



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

**Criminal Case 9 of 2007**

**REPUBLIC ..... PROSECUTOR**

**~VRS~**

**MARTIN WAFULA KISIANGANI ..... ACCUSED**

**JUDGMENT**

Martin Wafula Kisiangani faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 25<sup>th</sup> day of December 2006 at Samoya Village, Musikoma Location in Bungoma District he murdered Eric Juma Mutaki. The accused pleaded not guilty to the charge.

The facts of the case are that on the 25/12/2006, the brother of the accused one Paul Manyilila Kisiangani hosted a party for his friends in his house at Samoya Village, Musikoma Location of Bungoma District. The accused was present and the total number of guests was about ten (10). There was music being played and traditional liquor (busaa) and food was available for the guests to enjoy as they celebrated Christmas day. The party started around 9.00 a.m and proceeded to around 11.30 p.m. A group of young men including the deceased and PW1 went to the home of Paul and wanted to join the guests in the party where there was a disco. The accused person met them at the door and armed himself with a club to resist them entry into the house. PW1 was injured when he left for his home leaving the deceased behind. The deceased is said to have been assaulted too and died a short while later. His body was found by relatives who were attracted by screams outside Paul's house next to the road. The accused person was arrested the following day and charged with the offence.

A total of eight (8) witnesses testified. PW1 was in the company of the deceased and another when they went to the house of Paul. PW1's brother one Madeni was among the visitors of Paul. PW1 said he wanted to pick the key to

their house from his brother but the accused could not let him in or even call his brother to talk to him outside the house. The accused hit PW1 with a club on the face and mouth. PW1 went home bleeding leaving behind his friends the deceased Eric Juma Mutaki and George Wanjala. PW1 learnt later in the night that the deceased was dead. He proceeded to the scene with his brother Wycliffe and saw the body of deceased in the compound of accused's house with a fresh injury which was bleeding. All the guests had left by that time.

PW2 was helping Paul to cook and serve the visitors with food and drinks. She testified that she heard PW1 scream asking the accused why he was beating him. The accused was armed with a stick. The deceased was there too. PW2 went to hide in the sugar plantation because she was scared of the violence. While in the plantation she heard from someone that the deceased was dead.

PW3 did not witness the incident. She went to the house of Paul to look for PW2. She found the deceased lying outside the house. She called relatives and neighbours who came to the scene. They noticed the deceased had a deep cut on the forehead. They confirmed the deceased was dead before they could take him to hospital.

PW4 went to Paul's house at around 2.00 p.m to look for his friend one Wamalwa. He got a hostile reception. The accused followed PW4 as he left the home and rained blows on him. PW4 was warned by the mother of the accused who sat outside the house that if he did not leave, he would be killed. He left and went away. It was the following morning that he learnt that the deceased died in the same home.

PW5 was with the deceased on the material evening. The two had supper together and parted. PW5 learnt of the fate of the deceased around 12.30 a.m the same night from PW3. He found deceased in a critical condition and confirmed he was dead a short while later.

PW6 was one of the guests in Paul's house on the material day. He left around 7.00 p.m. before the incident. He remembers seeing PW4 come to the house. He was received with hostility by the accused. PW4 left warning the accused that he will see. He learnt of the death of deceased the following day.

PW7 is the doctor who produced the postmortem report of Dr. Alwang'a. The doctor formed the opinion that the deceased died of cardio-respiratory failure due to sub-dural haematoma secondary to the deep cuts in the skull.

The Investigating Officer (PW8) investigated the matter after visiting the scene. He later charged the accused with the offence after accused was certified fit to plead to the charge.

The accused denied the offence. He testified that on the 25/12/2006, he was helping his brother Paul to entertain guests in his house. Around 10.00 p.m, the accused, his brother and the visitors were attacked by a group of young men who invaded the home. They were assaulted by the men who had rungu who later left the home. Around 11.00 p.m all the guests had left. The accused came to hear of the death of deceased around 1.00 a.m that night. He denies the offence and said that the deceased was assaulted on the road. His home and that of Paul were demolished by a mob as the accused went into hiding. He surrendered to the Area Chief the following day. He was taken to the police station

where he claims he was over detained. He spent 48 days in the police cells. He was only arraigned in court after his advocate intervened.

There was evidence from three (3) witnesses PW1, PW2 and PW4 that uninvited guests were not welcome to the Christmas party at Paul's house. The accused stood out as the person who guarded the place and repulsed uninvited guests. PW1 who was in the company of the deceased was the first to be assaulted. He left the place and went home leaving the deceased and another friend behind. PW1 testified that the accused assaulted him using a club. PW2 heard PW1 shouting for help as she worked in the kitchen. She heard PW1 asking accused **"Wafula! Wafula! Kwanini umenipiga? – Wafula! Why have you assaulted me?"** Then she heard a man's voice answer **"what are you looking for here at this time?"** When she went out, PW2 found that it was PW1 who was complaining to the accused that he had assaulted him. The accused stood at the door preventing the uninvited guests from going into the house and was armed with a stick. PW2 left the place a short while she heard people shouting that the deceased was dead. PW2 said the deceased and PW1 went to Paul's house around 9.00 p.m. PW4 said he had gone to the home around 2.00 p.m and he too was not welcome. The accused even refused to shake his hand in way of greetings. As PW4 went out of the accused hit him severally and got hold of him asking the visitors; **"shall I kill him" (nimuue?)**. It appears that the accused continued in this foul mood through out the party. The deceased and PW1 were uninvited guests who went there later and were met with a similar wrath.

Neither PW1 nor PW4 were attacked by accused without being involved in an exchange of words followed by assault. As the witnesses talked and argued with the accused, each knew whom they were dealing with. The young men were neighbours and knew each other. There was no possibility of any mistaken identity. It follows therefore, that the defence of the accused person that they were attacked by strangers in his brother's home was not true. The accused and the young men specifically PW1, deceased and others were not strangers. I therefore, reject the argument by defence that the deceased and his companions were mistaken for thieves.

The accused and the visitors started consuming liquor (busaa) from 3.00 p.m and must have been a bit drunk by 9.00 p.m when the deceased and PW1 went there. The accused put up a spirited fight in repulsing the two young men which demonstrates that he was not very drunk as not to appreciate what he was doing.

The body of the deceased was found outside the house where the party was held. PW1 said the accused's house and that of his brother are next to each another. The body of deceased was about ten (10) metres from the house of accused according to PW1. PW3 said that she was leaving the house of Paul when she saw the deceased lying outside the house. The deceased was groaning in pain at that time. PW4 said he went to the compound of Paul the following morning and found the body lying there with an injury on the head. PW8 the Investigating Officer said he found the body on the road next to the house of the accused. These descriptions of the place lead to the conclusion that there was a road next to the houses of the accused and that of Paul. The body was found in the vicinity of the compound of the two

houses and the road. The witnesses gave the distance from the houses to where the body lay as 10 – 20 metres.

The evidence in this case is purely circumstantial because none of the witnesses saw the accused inflict the fatal blow on the deceased. This court has to determine whether the circumstances as analyzed point out to the guilty of the accused. In summary, the facts are that the deceased, PW1 and another went to the house of the accused's brother where there was a party in the evening of the material day. It is not disputed that they were uninvited guests. It has been established that the accused resisted their entry into the house. PW1 was assaulted in the process which led to an assault charge against the accused. The parties later reconciled and the case was withdrawn. The deceased was in the company of PW1 and one George Wangila. When he was assaulted at around 9.00 p.m, PW1 took off leaving his friends in the house of Paul. PW1 was woken up at midnight and informed of the fate of the deceased. He went to the scene and saw the deceased's body near the house of accused. The accused and his brother escaped from their houses that night to avoid the wrath of neighbours who were gathered at the scene on learning about the death of the deceased. The accused confirmed this fact in his defence that he had to go into hiding. The deceased died of cardio respiratory failure due to sub-dural haematoma due to assault. The deceased had several deep cuts on the head.

On consideration of all the evidence and circumstances of the events giving rise to this case, I am satisfied that the facts point guilt to the accused. I have already considered the defence and concluded that the accused could not have mistaken the deceased and his friends for thugs. In the case relied on by the defence of **NGUYE & ANO. –VRS-** **REPUBLIC COURT OF APPEAL AT KISUMU** it was established that the accused had mistaken the visitors who came to their home at night for thugs. The facts of this case are different in that the accused and the uninvited guests knew one another and had opportunity to satisfy themselves on each other's identities. In the case of **NGUYE**, the accused and the visitors were total strangers.

I find that the prosecution have established that the accused caused the death of the deceased. The accused inflicted the injury which resulted in the death of deceased in the course of repulsing the uninvited guests. In the circumstances, the accused had no intention to kill the deceased. The evidence of malice aforethought is therefore lacking and a conviction of murder can not be sustained. I find the accused guilty of a lesser offence of manslaughter. I convict him accordingly under section 202 as read with 205 of the Penal Code.

The accused raised the issue of violation of his constitutional rights for being held in police custody for a period of 45 days. He was arrested on 26/12/2006 and arraigned in court for the charge of murder on the 8<sup>th</sup> February, 2007. PW8 on cross-examination said that the accused was arrested also for the charge of assault against PW1. He was charged with that offence. PW1 confirmed that the parties reconciled later and the assault charge was withdrawn. It is not known when the accused was arraigned in court for the charge of assault. Neither is it known when the charge was withdrawn, For a charge of assault, a suspect should be charged in court or released within 24 hours. For that of murder the maximum period a suspect can be held in police custody is 14 days. PW8 did not deny that he exceeded the 14 days

prescribed by the law. The excess days the accused was held in regard to the charge of murder was forty four (44) days. The constitutional rights of the accused persons under section 72 (3) (b) and 77 were indeed violated. Does this violation entitle the accused to be released? The court has a duty to balance the rights of the accused regarding expeditious justice and those of the deceased who had his right to life under section 70 of the Constitution. Each of the two has suffered a violation. The accused has a remedy to sue whoever violated his rights under section 72 (6) of the Constitution. This remedy will compensate him in monetary terms for the violation. I am aware of some of the Court of Appeal decisions on violation of Constitutional rights under section 72 where some accused persons were released. However, in regard to the offence herein and its impact in the family of deceased and the society at large, I find it not appropriate to set the accused free. He is at liberty to utilize the remedy provided for by the law. I hereby so decree and declare.

**F. N. MUCHEMI  
JUDGE**

Judgment dated and delivered on the 21<sup>st</sup> day of July 2010 in the presence of the accused, the defence counsel Mr. Makali and the State Counsel Mr. Ogoti.

**F. N. MUCHEMI  
JUDGE**