumour ruptured, causing internal bleeding, which resulted in the death.

**PW 5, ANTHONY KAMAU MUIRURI**, is a shopkeeper. On 5<sup>th</sup> October 2008, at about 8.00a.m., he was on his way to the shop, when he met “Mama Njoroge”. That lady told him that the deceased had been assaulted by an unknown person.

The deceased had been his neighbour for about five years.

**PW 5** found the deceased lying down unconscious, behind his, (**PW 5's**) shop. **PW 5** phoned **PW 2**, requesting for a vehicle to ferry the deceased to hospital.

However, when **PW 2** said that his vehicle did not have fuel, **PW 5** organized for an alternative vehicle, which took the deceased to the Thika District Hospital.

Whilst **PW 5** was escorting the deceased to hospital, the latter regained consciousness, and told **PW 5** that he had been assaulted by Wang’ombe. **PW 5** was also told by the deceased that Wang’ombe had demanded alcohol from the deceased, before abusing him.

Whilst **PW 5** was still escorting the deceased to the hospital, the deceased vomited twice.

Finally, when the deceased was at the Casualty Department of the Thika District Hospital, he complained that Wang’ombe had kicked him.

About ten minutes later, **PW 3** arrived at the hospital. Not long after that, the doctor who was attending to the deceased announced to **PW 5** that the patient had passed on. **PW 5** relayed that information to both **PW 2** and **PW 3**. **PW 5** also asked **PW 2** to search for Wang’ombe. However, the Wang’ombe who had been named by the deceased was not known to **PW 5**.

In response to the request by **PW 5**, **PW 2** told him that they had already arrested the suspect, Wang'ombe.

**PW 5** then went to Ng'ati Police Post, where Wang'ombe was thereafter brought. From the Police Post, **PW 5** joined **PW 8**, who escorted the suspect to the Thika Police Station, after verifying that the deceased was dead. The verification was done by visiting the Thika District Hospital Mortuary, where the body was.

According to **PW 5**, the accused herein is the same suspect who had been arrested on 5<sup>th</sup> October 2008.

**PW 6, NAHASHON GIKURE KARIUKI**, was at his shop in Greystone Estate, when Winnie told him that the deceased was lying down outside his shop. He was given that information at about 11.00a.m.

When **PW 6** went behind his shop, he found the deceased foaming from the mouth.

**PW 6** then called **PW 5** and Mwangi, and told them to take the deceased to hospital.

**PW 6** escorted the deceased to "Kwa Ndung'u Dispensary", where Mr. Ndungu advised him to take the deceased to Thika District Hospital.

At about 5.00p.m., **PW 6** was informed that the deceased had passed away.

**PW 7, JOHN IRUNGU KAMAU**, is a medical doctor. He holds a Bachelor's Degree in Medicine and Surgery. And, as at the date when he testified, he was pursuing a Master's Degree in Pathology, at the University of Nairobi.

On 13<sup>th</sup> October 2008, **PW 7** conducted a post mortem examination on the body of the deceased.

The two police officers who accompanied the two relatives who identified the body, told **PW 7** that the deceased had been involved in a fight. **PW 7** was told that after the fight, the deceased had complained of stomach-ache and also that the deceased did vomit.

**PW 7** noted no external injuries on the body. However, on the inside, **PW 7** noted that the spleen was massively enlarged. He also noted that there was a pancreatic tumour that was lacerated.

Eventually, **PW 7** formed the opinion that the cause of death was massive bleeding due to the lacerated pancreatic tumour.

By way of further explanation, **PW 7** stated that the pancreas is a very soft internal organ, which is usually deep in the abdomen. When it has a tumour, the pancreas would occupy a larger space than normal. In this case, the tumour had extended almost to the anterior wall. Therefore, any force to the abdomen would have led to the laceration of the tumour.

It was the doctor's evidence that a force would have to be exerted before any laceration could occur.

It was also his further evidence that the tumour could not have caused death if there was no external force.

During cross-examination **PW 7** said that the cause of tumours was not known. However, in this case, **PW 7** said that the deceased probably had a cancerous tumour. Any external force could have caused the laceration, he said.

But the tumour was not so massive as to be visible when the deceased was standing.

**PW 8, PC STANLEY MUIRURI NGANGA**, was on stand-by duty at the Ng'ati Police Post, as at 5<sup>th</sup> October 2008, when two men arrived there, at about 4.45p.m. The said men reported to him that the deceased and the accused had fought at about 10.30a.m.

The two men also said that the deceased had complained of stomach-ache after the fight. However, the two men made it clear to **PW 8** that neither of them had witnessed the fight. They had only been told about the fight by a good Samaritan.

By the time the two men made the report, the deceased was at the Thika District Hospital, where he had been taken on the advice of the gentleman who runs the Dispensary to which he was first taken for treatment.

**PW 8** advised the two gentlemen to arrange for the arrest of the suspect. In a little while, the accused was escorted to the Police Post.

**PW 8** then escorted the accused to Thika District Hospital Mortuary, where he verified that the deceased had passed away. **PW 8**, thereafter escorted the deceased to the Thika Police Station.

On 6<sup>th</sup> October 2008, **PW 8** visited the scene, at a place near an un-named shop and the Jehovah Gibor Christian Church. Later, **PW 8** recorded witness statements. And on 13<sup>th</sup> October 2008, **PW 8** was present when **PW 7** conducted the post mortem examination on the body of the deceased.

**PW 8** also escorted the accused to a medical doctor, who examined his mental faculties and certified him to be fit to stand trial.

Having given due consideration to the evidence adduced by the prosecution, it is clear to

me that none of those who testified witnessed the fight between the accused and the deceased, or the assault on the deceased.

According to the wife of the deceased, it is "Baba Emma" who told her that the deceased had been assaulted by Mungai Ndungu. Of course, the accused person is Peter Mungai Ndungu. But that, of itself, would not mean that he was the Mungai Ndungu whom Baba Emma had told **PW 1**, as having been responsible for beating up the deceased.

In my considered view, the prosecution ought to have had the said "Baba Emma" testify, so as to enable this court get information about how the said person became aware of the identity of the assailant.

Not only did "Baba Emma" not testify, but also the prosecution did not offer an explanation for his failure to give evidence.

Of course, **PW 5** did say that the accused was the same person as the Wang'ombe whom the deceased had named, as the person who had kicked him in the stomach. But then, the prosecution did not lead evidence to prove that the Wang'ombe who was named by the deceased, was one and the same person as the accused herein.

**PW 5** asked **PW 2** to organize a search for Wang'ombe. As at that time, **PW 5** did not know who Wang'ombe was. The name had simply been given to him by the deceased.

According to **PW 5**, he was informed by **PW 2**, that they had already arrested Wang'ombe.

However, when the suspect who had been arrested was brought to the Ng'ati Police Post, it turned out to be the accused herein.

As **PW 2** had been told to organize a search for Wang'ombe, he ought to have led evidence to prove that the person whom they had arrested was the Wang'ombe whom the deceased had named as his assailant.

In the absence of that crucial nexus, I find no basis, in law, to warrant the accused, Peter Mungai Ndungu, being required to defend himself against an act attributed to Wang'ombe

Before concluding this ruling, I wish to make it clear that had the prosecution led sufficient evidence to prove that the accused was one and the same person as Wang'ombe, whom the deceased had named, I would in all probability have held him accountable for the death of the deceased. I say so because contrary to the assertions of the accused, the cause of death was not the cancerous tumour of itself. Dr. John Irungu Kamau, (**PW 7**), made it explicitly clear that the pancreatic tumour could not have caused death if there was no external force exerted onto it.

In the result, the circumstantial evidence adduced, coupled with what appears to be a dying declaration made by the deceased, does not meet the minimum requirements of a prima facie case against the accused herein.

I do therefore dismiss the case of murder that was preferred against the accused herein, and order that he be acquitted forthwith, pursuant to the provisions of section 210 of the Criminal Procedure Code.

Finally, I direct that the accused be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 29<sup>th</sup> day of April, 2010.**

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**FRED A. OCHIENG**  
**JUDGE**