

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 68 of 2003

REPUBLIC PROSECUTOR

Versus

MARY WAMBUI KARIUKI alias WAMUTHENGI & SIX OTHERSACCUSED

RULING

All the seven accused persons faced two counts of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. In the first count they were charged with the murder of Peter Macharia Mugo. In the second count they were charged with the murder of William Gachuche Wambugu. Witnesses who gave evidence for the state described what occurred on 6th August 2003 at Kaweru shopping centre which is commonly known as mob justice. PW 1 survived the ordeal of that mob justice to be able to tell the tale of that evening. He encountered the 5th accused on that evening when he had gone to buy a match box. 5th accused warned him not to buy the match box. He however did buy it and left the bar where he had gone to buy it. As he went outside he met the 3rd and 4th accused. They were armed with pangas, rungas and sticks. They ordered him to sit down. He refused. The 5th accused came out of the bar and slapped him. He was also hit with rungu on the leg. He tried to run away but because of those injuries the 5th accused was able to catch him. He was tied up with a rope by the 4th and 5th accused persons. They also tied up another person who he named as Mwangi who is an alias of William Gacheche Wambugu the deceased in the second count. The accused asked PW1 to take him to the home of Macharia the deceased in count 1. They went to his home and by then they were twenty or so people. They took away Macharia from his home and returned to the shopping centre also with PW 1. They were followed by the family of Peter Macharia, deceased. On reaching the shopping centre they began to cut PW 1 and the two deceased. He noted that the first accused had Jerican which contained paraffin. She also had a panga. At this time they were being cut by the accused persons paraffin was poured on them by the first accused. She saw the first accused light them up. The deceased in the second count ran away on fire screaming. The orgy of violence continued with PW1 going in and out of consciousness. He was eventually taken to hospital where he regained consciousness. PW 2 was the mother of the deceased in the first count. She said that all the accused persons were known to her and that except the first accused, they were all born in the area where she lived. On 6th August 2003 just before 10 p.m. she was in her home. She heard dogs barking. She also heard voices of people talking. On going out she found a group of people who were accompanied by pw1. The people asked for her son Macharia deceased. They took him away together with PW 1. She followed them up to Kaweru shopping centre. They found the deceased in the second count tied up there. She then witnessed the most horrific attack on the three persons, that is, PW1, Peter Macharia Mugo deceased and William Gachuche Wambugu deceased. She described the part each of the accused played in the attack of the three persons. She said that some of them were cutting those persons whilst others were hitting them with sticks and rungas. She witnessed the first accused pouring paraffin and lighting fire on their bodies. Indeed the court did notice the marks on PW 1 of that horrific attack. The state called in total 11 witnesses. The state intended to call the 12th witness who was the doctor who performed the post mortem. The state requested and obtained two adjournments to enable it produce the doctor to produce the postmortem report. After those two adjournments and after the court had indicated that they will be the last adjournments when the case came up for hearing the state indicated that it did not know the whereabouts of the doctor and that the representative of that doctor was out of the country. The state then applied to have the post mortem

report produced by the Investigating Officer. That application was objected to by counsels representing the accused persons. The main reason for objecting was that the doctor was required to be questioned on the cause of death. The court ruled that in the interest of justice it was necessary for the doctor to attend court in view of the fact that the accused persons were facing a charge of murder. The state on hearing the ruling of the court choose to close its case. It is clear that although there was evidence showing the part that the accused persons played in the attack of the deceased, there was no evidence of death of the two accused persons. That evidence would have been adduced by the doctor who was not called by the state. It therefore follows that the state failed to prove a case of murder in respect of the two counts against the accused persons beyond a reasonable doubt. There simply was no evidence of death before court. Having reached that conclusion I find that the accused persons have no case to answer. I accordingly do hereby acquit them of the two counts of murder under **Section 306** of the Criminal Procedure Code. I therefore make a finding of not guilty against all the accused persons. All the accused persons are hereby set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2008.

MARY KASANGO

JUDGE