



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

**Criminal Case 34 of 2007**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PETER NDERITU NGOITIEK ..... ACCUSED**

**RULING**

The Accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence stated that on the night of 20<sup>th</sup> and 21<sup>st</sup> day of December 2006 at Olpopong area in Narok District within Rift Valley Province murdered Lucy Wambui Mariko.

The prosecution called a total of eight witnesses in their bid to prove the charge against the accused person. Several witnesses gave evidence how Lucy Wambui Mariko the deceased herein went missing from her house in Narok. Peter Ndathi, PW3 testified that the deceased used to worship in his Church where he is a pastor of a Church known as Word of Faith in Narok. On 21<sup>st</sup> December 2006, he was informed that the deceased had gone missing from the previous day. PW3 enquired from the police whether there was a police swoop in which the deceased could have been arrested. He with other members of the church visited the police station, after failing to find the deceased, PW3 summoned the other Christians and they started combing the area looking for the deceased.

The search started from the deceased house, where they noted some blood stains, they followed the streaks of blood and found a place where it looked like there was a scuffle. They found a neck chain which was identified as belonging to the deceased person. They noticed wheelbarrow marks which they followed up to the river. They suspected the deceased was transported in the wheelbarrow and was thrown into the river. The following day, on 22<sup>nd</sup> December 2006, the police sent some divers. The search team was divided into several teams comprising of members of the Church, relatives of the deceased and members of the public. They saw some clothes floating in the river, and also saw the body of the deceased. The body had been dressed like a man and the head was tied. PW3 identified the clothes that are a trouser and a jacket as the clothes they recovered on the body of the deceased.

The body of the deceased was taken to the mortuary and was identified by Stephen Mwaura PW2 the brother of the deceased. The post mortem examination was carried out by Doctor Esther Nyachae at the Narok District Hospital Mortuary on 26<sup>th</sup> December 2006. Upon examination of the body of the deceased, the Doctor saw two dip cuts on the head and the skull was exposed. After examination she formed the opinion that the cause of the death was cardio plenary arrest secondly to a head injury.

Joseph Muranga Olegwa PW1 testified that he used to work with the accused person at the quarry but on the 20<sup>th</sup> December 2006 the accused person disappeared from the place of work until the day he was arrested. Ag inspector Odhiambo Nyakaa testified that on 21<sup>st</sup> December 2006 while at Narok police station he received a report that the deceased had gone missing from 20<sup>th</sup> November 2006. She had gone to Church and failed to return. He recorded the matter and they started searching for the deceased.

They followed a trail of blood which they noticed from the deceased house and it led them to the river. Along the way, they noticed a place which looked like there was a scuffle. They recovered a necklace which he produced it as exhibit in this matter. They followed the wheelbarrow marking up to the river.

The body of the deceased was retrieved from the river. He also recovered the clothes that the deceased wearing which he produced as exhibits. He also examined the body of the deceased and saw blood oozing from the head.

He handed over the investigations of this matter to Sergeant Martin Wanjala PW8 who carried out the investigations following a tip off from informers he arrested the accused person with some suspected stolen window panes. PW8 testified that after interviewing the accused person he established that he used to work at the quarry and this was confirmed by PW1. The clothes that were recovered from the body of the deceased were also identified as belonging to the accused person. PW8 tried to interview the wife of the accused person and another child who confirmed the clothes belonged to the accused person. However this child was not called as a witness and this is the only evidence PW8 used to charge the accused person.

The prosecution in this case has miserably failed to establish a prima facie requiring the accused person to be placed on his defence. The only evidence against the accused person is the clothes that were recovered from the body of the deceased which the investigating officer suspected belonged to the accused person. I say suspected because he was led to believe they belong to the accused person through the evidence of a child who was not even called as a witness. This is worthless evidence and cannot form the basis of requiring the accused person to be placed on his defence. **(See the case of Bhatt vs. Republic)** the court of appeal gave guidance on what constitutes a prima facie case in the following terms;

***“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be though sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hoes the defence will fill the gaps in the prosecution case.***

***Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: or can any amount of worthless discredited evidence. It is true, as Wilson J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence ahs been heard. It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if not explanation is offered by the defence.”***

All the evidence that connected the accused person with the murder of the deceased was circumstantial, there was no direct evidence. In case of ***Kipkering Arap Koskei & Another – vs. Republic 16 E.A.C.A 135:-***

***“In order to justify, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

It is evident from the prosecutions witnesses there is absolutely no evidence to link the accused person with the murder of the deceased. Accordingly the accused person is found not guilty of the offence of murder and he is discharged under the provisions of section 306 of the Criminal Procedure Code.

**RULING READ AND SIGNED THIS 25<sup>TH</sup> JUNE 2009.**

**M.K. KOOME**

**JUDGE**