



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

Criminal Case 47 of 2008

REPUBLICAPPLICANT

VERSUS

JOHN KARANJA GITONGA.....RESPONDENT

JUDGMENT

1. **JOHN KARANJA GITONGA** and **ESTHER WANGARE GATURA** were jointly charged with the murder of one **TOM MUTUNGWA MUTALII** Contrary to **S.203** as read with **S.204** of the Penal Code. It was alleged that the offence was committed on 29.10.2008 at

7.30 p.m. They both denied the charge and at the close of the case for the Republic, Esther Wangare Gatura was acquitted of the charge and this judgment is limited to the case against John Karanja Gitonga.
2. The evidence on record is that Tom Mutungwa Mutalii was stabbed on 29.10.2008 at about 7.30 p.m. and according to PW1, Martin Wakunguli, the deceased's neighbour, when he heard the deceased calling out to him and saying "***mtoto amenichoma na kisu***" (***the child has stabbed me with a knife***), he rushed to the deceased's home and found the "***1st accused holding a knife and lying on the deceased's chest. The deceased was facing upwards***" and then the 1st accused's mother, Esther was at the same time holding the hand of the 1st accused and talking to him in the Kikuyu language. The 1st accused then released the knife and the deceased was taken to hospital where he later died. PW1 also added that the 1st accused told him that the "***deceased was a bad person***" and then ran away after letting go of the knife.
3. **PW2, MOSES ANANGWE SHIKUNYI** another neighbour, heard noise from the deceased's home and when he went out, he saw the 1st accused crying and riding away on a bicycle.
4. **PW3, ANN NJERI KAMAU** went to the deceased's home and found him outside his door breathing heavily

and bleeding on the right side of his body. After the deceased was taken to hospital, she started looking for the 1st accused who returned home at 4.00 a.m. and he was then taken to Kakamega Police Station. **PW4, JOSEPH KAMAU NJOROGE** was with PW3 when the deceased was taken to hospital and was the one who took the 1st accused to the Police Station. Of interest was his evidence that;

“At about 3.30 a.m. John, 1st accused came. He came crying. He had some small cuts on his face. He asked us about his father’s condition.”

In cross-examination, he added thus;

“I saw John when he came back that night. He had light wounds. He had blood in the mouth and his hand was in pain.”

5. **PW7, CPL. ALEX NDOMBI** investigated the case and concluded that the deceased and 1st accused had a disagreement because the 1st accused had no respect for the deceased and then the 1st accused stabbed the deceased.
6. **PW10, DR. EDWARD BILEMBYA** who performed the Post-mortem concluded that the deceased died of cardio-pulmonary arrest due to loss of blood arising from a penetrating groin injury.
7. When the 1st accused was placed on his defence, he said that on the material date, he disagreed with the deceased who claimed that he, the 1st accused, was a thief. The deceased then allegedly started kicking and beating him and picked a knife which was nearby and tried to stab him. That as they struggled for the knife, the deceased was stabbed and the 1st accused ran away. He denied that he deliberately stabbed the deceased and denied that he hid the knife after the incident. He added that he acted in self-defence and did not even know on what part of the body the deceased had been stabbed.
8. From the above evidence and without shifting any burden to the 1st accused person, there is no doubt that what happened on the material evening is that the deceased got stabbed in the groin and there is also no doubt that the person who stabbed him was the 1st accused. According to PW7 there was only one abdominal injury – the stab wound measuring 3cm x 3 cm. It was certainly caused by the actions of the 1st accused and I have no doubt that from the evidence of PW1, the person who was holding the knife when he arrived at the scene, was the 1st accused. It cannot be true that the stab wound was accidentally caused.
9. That being the case, the only question left to answer is whether there was malice aforethought in the conduct of the 1st accused person. On that aspect of the case, there was no eye witness to what triggered the incident because from all evidence on record, only Esther Wangare Gatura was in the vicinity and being a co-accused, no evidence against the present accused was elicited from her. However, circumstantial evidence would point to once conclusion; that the deceased and the 1st accused had a violent disagreement that turned fatal. I would

believe the 1st accused on that point and agree with him that he never set out to harm the deceased. The evidence of PW4 is useful in this respect. He saw the 1st accused with fresh injuries and he noted that he was crying and asking about his father's condition. These facts coupled with the fact that he ran away after stabbing the deceased only once cannot be evidence of a person with malice aforethought as defined by S. 206 of the Penal Code.

10. In the end, without malice aforethought there cannot be murder. The accused is acquitted of the charge of murder aforesaid but is duly convicted of the lesser offence of manslaughter.

11. Orders accordingly.

Dated, Signed and Delivered at Kakamega, this 21st day of April, 2010

ISAAC LENAOLA

JUDGE