REPUBLIC……..……PROSECUTOR

Versus

PETER MURIITHI MWANGI)

FREDRICK MURIMI MURIITHI)……...…….……ACCUSED

R U L I N G

Peter Muriithi Mwangi and **Fredrick Murimi Muriithi** hereinafter referred to as "*the accused"* were arraigned before this court charged with the offence of Murder contrary to *Section 203* as read with *Section 204* of the Penal Code. It was alleged that on the night of 7th and 8th May, 2008 at Njine village in Kiine location within Kirinyaga District of Central province they jointly murdered **MWM** hereinafter referred to as "*the deceased."* The accused pleaded not guilty to the information and were tried.

The prosecution closed its case after calling a total of 8 witnesses. The evidence adduced by the witnesses is clear that the body of the deceased was on the morning of 8th May, 2008 found lying half naked in the farm of **Willy Kamotho Gatimu** (PW4) by a school going kid namely **K K** who alerted PW4. PW4 went to the scene and recognized the deceased as a wife of a neighbour **Peterson Mbugua Kangaro** (PW1). The deceased's body was half-naked with no undergarments. He went and informed the Assistant Chief, **Patrick Muriithi Maru** (PW5) and thereafter PW1. They all came to the scene. PW1 noted that the deceased's mouth had been filled with soil, she had been raped and strangled. According to PW1, the deceased had the previous day at about 3 p.m left the home to go and buy bananas that should then sell later. She never came back home. However she had been seen taking local brew called makabo in the home of the 1st accused. She had been seen by **Samuel Kinyua Njeri** (PW2) and her son **Cyrus Kinyua Mbugua** (PW3) both of whom were also partaking the same brew. The two however left the alcohol den at about 8.30 p.m. The deceased was still drinking. There were many patrons though that this witnesses left behind in the company of the deceased.

Thereafter PW1 reported the incident at Baricho police station. In the company of **Sgt Lewis Chany**i (PW8), **P.C. Talam** and **P.C. Ratemo** they came back to the scene and removed the body to Karatina District Hospital mortuary. Post mortem was conducted by **Dr. Gatangi** (PW7) who formed the opinion that the cause of death was asphyxia due to strangulation. Later the accused were arrested by members of the public and brought to Kerugoya Police Station and were then charged with offence having been mentally evaluated by **Dr. Owino Ong'ang'a** (PW6). In summary, that was all the evidence that the prosecution led in respect of this case.

Mr. Mwangi, learned counsel for the accused thereafter submitted that the prosecution had not established a prima facie case against the accused to warrant them being placed on their defence. The prosecution case was purely circumstantial. However there were other circumstances that weakened the circumstantial evidence of the prosecution. For this submission counsel relied on the following authority; **Neema Mwandoro Ndungu V R (2008) eKLR**.

In response, **Mr. Orinda**, learned Senior principal State Counsel submitted that the deceased was seen in the 1st accused's drinking den. The deceased's body was found within the proximity of the accused's

home. PW5's evidence as to the circumstances of arrest was sufficient to link the accused to the offence.

It is trite law that for an accused person to be placed on his defence, the prosecution must at the close of its case establish a prima facie case against the accused. It was so stated in the case of **Ramanklal Trambaklal Bhatt V R (1957) EA. 332** in these terms:

"**(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one 'which on full consideration might possibly be thought sufficient to sustain a conviction.'**

(ii) The question whether there is a case to answer cannot depend only on whether there is 'some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."

In the circumstances of this case, I am satisfied that what we have is a mere scintilla of evidence insufficient to put both accused to their defences. No evidence has been adduced as to how the deceased sustained the injuries. Nobody saw the accused commit the alleged offence. Indeed it would appear that the accused were merely arrested because the deceased had been seen drinking makabo from their home. There was nobody who even saw the accused in the drinking den with the deceased. There was therefore no direct evidence linking the accused to the death of the deceased. The evidence adduced against the accused was therefore purely circumstantial. The general rule set out in the case of **Kipkering arap Koske and another (1949) 16 EACA 135** and reinforced in the case **Neema Mwandro Ndarya** (supra) regarding circumstantial evidence is as follows:

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

The question that this court has to contend with at this stage is whether the evidence that has been adduced by the prosecution is incompatible with the innocence of the accused and incapable of any explanation other than the guilt of the accused.

The evidence implicating the accused is simply that the body of the deceased was found in the proximity of their home and where she had been seen drinking local brew the previous night. This obviously raises suspicion against the accused as having had the opportunity to commit the murder. It does not however eliminate the possibility of any other person(s) having similar opportunity. Afterall, there were many patrons drinking thereat. Nobody saw the deceased leave the drinking den and with whom. Indeed there is even no evidence at all that the accused were present at the den. All the witnesses were categorical that they did not in particular see the 1st accused in the drinking den. It cannot be said therefore that such evidence points irresistibly to the guilt of the accused nor can the circumstances be said to be incompatible with the innocence of the accused. Further there is even evidence that the accused were arrested for selling the illegal brew. It is instructive that the accused were first arrested by members of public and handed to the police. No such member of public was called to testify so as to let the court in the picture the basis upon which they had arrested the accused. One is therefore tempted to think that the members of public were fed up with the dangers posed to the community by the brewing and selling of makabo brew by the accused and decided to take the law in their hands. That is why they arrested the accused in the first place and handed them to the police. The evidence that has been adduced by the prosecution therefore is not one on which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered - **Ramakalal T. Bhatt V Republic** (supra). There is

therefore no prima facie case established against the accused upon which this court can put them on their defences. I find the accused not guilty and acquit them under *section 306 (1)* of the Criminal Procedure Code. The accused shall be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A MAKHANDIA

JUDGE