



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Case 70 of 2004

REPUBLIC.PROSECUTOR

VERSUS

JONAH MUTHEE.....1ST ACCUSED

SHADRCK MUTIRA.....2ND ACCUSED

JUDGMENT OF THE COURT

1. The enactment and operationalisation of the STATUTE LAW (Miscellaneous Amendments) ACT 2007 abolished the role of assessors in murder trials with effect from 15.10.2007
2. As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that no prejudice shall be suffered by the accused as a result of this decision. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred to date.
3. The two accused persons, who are also brothers, are charged with murder contrary to section 203 as read with section 204 of the penal code. It is alleged that on the 19th day of March 2004 at Nchiru market in Nkomo location of Meru North district, within the Eastern Province, they jointly murdered JASON THURANIRA.
4. The facts of this case shall emerge from the evidence given by the 10 prosecution witnesses. PW1 was **Shadrack Gikundi**, a resident of Ndiru market, well known to both the two accused persons and the deceased. He stated that on 19.3.2004 at about 7.30pm, he was at his hotel at Nchiru market selling tea to his patrons, among them the two accused persons. He stated that after the two accused persons took their tea, they left and that at the same time the deceased was also present at the hotel where he had gone to collect his clothes which he had washed earlier in the day.
5. PW1 stated that soon after the two accused persons had gone out of the hotel and the deceased had passed through the hotel to the rear, he (PW1) heard some noise coming from the corridor of the hotel and that when he rushed out to see, he saw the 1st accused stabbing the deceased with a sword, while the 2nd accused was holding the deceased by the hands. PW1 stated that the 1st accused stabbed the deceased a number of times, though he could not say how many nor could he say which part of the deceased's body was stabbed. PW1 also stated that as he tried to separate the deceased and the pair as the deceased pleaded with the 1st accused, Jonah not to kill him.
6. PW1 also testified that the 1st accused threatened to stab him (PW1). That fearing for his life, PW1 ran off, screaming and other members of the public came around, some of them took the

- deceased to hospital. PW1 also testified that when he saw the deceased being stabbed by the 1st accused, the three persons were also struggling over a small radio. PW1 identified both the Somali sword-MFI-1 and the small radio, MFI-2. PW1 also told the court that the scene of the crime was well lit with electricity lighting and that he was therefore able to see everything and everyone clearly.
7. During the cross examination, PW1 admitted that part of his statement to the police, saying that he saw the two accused persons pass through the hotel into the corridor behind the deceased was not correct. He also stated that the 1st accused stabbed the deceased 4 times while the 2nd accused held the deceased and that after members of the public came to the scene the 1st accused ran through the hotel to the front while the 2nd accused ran out through the hotel to the front while the 2nd accused ran out through the rear door corridor.
 8. PW2 was **Francis Muthee**. He stated that at about 7.30pm on the 19.3.2004, he was at Nchiru market taking tea at PW1's hotel. He said that as he was taking his tea, he heard some noises from the rear of the hotel and that when he went to see what was happening he found the two accused persons pass through the hotel and that when he saw the three persons, he heard the deceased demanding his money and 1st accused stabbing the deceased while the 2nd accused was holding the deceased by the hands.
 9. PW2 also testified that before the fight broke out he saw the deceased removing his clothes from the clothes line and further that the fight was preceded by a verbal exchange. PW2 also stated that though the dispute between the two accused persons and the deceased had initially been amicably settled, the two accused persons attacked the deceased on grounds that he (deceased) had demanded money from the 1st accused in public. He also said that he saw the 1st accused stabbing the deceased first on the head, then on the chest and then the stomach. He also said that he saw the 1st accused carrying a small radio as he (1st accused) passed through the hotel: and that he was able to witness all the events with the help of electric lighting.
 10. PW3 was Robert Kimathi Murega, a miraa businessman at Nchiru Market. He stated that on 19.3.2004 at about 7.30pm, he was at PW1's hotel where he had gone to keep his miraa box for the night. He said that as he went to keep his box at the rear of the hotel, he saw the two accused persons, whom he knew well, holding each other with a 3rd person who was saying that he had been stabbed. PW3 also stated that he saw the 1st accused holding a sword with which he (1st accused) stabbed the deceased, and that PW3 was only 5 metres away from the struggling trio and that there was sufficient electric lighting. He also testified that the 1st accused stabbed the deceased while the 2nd accused held the deceased by the hands to facilitate the stabbing. PW2 stated further that after the two accused persons had inflicted the fatal wounds on the deceased they ran out of the hotel with the 1st accused carrying the sword high in his hand and shouting. PW3 said he had at that point, to run for dear life.
 11. during cross-examination, PW3 stated that when he first saw the two accused persons and the deceased, the 1st accused was demanding a radio from the deceased and that immediately he heard those words, he heard the deceased say twice in close succession that he had been stabbed and that PW3 actually saw the 1st accused stab the deceased on the head, and that he only ran away after the deceased fell down. PW3 denied a suggestion by the Defence that he did not witness the incident.
 12. PW4 was **Joseph Mwenda**, a businessman at Nchiru market. He stated that on 19.3.2004 at about 7.30pm, he was inside his kiosk when he heard from one Cyprian that Jason Thurairira (deceased) had been stabbed at PW1's hotel. He said he ran to PW1's hotel and that on arrival there he helped take the deceased to hospital and later reported the matter to Nchiru Police Station.
 13. PW4 also stated that when he and others arrived at the police station they found the 2nd accused person at the police station and the 2nd accused had gone to report that he had been beaten. PW4 said that the deceased was pronounced dead on arrival at the Meru District General Hospital. PW4 also stated that he saw the 1st accused at the police station and that his head (1st accused) was bandaged but he could not say why the 1st accused's head was bandaged.
 14. PW5 was **Kinyua Robert** who testified that on 19.3.2004 at about 7.30pm, he was at Nchiru market when he was asked to take the deceased to hospital. He said that they passed through the

- police station before going to hospital but that the deceased was pronounced dead on arrival at the hospital. PW5 also testified that on return to Nchiru police station after they had left the deceased's body at the mortuary, he saw the 1st accused at the station and that he (1st accused) had his head bandaged with a lesso.
15. PW6 was Stephen Mungathia who testified that on 19.3.2004 at about 7.30pm, he was at his kiosk at Nchiru market when he heard some commotion at PW1's hotel. He said that when he went to the scene, he saw the deceased who had been stabbed on the left side of the stomach and on the head. PW6 said he joined other members of the public in finding a vehicle to take the deceased to hospital. He also said that at the police station, he saw the 2nd accused who had come to report that his brother (1st accused) had killed someone. Later, PW6 said he also saw the 1st accused at the police station alleging that he had been assaulted.
 16. PW7 was **John Nthambura**, the father of the deceased. Stated that he received news of his son's death on the morning of 20.3.2004 and that on 22.3.2004, he identified the deceased's body to the doctor for the post-mortem examination.
 17. PW8 was **M'Marete Samuel** father to the two accused persons. He stated that on 19.3.2004 at about 9.00pm, the 1st accused went home crying and alleging that the deceased had snatched his radio and that he had also been stabbed by the deceased. He said that later he escorted the 1st accused to Nchiru police station to make a report. PW8 also stated that according to what the 1st accused told him, PW1 is also one who hit him (1st accused) on the head while the deceased is the one who stabbed him (1st accused) on the hand that the disagreement between the deceased and the 1st accused was over a debt of 30/= owed by the 1st accused to the deceased and for which the deceased had taken the 1st accused's radio in lieu of payment.
 18. PW9 was Number 58987 police constable **Fredrick Mutua** who investigated this case. He stated that on 19.3.2004, he was on duty at Nchiru police station when 2nd accused herein went to the station and reported he had been stabbed by the deceased and that the 2nd accused had a bleeding stab wound on the right hand and that the 2nd accused was also carrying a knife. Pw9 further testified that when the deceased was later brought to the station by members of the public the 2nd accused told him (PW9) that the deceased had been stabbed by the 1st accused who had run away. PW9 stated that the deceased was bleeding profusely from the head and the stomach and that he (PW9) issued the people escorting the deceased with a note to take him (deceased) to hospital.
 19. PW9 also told the court that he carried out investigations into the incident including a visit to the scene from where he recovered a small radio which he produced as P exhibit 1. He also said that his investigations revealed that there was a dispute between the deceased and the 1st accused over a debt that the 1st accused owed the deceased and that the 1st accused had given P exhibit 1 to the deceased in lieu of the money that was owed. PW9 also testified that he found out that the stab wounds on the hand of the 2nd accused were also inflicted by the 1st accused and that the attack on the deceased was precipitated by the deceased's demand for his money from the 1st accused. PW9 produced the knife he recovered from the 2nd accused as P exhibit 2.
 20. PW9 also testified that as he was booking the report about the deceased's death the 1st accused was escorted to the station by the father. On the following day, PW9 said he escorted the two accused persons to the hospital for treatment and subsequently charged them with the offence of murder.
 21. in his further testimony, PW9 stated that the 2nd accused reported to him that he (2nd accused) had been stabbed by the 1st accused, and that it was the 2nd accused who took the knife to the police station, while the 1st accused later reported that he (1st accused) had been assaulted by the deceased. PW9 also produced his investigation diary as P exhibit 3 with particular emphasis on entries Nos. 33 and 36 of 19.3.2004. Entry NO.33 concerns the report made by the 2nd accused to the effect that he had been assaulted by the 1st accused and that the 1st accused had also stabbed the deceased, JASON THURANIRA on the head and the stomach. Entry Number 36 records the events preceding the stabbing of the deceased which revolved around a dispute over a debt owed by the 1st accused to the deceased. The entry also noted that the murder weapon had been recovered and kept in police custody as an exhibit.

22. PW10 was DR. **Isaac Mwangi Macharia** of the Meru District General Hospital. He testified that in or around March 2004, he worked alongside one DR. IRUNGU MPUTHIA at the Meru District General Hospital before the latter proceeded for further studies. It was Dr. Mputhia who performed the post mortem examination on the body of the deceased. According to the reported date 20.3.2004, the deceased suffered injuries on the temporal region of the head, about 8cm deep, a 6cm long cut on the back of shoulder; a 3cm wide cut on the backside of the left armpit and another 3cm wide cut on the left side of the abdomen.
23. Dr. Macharia also testified that according to the report the deceased's left side of the chest was full of air while there was massive bleeding in the abdominal cavity. The doctor also said that the deceased's spleen had a 2cm wide wound, and a deep cut on the head. In the doctor's opinion, the deceased died from multiple cuts. The post mortem report was produced as p exhibit 4.
24. At the close of the prosecution's case, each of the two accused persons chose to give sworn testimony. They also called 3 witnesses. The 1st accused JONAH MUTHEE MARETE testified that on 19.3.2004, sometime after 5.00pm he and his brother the 2nd accused herein took tea at shadrack's (pw1's) hotel and that after the tea, the 2nd accused went away and left the 1st accused waiting for the deceased whose radio he (1st accused) had repaired. The 1st accused went on explain that at about 7.30pm, he met with the deceased behind PW1's hotel when the deceased demanded to be paid his 70/= which the 1st accused said he owed the deceased. He also said that at that point the deceased forcibly took the small radio from him (1st accused) and walked into the hotel; the 1st accused followed the deceased and the two walked towards the kitchen door but found the same closed. The 1st accused testifies further that when he and the deceased got outside the hotel the 1st accused demanded to be given back his radio but instead the deceased tucked the radio away into his (deceased's pocket). The 1st accused stated further that the deceased then grabbed him (1st accused) by the neck and removed a knife which he (deceased) aimed at the 1st accused's chest, and that as the 1st accused put up his left hand in self defence he deceased cut him (1st accused) on that hand just above the wrist.
25. the 1st accused testified further that a struggle ensued between him and the deceased during which he (1st accused) wrestled the knife from the deceased and let him go, but that the deceased took a long plank of wood with which he (deceased) hit the 1st accused at the back of the head and also on the left hand side of the head. The court observed visible scars at the back of the 1st accused person's head. The court observed visible scars at the back of the 1st accused person's head. The 1st accused also said that after he had been hit by the deceased, he retaliated by hitting the deceased in the stomach using the head and thereafter he could not remember what happened. The 1st accused denied any knowledge of how the deceased sustained the stab wounds and that he only came to when he was in hospital. The 1st accused said he was later taken to Meru District General Hospital on 22.3.2004. The 1st accused denied that the 2nd accused was present when the struggle with the deceased was going on.
26. The 1st accused was questioned at length by Mr. Oluoch for the state. he testified that he could not tell whether he stabbed the 2nd accused. He also stated that when the deceased demanded his 70/= from him the 1st accused got upset. The 1st accused denied that he took a knife from the hote; with which he stabbed the deceased; he also said he could not verify the statement taken from him under inquiry because he (1st accused) had just come from the hospital the 1st accused also disowned the version of the story which he is said to have given to PW8 samuel Marete. He also stated that he killed the deceased but that he did not know how and that the 2nd accused did not assist him in killing the deceased. The 1st accused also stated that he did not obtain a P3 form in respect of the injuries he allegedly suffered at the hands of the deceased.
27. the 2nd accused also gave sworn testimony and stated that on 19.3.2004 at about 5.00pm, he was at Nchiru market trying to find a tractor. He also said that before he went in search of a tractor he

- and the 1st accused took tea together at PW1'S hotel he met the 1st accused holding a knife and that he (1st accused) was bleeding from the head. That the 1st accused looked drunk and confused and that he (2nd accused) said he tried to wrestle the knife from the 1st accused when he cut himself on the right arm. The 2nd accused also stated that he heard people saying that the 1st accused had killed the deceased. The 2nd accused distanced himself from the OB entry numbers 33 and 36 of 19.3.2004 and said that he was not at the scene when the deceased was stabbed; and further said that it was not true that the 1st accused stabbed him.
28. In his further testimony, the 2nd accused stated that he grabbed the 1st accused with the left hand while he took the knife with the right hand. The 2nd accused could not say whether the 1st accused lost consciousness but that he could remember that the 1st accused was walking in a drunken manner and looked like he was mad. He also said that the evidence given by the police and all the other witnesses was all lies and that he and the prosecution witnesses have had a long dispute.
29. DW1 was **Isaya Thurania**. He stated that on 19.3.2004 at about 7.30pm, he was at Nchiru market when he met the 2nd accused and that soon thereafter he heard screams coming from PW1's hotel. He stated that he rushed to the scene and on arrival at PW1's hotel, he saw the 1st accused coming from behind the hotel holding a knife in the hand and that sensing danger, he (dw1) ducked the 1st accused and went back to the hotel. He also said that as he ran back to the hotel, he left the 2nd accused struggling with 1st accused in an effort to disarm him (1st accused)
30. When put under cross-examination, DW1 admitted that he did not tell the police of what he had witnessed on the evening of 19.3.2004 and explained that the omission was due to the fact that he was transferred from Meru to Kisii.
31. DW2 WAS **Samson Murungi** who stated that on 19.3.2004, he was at Nchiru market when he met the 2nd accused and DW1 and that after screams were raised from PW1's hotel, he rushed to the hotel only to meet the 1st accused running out of PW1's hotel carrying a pang. The 1st accused was bleeding and that after he saw the deceased lying on the ground dead, he got shocked and went home to sleep. DW2 admitted that he did not witness the incident.
32. DW3 was **Dr. Isaac Macharia**, the medical officer of health at Meru District General Hospital. He testified that on 22.3.2004, he was working at Meru District Hospital. He testified that on 22.3.2004, he was working at Meru District General Hospital together with one Dr. Kimotho who filled and signed DMFI- 1(a) and(b) in respect of the 1st accused Jonah Muthee. Dr. Macharia said that from th report, the 1st accused appeared confused, incoherent and talking inappropriately and that he had some injuries on the back of the head with swollen scalp which on x-ray showed a fracture of the skull. That the 1st accused was put on antibiotics. He produced the discharge summary, inpatient notes, prescription and consent for surgery as D exhibit 1A (bundle), while the x-ray pictures were produced as D exhibit 1B. Dr. Macharia also told the court that the magnitude of the injuries were such that they could cause confusion and abnormalcy in the sufferer. Dr. Macharia further testified that D exhibits do not contain names of the person or persons who may have inflicted the injuries on the 1st accused, and that in such a confused state one could say he was assaulted when he was not.
33. at close of the hearing Mr. Mosota for the two accused persons submitted that the prosecution had failed to prove its case beyond reasonable doubt against both of them. He argued that the prosecution evidence was inconsistent and that of the witnesses could not say how and by whom the deceased was stabbed. Mr. Mosota also contended that the testimony given by PW1 in court was inconsistent with what he told the police in his statement. The evidence by PW2 also came under scrutiny and Mr. Mosota urged the court to discard PW2's testimony. It was also contended on behalf of the accused persons that the prosecution witnesses were not sure as to whether the accused persons escaped through the front of rear door of PW1's hotel and urged the court to give the benefit of doubt to the accused persons. According to Mr. Mosota, the only credible prosecution witness was PW8, the father of the two accused persons. Regarding the defence, Mr. Mosota contended that the same remained unshaken and that the prosecution failed in its bid to place the two accused persons at the scene of the crime.
34. Finally, Mr. Mosota submitted that each of the two accused persons should be acquitted for the reason that their constitution rights under section 72(3) of the constitution were violated. He

submitted that the accused persons were entitled to be produced before the court within 14 days of their arrest on 19.3.2004, but that instead they were not taken to court until 6.7.2004. The defence relied on the case of **Albanus Mwasia Mutua – Vs- R Cr. Appeal No. 120 of 2004**. (Court of appeal at Nairobi)

35. Mr. Oluoch for the state did not agree with Mr. Mosota. He submitted that the evidence given by both PW1 and PW2 places both accused persons squarely at the scene of the crime and that it was clear that the two accused persons formed a common intention to commit an unlawful act and eventually murdered the deceased. Mr. Oluoch relied on the provisions of section 21 of the penal code and also on the case of **Francis Mwangi Njaruni-vs- R Cr. Appeal No. 39 of 2000**. Section 21 of the penal code provides that-

“21. When two or more persons form a common purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

36. In the **Mwangi Njaruni** case (supra) the court of appeal said the following at page 4 of the judgment: -

“The learned judge was sensitive to the provision of section 21 of the penal code. In that it was not incumbent upon the prosecution to prove which of the accused struck the fatal blow on the head of the deceased. The essential ingredient of the charge was that all the attackers must have formed a common intention to cause grievous harm to the deceased. We wholly agree with the judge’s expression that: -

“The fact that others also beat the deceased does not absolve one who was positively identified from liability, so long as it can be shown that they had a common intention in terms of section 21 of the penal code.”

Mr. Oluoch further submitted that the 1st accused admitted that he was not only at the scene of the crime, but that he was also involved in a fracas with the deceased and that the defence evidence had not displaced the prosecution’s case that the 1st accused stabbed the deceased during that fracas.

37. It was further contended by Mr. Oluoch that the prosecution had proved beyond doubt that there was malice aforethought in that: -

- a. A dangerous weapon, namely a knife was used during the attack.
- b. The deceased was stabbed in numerous parts of the body.
- c. The most critical body parts were stabbed, namely the chest the head and the stomach.
- d. All along the 2nd accused was holding on to the deceased so as to facilitate stabbing by the 1st accused.
- e. The conduct of both accused persons, especially when the two turned the story round to allege that the deceased had attacked the 1st accused was not consistent with the innocence of the two accused

38. Mr. Oluoch also tore into the defence case and particularly the testimony of DW1 which said was at variance with what was contained in the OB under entries 33 and 36 of 19.3.2004. Mr. Oluoch said that the evidence by DW2 and DW3 was of little value to the defence case and was easily displaced by the prosecution evidence.

39. Regarding the alleged violation of the accused persons’ constitution rights under 72(3) of the constitution, Mr. Oluoch submitted that the fact that both accused persons were also injured during the same time required much more time for investigations to be absolutely certain about who had assaulted them, and in particular to establish who had assaulted the 1st accused.

40. From the evidence and the submissions, I think the following issues arise for determination (a) whether the prosecution has proved its case beyond any reasonable doubt and in reaching that

conclusion; (b) whether both accused persons are placed at the scene of the crime on the material day; (c) whether it was the 1st accused who inflicted the fatal injuries on the deceased (d) whether the 2nd accused was at the scene holding the deceased by the hands as the 1st accused stabbed the deceased; (e) whether it was the deceased who started the quarrel (f) whether the provisions of section 72(3) of the constitution should apply or whether a reasonable explanation has been given for the delay in arraigning the accused persons before court outside the 14 day period allowed by law.

41. It is not in dispute that the deceased was stabbed to death at about 7.30 pm on 19.3.2004 while he was collecting his washed clothes from the clothes line at PW1's hotel. It is also not in dispute that the 1st accused herein owed the deceased some Ksh. 70/= which amount the deceased demanded from the 1st accused on that fateful evening. It is not in dispute also that the 1st accused was not particularly pleased with the fact that the deceased was demanding the debt in broad daylight and before members of the public. It is also not in dispute that the 1st accused was involved in a fracas with the deceased and though it is not clear where the knife came from, there was a knife in use during the fracas. The prosecution says the 1st accused used that knife to stab the deceased while the defence alleges that the deceased started the fracas by aiming the knife at the 1st accused. The prosecution eyewitnesses say that the two accused persons were working together during the attack on the deceased, though the accused persons deny such a common intention. While the 1st accused flatly denies the presence of the 2nd accused at the scene, the 2nd accused and both DW1 and DW2 say that the 2nd accused was at the scene, though his only role they said was that of disarming the 1st accused who appeared drunk and ran around carrying a knife and behaving like a mad man.
42. I have carefully weighed the evidence before and I am satisfied that the prosecution has proved beyond any reasonable doubt against each of the accused persons. I believe the evidence of both PW1 and PW2 and that of the 1st accused person is the one who stabbed the deceased as the 2nd accused person held the deceased's hands. I do not believe the defence case that the presence of the two accused persons at PW1's hotel at the material time was a mere coincidence. The evidence is clear that the 1st accused, who owed the deceased some money did not feel good when the deceased publicly demanded to be paid. The situation was made worse when the deceased tried to take the 1st accused's small radio as a way of paying himself. The two accused persons only did what they knew best- silence the deceased and take away their precious little radio. I do not find any merit in the defence contention that it was the deceased who started the quarrel. This theory cannot stand, in the face of the evidence given by PW9 Fredrick Mutua. The evidence of the OB to which no question was raised seals the fate of each of the two accused persons in connection with the murder of the deceased.
43. I have considered the accused persons' defences but I find both devoid of merit. I reject the said testimonies as being of no consequences and also reject the testimonies as given by DW1 and DW2. As concerns the evidence by DW3, it was not stated that the 1st accused was in a state of confusion as at the time of the commission of the offence. In the result, I do not find DW3's evidence helpful to the case for the 1st accused.
44. I am also satisfied that malice aforethought has been proved beyond any reasonable doubt. First the manner in which the two accused persons attacked the deceased by holding him by the hands and stabbing him repeatedly on the head chest and stomach was a clear manifestation of the accuseds' intention that the deceased would have no chance of survival knowing that the deceased being dead has no tales to tell, the two accused turned round and alleged that it was the deceased who fired the first shot.
45. Finally, should the accused persons be set free on the ground that their constitutional rights were violated or has the prosecution provided a reasonable explanation for the three-month's delay? Mr. Oluoch explained that the case needed much more than ordinary investigations since the two accused persons were also injured during the fracas. Section 72(3) of the constitution proves that-

“72(3) a person who is arrested or detained-

a. For the purpose of bringing him before a court in execution of the order of a court; or

b. Upon reasonable suspicion of his having committed or being about to commit a criminal offence,

And who is not released, shall be brought before a court as soon as is reasonably practicable, and when he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this sub section have been complied with.”

46.I have considered the reasons given by Mr. Oluoch in answer to Mr. Mosota’s abrupt submission on this point and I am satisfied that the explanation is reasonable. It is on this point and I am satisfied that the explanation is reasonable. It is not disputed that both the accused persons were injured in the fracas and that the 1st accused in particular suffered a fractured skull though DW3 did not say whether or not 1st accused went for surgery. I also find, on the basis of the case of **Eluid Njeru Nyaga- VS R.Criminal Appeal No.182 of 2006 (court of appeal Nyeri)** the defence simply ambushed the prosecution with the demand for an explanation at the eleventh hour. The court of appeal has held that any complaint touching on the violation of an accused persons rights under the constitution must be made early during trial.

47.In the result, I find and hold that the two accused persons are jointly guilty of the murder of the deceased, JASON THURANIRA and I accordingly convict them of the same

48.It is so ordered.

Dated and delivered at Meru this 18th day of January 2008

RUTH N. SITATI

JUDGE