



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

**AT MERU**

**Criminal Case 21 of 2002**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL MUTWIRI MUNENE.....ACCUSED**

**Evidence – circumstantial evidence – as distinguished from direct evidence- legal requirements of circumstantial evidence.**

- **circumstances justifying conviction on the basis of circumstantial evidence –**
- **When inference of guilt points to - one to the exclusion of all others**
- **Burden of proof in cases of circumstantial evidence –**
- **Whether suspicion can be a basis for inferring guilt.**

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**JUDGMENT**

The accused, Paul Mutwiri Munene was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars were that the accused on diverse days between 4<sup>th</sup> and 8<sup>th</sup> September 2001 at unknown time at Kibirichia Sub-location Kiamiogo Location Meru Central District within Eastern Province murdered Jacob Muriuki Munene.

The accused was arraigned in Court on 26.06.2003 when his plea was taken, and he stated – “I did not kill him intentionally” and a plea of not guilty was entered. The prosecution called four witnesses. This was their evidence.

PW1 was the father of both the accused and the deceased. The accused and the deceased were living together at their father’s (PW1) plot at Kibirichia while he himself and his wife, (PW2) lived at Ntombiri. His testimony was that his wife called Margaret Ngiri Munene, visited her sons on 8<sup>th</sup> September 2001

but did not find the deceased and met the accused who told her that he was unaware of the whereabouts of the deceased.

PW1 testified further that five days later on 13<sup>th</sup> September 2001, he sent his wife to go and see their sons again and again upon her return, she informed him that he had only met the accused who again informed her that he did not know where Jakubu had gone to. Alarmed, he decided to go and visit the plot at Kibirichia himself together with his wife on 14<sup>th</sup> September 2001.

Upon reaching the plot at Kibirichia he decided to answer a call of nature and went straight to the toilet. He met with a bad smell, and called his wife to come and she met the same bad smell. He thought his son had been killed and was in the pit latrine. He made a report to the Kiirua Police Station, and returned to the scene with five (5) Policemen. Upon removing the structure of the toilet and search, they found two sacks with human parts – the body had been cut into two and each part was in a different sack and tied together. The hands were cut off at the waist. The head was intact. He identified it as the body of Jakubu Muriuki the deceased.

PW1 testified that thereafter the Police decided to look for the accused who was not present when the body was retrieved, but was within the Market Centre. The body parts were placed in plastic bags, the accused was arrested, and together with the body parts was taken to the Police Station and parts taken to the mortuary. He attended the post-mortem on 21.07.2001, and identified the body to the Doctor who carried out the post-mortem.

In cross-examination by Mr. Nyaboga learned Counsel for the accused PW1 testified that the deceased had been at home (Ntombiri) prior to his death. He had asked his wife (PW2) to go and visit the boys out of a feeling that something was not right. On her return she had informed him that she had only found the accused in the house, did not see any bloodstains, that his sons used to quarrel because the accused wanted to sell the deceased's goods. He testified that he did not see anyone killing the deceased and that an axe was recovered, a sword and panga with bloodstains as were the blanket and mattress. PW1 denied any quarrel with the deceased. He had not witnessed a swarm of flies when he first visited the pit latrine at 8.00 a.m, but it was swarming with flies upon his return with the Police.

In re-examination by Mr. Muteti learned state counsel then, (now Senior State Counsel), PW1 testified that he had sent his wife to go and check on his sons because it is usual for parents to keep an eye on their children, that the deceased had informed him of his disagreements with the accused, and that this was about two weeks prior to his killing that he did not see the accused but they used to live together with the deceased.

PW2, Margaret Ngiri Munene testified that both the accused and the deceased were her sons and at the material time, September 2001 they were living in the family Plot in Kibirichia. PW2 reiterated her husband's (PW1's) evidence that she had been asked by him to visit the accused and the deceased on 8<sup>th</sup> September 2001 but met the accused only who upon inquiry by the mother about his brother the deceased told her that he did not know where he was, that the deceased also had the keys to her room. She returned to Ntombiri and told (PW1) her husband of what had happened.

It was, the same story when she again returned to Kibirichia on 13.09.2001 to visit her sons. She met a lady at the door of the house but none of her sons. Upon her inquiry about her sons, the lady informed her that the accused had gone to the forest to plant potatoes. On introducing herself as the mother of the two sons, and if she had the keys to any of the rooms, the lady acknowledged that she had them and she took them from her and opened the door to the room she used to rest in and found one of her blankets missing. However on a visit to her sons' room she discovered her blanket in their room, and found a radio on the table, the deceased's shoes under the bed, and all the accused's clothes.

PW2 testified further that she locked their room, locked her room and took the keys. She left the lady at the plot and went to the shamba where the accused was digging but met the accused on the way, and when asked about his brother, he informed her that he did not know where he had been for 6 days and when challenged by his mother about his lack of interest in his brother, he had answered that "a man

cannot be looked for”, and when asked about the keys, he said that the deceased had them

On visiting the shamba upon which the accused had been planting potatoes, PW2 found that the accused had planted both his and his brother’s portion. On her return from the shamba to Kibirichia, she met the accused, who asked her for the keys, but she lied and told him that the keys got lost on 8<sup>th</sup> September 2001, and being asked why he had planted his brothers portion with potatoes, the accused informed her, that his brother had agreed to doing so.

Upon her return to Ntombiri, she briefed PW1 her husband of what had happened at Kibirichia and on the next day, 14.09.2001 she and her husband both went to Kibirichia. PW2 then reiterated her husband’s evidence as PW1, that he went to answer a call of nature while she went to open the rooms and how her husband had called her to the pit latrine. She met with a foul smell, looked into the latrine saw ashes spread inside together with dry leaves of nappier grass.

Thereafter like PW1, testified, they reported the matter to Kiirua Police Station, returned with 5 Police Officers, and found flies all over, that the Police demolished the toilet structure including the floor and removed Jakubu’s body from the toilet, that it had been cut and put into sacks. She too identified the body and attended the post mortem on 21.09.2001. She testified that though the accused and the deceased used to live well, the deceased had before he died visited their parents at Ntombiri and explained that the accused wanted to sell his belongings, but she had no problems with either of them.

On cross-examination, PW2 testified that she did not see the killers(s) of the deceased Jakubu, and the accused refused to tell her on 8<sup>th</sup> September 2001, and 13<sup>th</sup> September 2001 where his brother was, yet he had the keys and said the deceased had them, but he also planted Jakubu’s portion of the forest plot, did not know whether the lady was a friend of her sons. The lady was given the keys by the accused, saw no bloodstains either at the latrine or the rooms, did not see any weapon at the plot on 14.09.2001 but that the Police recovered some weapons, an axe, a panga, a small sword, and Police and took them away and stated that her husband had no quarrel with her sons.

In re-examination, by Mr. Muteti learned State Counsel PW2 testified that the accused left the keys with her including the keys kept by Jakubu – the deceased.

PW3 was No.41833 Cpl. Mwingi Mbula, was attached to Kiirua Police Station in the year 2001, and was in the Crime Office on 4.09.2001 at 10.30 a.m. when he received a report from PW1 and PW2 that their son had not been seen a Kibirichia for a long time and that there was a foul smell in their latrine.

He in the company of P.C. Erurudi and a trainee policeman went to the site and found a truly foul smell. They demolished the latrine and found soil cover on the feaces, and found two sacks in the feaces and found a rotten body, cut vertically to the waist folded into one sack and then put into another. PW3 testified that the parents, identified the body as one of Jacob Munene. On information that the deceased used to live with the accused, they sought and arrested the accused within Kibirichia Market. He denied any knowledge about the whereabouts of his brother. He was interrogated as a suspect while the body was taken to Meru General Hospital Mortuary.

PW3 testified further that he recorded four witness statements including one from a Kenneth Gitonga who informed him that Paul Mutwiri the accused asked him to get some used saw dust for him during the same week but that he did not deliver the saw dust. This witness then decided to charge the accused with the offence.

In cross-examination by Mr. Nyaboga learned Counsel for the accused PW3 testified that he was the investigating officer in this case, he did not know the accused or the deceased, but charged the accused because he used to live with the deceased, he found soil in the latrine, and Gitonga had been asked to bring saw dust for the same purpose. Although he was not told that the accused placed the soil in the latrine, and that no one saw the accused place the soil in the latrine, but that he found the accused’s clothes and those of the deceased and beddings too – but did not get an axe, panga or knife; nor any bloodstains in the house, or compound, but had concluded that circumstances surrounding the conduct of

the accused as outlined show him that the accused was the prime suspect.

PW3 further testified that the two sacks where the body was kept were taken to the mortuary and he did not have them in Court. He was informed of the lady called Margaret Munene who was met with the accused but he never identified her. Although he had entered the accused's house with PW1 and PW2, he did not collect any exhibit from the scene, and was unaware of any dispute between the accused and the deceased, and was also unaware of the motive in the killing of the deceased.

PW4 was Dr. Isaac Mwangi attached to Meru District Hospital and knew Dr. Odigo who was his colleague, had worked and interacted with him, and knew his handwriting and signature and had carried out the post-mortem on the body of the deceased. He produced a post-mortem report carried out on the deceased body on 21.09.2001. The findings were –

- decomposed body with maggots;
- the flesh had decayed completely and the date of death was put at a week before the post-mortem
- injuries included a fracture of the left temporal region of the skull – deep wound on the right leg which was filled with maggots. internally the skull had the fracture.

### Conclusion

The injury on the head caused by a blunt object and the wound inflicted by a sharp object caused the death.

In cross-examination by Mr. Nyaboga learned counsel for the accused, PW4 reiterated his evidence in chief, that he did not perform the post-mortem but was at the Meru District General Hospital at the time the post-mortem was done, that the cause of death was a blunt object and wound inflicted by a sharp object. He testified that the body decayed but there was no indication that the body was cut into pieces, and the report shows the body was in one piece. He had worked with Dr. Odigo for one year.

On 15.05 2006 the prosecution closed its case as one witness Kennedy Gitonga Kithinji could not allegedly be traced, and despite the spirited submissions by Mr. Nyaboga learned Counsel for the accused that the prosecution had made no case against the accused, the accused was put on his defence by a Ruling delivered by Ho. Mr. Justice Lenaola on 19.06.2006 and advised the accused of his rights under Section 306 of the Criminal Procedure Code (Cap 75, Laws of Kenya) to give evidence on oath and be subjected to cross-examination or make unsworn statement and not be liable to cross-examination or elect to keep silent, and give no evidence. The accused elected to give sworn evidence and was subjected to cross-examination.

The accused testified that he and his brother, the deceased were staying together at Kibirichia, and that he worked as a turn-boy in a lorry. On 7.09.2001 he testified, he was from a safari from Voi where he had allegedly taken timber in lorry KAD 010K and on the way back had picked cement from Athi River and delivered it to Maua, and he returned to Kibirichia.

The Accused testified that on 8.09.2001, he went to Kibirichia and stood by the gate where his mother (PW2) found him and asked for keys to the house which he said he did not have. He neither found his brother nor his brother's girl friend Julia Kinya, whom he had last seen on 7.09.2008.

On 9.09.2001 the accused testified that he moved and took timber to Nairobi and that between 11<sup>th</sup>-12<sup>th</sup> September 2001 he went to Kitale and brought some maize to Kangeta where he spent the night of 12<sup>th</sup> September 2001 and travelled to Kibirichia on 13.09.2001 and decided to go and harvest his potatoes and returned home (Kibirichia) to collect fertilizer where he found Julia Kinya, the deceased's girlfriend and took the keys to the house from her, and took fertilizer from the store and went to plant potatoes in the

forest; after telling Julia to ask Jacob (the deceased) to join him in planting the potatoes in the forest. When Jacob did not show up, he came back leaving two ladies who were helping to harvest/plant the potatoes!

When he met his mother on 13.09.2001 and on being asked by her where his brother was he informed her – he had not seen him for six days and that Kinya had the keys. The accused further testified that after talking to his mother, he went home and left the panga and string he was using to plant potatoes, and finding no keys, went to Kibirichia Market where he again met his mother (PW2) and asked her whether she had any spare keys which she answered in the negative, and he went and spent the night at Peter Kinya's home. He was arrested by the Police on 14.09.2001 at 2.00 p.m.

It is significant that the accused said in his evidence-in-chief "I never killed my brother and I do not know who killed him", and yet in his plea as per record of court taken on 26.06.2003, "an offer of manslaughter floated by Mr. Nyamboga – and Ondari – " offer (of manslaughter) not accepted.

Ondari – "offer not acceptable he murdered his brother and dumped him in a toilet"

Thereafter the charge was read to the accused which is translated into Kimeru to which he says:-

"I did not kill him intentionally"

and a plea of not guilty was entered and hence the prosecution and defence evidence received herein

This court took over this matter from 15.05.2008 but a formal order for the take over was not made until 26.11.2008 when the issue was drawn to the attention of the court that the accused be put to his election in accordance with the provisions of Section 200 (as amended) of the Criminal Procedure Code) whether he prefers the proceedings to proceed from where the previous judge left or whether he preferred the proceedings to commence afresh.

Mr. Lompo learned Counsel who had taken over from Mr. Kosgey previous Counsel informed the Court that the accused had already been in custody for 8 years and that it would only be fair and just if the Court took over from where the Hon. Mr. Justice Lenaola left to enable the matter to be determined one or the other way.

When the matter was put to the accused he elected to continue from where the Hon. Mr. Justice Lenaola left. The Court therefore made an order deeming the proceedings of 14. 05.2008, 8.07.2008, 9.07.2008, 24.07.2008, 24.10.2008 and 24.11.2008 to have been proceedings taken over from where the Hon. Mr. Justice Lenaola left. The issue left was the submission by Counsel for the defence and prosecution.

## ANALYSIS OF EVIDENCE AND SUBMISSIONS BY COUNSEL FOR THE ACCUSED AND COUNSEL FOR THE PROSECUTION

### SUBMISSIONS FOR DEFENCE COUNSEL

As already indicated above Mr. Lompo learned Counsel for the accused submitted that the prosecution had not proved its case beyond reasonable doubt. The prosecution called 4 witnesses and none of them connected the death of the deceased with the accused, and PW3, the investigating officer correctly stated the circumstances surrounding the death of the deceased were the main reasons why he charged the accused.

The accused is alleged to have murdered his brother on a date unknown between 8<sup>th</sup>-14<sup>th</sup> September 2001. It is common ground that the deceased and the accused were sharing a house belonging to their father at Kibirichia. When PW2, the mother gave her evidence, she stated that on 8<sup>th</sup> September 2001, she had agreed with her husband PW1 to go and visit their sons, and on that material date she only found

the accused, and when she inquired about the whereabouts of the deceased, the accused told her that he did not know. PW2 went home and briefed her husband and after a period of five days on 13.09.2001, PW2 went to Kibirichia where the accused and the deceased were staying but did not find the accused or the deceased. PW2 found a lady whose names were not revealed to Court, and who upon inquiry to the lady was informed that the accused had gone to plant potatoes, and that she had no idea about the deceased. It was this lady who handed over the keys to PW2.

After PW2 had rested, she went to the shamba and found that the accused had planted both his own and the portion of land earmarked for the deceased. On inquiry by PW2, the accused informed her that the deceased had agreed for him to do so, and as to the whereabouts of his brother the accused informed the mother that a main is not looked for.

Counsel for the accused then reiterated the events of 14<sup>th</sup> September 2001, both PW1 and PW2 went to Kibirichia, how upon reaching the area, PW1 went straight to the toilet discovered a foul smell, informed his wife PW2, went to the Police and returned with policemen. Counsel submitted that the prosecution evidence was all entirely circumstantial. To found a conviction on circumstantial evidence, it must meet certain tests. For instance in the case of *Nzivo vs Republic* [2005] I.K.L.R.699, the Court of Appeal held inter alia that –

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accuseds’ guilt from circumstantial evidence to be there that there are no other co-existing circumstances which would weaken or destroy the inference.”

Counsel submitted that there are co-existing circumstances which are weakening the inference. Counsel cited the evidence of PW2 who on 13<sup>th</sup> September 2001 met a lady Kinyua Kinyangi a girlfriend of the deceased. No evidence from her was even tendered. Despite information about the lady, PW3, the investigation officer never followed that line of inquiry. Counsel submitted that the only incriminating evidence against the accused was one of opportunity because he was staying with his brother. The malice afore-thought was never established. Counsel also relied on the case of *SAWE VS REUBLIC* [2003] K. L. R. 364, where the Court of Appeal again held inter alia:-

- (i) that circumstantial evidence in the instant case did not irresistibly point to the appellant to the exclusion of all others so as to justify a conviction ,
- (ii) the evidence used to convict ..... must satisfy the requirements of circumstantial evidence to warrant or justify the conviction of the appellants,
- (iii) suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

Counsel submitted that the accused was not the only person in the picture when the events in this case took place. According to the accused’s defence tendered on 12.06.2006, on 7.09.2001 he came from Safari in Voi and on 8.09.2001, when he went home, he did not find any one except that he met with PW2 and he stated that the last time he saw the deceased was 7.09.2001 when he saw the deceased with his girlfriend, and that on 9.09.2001, he proceeded to Nairobi and between 11<sup>th</sup>-12<sup>th</sup> September 2001, was in Kitale engaged in his usual transport business. Counsel submitted that the conduct of the accused did not point to a person who could have committed such a crime.

Consequently, Counsel submitted it is only a question of opportunity and suspicion because of sharing premises and a room with a brother, and submitted therefore that circumstantial evidence had not passed the legal test to found a conviction.

Finally Counsel questioned the conduct of PW1 and PW2. PW2 noticed that one of her sons was missing, informed her husband and stayed another 6 days before making a report to the Police, and on

arrival at Kibirichia on 14.09.2009, PW1 went straight to the Pit Latrine where the body of the deceased was found. Is there something he knew? Counsel submitted that the prosecution had failed to prove its case beyond reasonable doubt and urged the Court to so find and acquit the accused. Those were the submissions on behalf of the accused.

### SUBMISSIONS FOR PROSECUTION

Mr. Muteti learned Senior State Counsel did not agree with those submissions. His submissions were based on four broad issues, that the prosecution had met the legal tests to prove a case beyond reasonable doubt on the basis of circumstantial evidence, that the accused had the last opportunity to kill the deceased, alleged alibis were not sustainable, the accused had motive to kill the deceased; there was adequate inculpatory evidence to link the accused with the death of the deceased.

The issue for determination by the Court is an answer to the test laid down by the Court of Appeal in the case of NZIVO Vs REPUBLIC (Supra) and SAWE VS REPUBLIC (SUPRA), whether –

- (a) the incriminating facts in the circumstantial evidence in this case, were sufficient to justify the inference of guilt and were incompatible with the innocence of the accused or the guilt of any other person and incapable of any other reasonable hypothesis other than that of the guilt of the accused,
- (b) there are other co-existing circumstances which would make or destroy the inference of the accused's guilt,
- (c) the circumstantial evidence did not irresistibly point to the accused to the exclusion of all others so as to justify the conviction,

### OPINION AND CONCLUSION

It is common ground among both the prosecution and the defence Counsel that there is no direct evidence connecting the accused with the death of the deceased. All the evidence is circumstantial. However as it has often been said on this subject, to say that the evidence of the entire prosecution is circumstantial is no derogation of that evidence for circumstantial evidence is the evidence of all the surrounding circumstances which go to prove a fact with the accuracy of mathematics.

The test of whether such evidence would indeed prove a fact with such accuracy is whether the incriminating facts are such that they must be incompatible with the innocence of the accused or the guilt of any other person and are incapable of explanation upon any other hypothesis than that of his guilt, and further that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused.

In this matter as Mr. Muteti learned Senior State Counsel submitted, it is not merely the question of circumstantial evidence only. There is also the case of recent possession of stolen items.

On circumstantial evidence there firstly is the uncontested fact that the accused lived with the deceased in the same house. Secondly the deceased used the toilet where the deceased's body parts were recovered stacked in the sack.

Counsel also submitted that the accused had opportunity to kill. It is admitted by the defence that the accused saw the deceased on 7<sup>th</sup> September 2001 the 4 days referred to in the Information or Charge Sheet. The attempt, Counsel submitted, for the accused to weave an alibi is hopelessly shattered by the accused himself. He said that he returned from Voi and saw the deceased on 7<sup>th</sup> September 2001. It gave him opportunity to kill the deceased. I agree.

Counsel further submitted that the attempts by the accused to invent trips made on 9<sup>th</sup> September to

Nairobi; and 11<sup>th</sup> to Kitale does not help the accused because the dates fall outside the period of inquiry or under investigation. Indeed the particulars of the Charge Sheet or Information read “on diverse (dates and time) between 4<sup>th</sup> and 8<sup>th</sup> September 2001 (and not 9<sup>th</sup>, 10<sup>th</sup> or 11<sup>th</sup> September 2001.) The purported alibi or trips are therefore of no consequence or avail to the accused.

## OF MOTIVE

Although motive would in view of the definition of malice aforethought (in 206 of Penal Code, Cap 63, Laws of Kenya), be irrelevant, in this case, there was an overriding motive why the accused would want to kill the deceased. The accused would want to kill the deceased because of a dispute between the accused and the deceased over the deceased’s properties (which the deceased had reported to his parents in Ntombiri) the accused wanted to sell. There was also evidence that the accused wanted to take over the deceased’s portion of the land, an unusual smell in a pit latrine that the accused would usually use and there is evidence that the accused took over the deceased’s portion of land, thus achieving his objective, he took over the deceased’s portion of land and told his mother that the deceased had so agreed. Dead men of course tell no tales. The accused says in his evidence that he instructed workers to plant his portion and when they finished to plant his portion, to also plant potatoes on the deceased’s portion as well.

Learned Senior State Counsel submitted and with which submission, I entirely agree, there was only one hypothesis, and that was that the accused wanted to take over the deceased’s land and knowing how emotive land issues are, the deceased would obviously resist. The best option therefore would be to eliminate the deceased at an opportune moment and be free to claim and utilize his land. Those facts are inculpatory against the accused. They can only lead to one hypothesis that the accused murdered the deceased.

The next crucial inculpatory evidence is possession of the keys which were ordinarily kept by the deceased, and were now in the hands of the accused. The explanation by the accused, Counsel submitted, and I again, with respect agree with that submission, that he got the keys from the deceased’s girlfriend is not plausible. If indeed, he had found the keys in the hands or possession of the deceased’s girlfriend, he would without hesitation have followed the girlfriend and found from her where her boyfriend, and his brother was. Although the girlfriend never gave (and her statement was never taken by the investigating officer PW3), my view and finding is that the accused took the keys from the accused. At least the evidence of PW2 showed that she took the keys from the girlfriend who informed her that she had been given the keys not by the deceased but by the accused!

According to the evidence of PW1 who upon the entering the toilet was attracted or noticed the presence of many flies and extremely foul smell from the toilet, and that alone made PW1 raise eyebrows as to what was in that toilet. If indeed the accused was in that compound would such matters have escaped his notice? The answer to that question must indeed be in that negative.

In my view the failure to raise any concern over the state of the toilet must speak volumes. The accused must have known that therein, in that toilet, were the remains of his brother, and have intended to conceal his heinous act, he would not raise any concern over the state of the smell from the toilet.

Interestingly in his evidence-in-chief, the accused stated that when he met his mother (PW2), he informed (his mother) that he had taken six days without seeing his brother that was on 14<sup>th</sup> September 2001. That alone in my view is confirmation that the accused was constantly within the homestead for six (6) days preceding the 8<sup>th</sup> September 2001 and within those six (6) days must have been the time he killed the deceased. He had said in his plea “I did not kill him intentionally”.

It is also noteworthy that on 14<sup>th</sup> September 2001, the days the body was discovered in the pit latrine, the accused fled home, and spent the night at Peter Kiugu’s home. The law of evidence Section 119 of the Evidence Act, (Cap 80 Laws of Kenya) is that the conduct of an accused person after the commission of an offence can be inferred to mean guilt on the part of the accused. Why would he move away from his

own place to avoid, his own bed? The answer must be that he had been discovered.

### OF MALICE

Although PW1, (the father of both the deceased and accused), testified that human parts – the body had been cut into two and each part was in a different sack and tied together, that the hands were cut off at the elbows – the body was cut off at the waist, the evidence of PW4, Dr Isaac Mwangi Macharia, who testified on behalf of Dr. Odingo, then Medical Officer of Health Meru District Hospital, who carried out the post-mortem showed that the body was decomposed – the flesh had decayed completely – I believe this is what PW1 saw as a cut up body – when the “hanging” limbs were as a result of natural decay of flesh or matter. To this extent, the two versions of evidence are two perspectives from a lay person, and a professionally trained person who on examination of the body was able to tell and testify on the injuries inflicted, and offer opinion on cause of death.

PW4 testified as already stated above, that the deceased suffered a fracture on the left Temporal Region of the skull, a mutilated wound on the right leg caused by a blunt object on the skull, cut wounds inflicted by a sharp object, the fact of knocking the deceased with a blunt object and cracking his skull, cutting his leg with a sharp object and stacking the body into two sacks and dumping the same into a pit latrine has no other explanation other than malice on the part of the accused.

### CONCLUSION

Having demonstrated motive, the fact that the deceased was at the scene during all the material time 4<sup>th</sup> – 8<sup>th</sup> September 2001, he was found with the deceased’s set of keys, and unacted his intention to take over the deceased’s land the legal tests on circumstantial evidence set out in both NZIVO VS REPUBLIC, and SAWE VS REPUBLIC (supra) are met. I find and hold that –

- (a) the circumstantial evidence in the instant case irresistibly points to the accused to the exclusion of any person;
- (b) the evidence herein satisfies the legal requirements of circumstantial evidence, the incriminating facts herein are incompatible with the innocence of the accused or the guilt of any other person and are incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused, and I find no other co-existing circumstances which would weaken or destroy inference of the accused’s guilt.

Being therefore of the above mind, I find that the prosecution has proved its case beyond any reasonable doubt. I consequently find the accused guilty of murder of the deceased, Jacob Muriuki Munene on a day between the 4<sup>th</sup>–8<sup>th</sup> September 2001 at Kibirichia Sub-location, Kibirichia Location Meru Central District within Eastern Province, at a time which must remain embedded only in the mind of the accused, and may he find peace in his soul.

The punishment for the offence of murder contrary to Section

203 of the Penal Code (Cap 63, Laws of Kenya), is prescribed under Section 204 of the said Code is death. I therefore sentence the accused to death as by law prescribed.

I also hasten to add that in accordance with the provisions of Section 330 of the Criminal Procedure Code, the accused will have a right of appeal within 30 days of the date hereof.

There shall be orders accordingly.

Dated, delivered, and signed at Meru this 24<sup>th</sup> day of April, 2009.

**M. J. ANYARA EMUKULE**

JUDGE