



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL CASE NO. 2 OF 2006**

**REPUBLIC.....PROS**

**VERSUS**

**JAMES NJERU GATUMU.....1<sup>ST</sup> ACCUSED**

**JOSEPH IRERI KABOGO.....2<sup>ND</sup> ACCUSED**

**JOSEPH MURIITHI MUCHIRI.....3<sup>RD</sup> ACCUSED**

**RULING UNDER SECTION 306 C.P.C**

The 3 accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 Penal Code.

That on the night between 12<sup>th</sup> and 13<sup>th</sup> February, 2006 at Kiangungi village they murdered James Munene Marita.

The Prosecution has closed its case after calling 12 witnesses. The postmortem report showed the doctor's opinion was that death was caused by severe head injury most closed described as intercereblum bleeding. The first witness was the doctor who examined the accused on mental status- All 3 accused were found to be of sound mental status.

Witness number 2 – (PW2) she was residing in Mutiriri where she had rented house. On 12/2/2006 she was in her house at about 5 p.m. She was with James Munene Marita the deceased to whom she was married. She saw 5 young men with sticks. She did not know them. They asked to be shown Marita's resident. This was her husband. They found her standing outside. They were shown the residence by another person. They asked him (deceased) to choose either to die or to go to Kisii or go to police station. He was a Kisii man. He said he should go to police station. Then 3 of the men left and 2 men remained at the scene. The three were going to bring the police. Later the three man returned saying they had police with them. They took deceased and went with him. She further said she saw only one person who entered the house. In the house there was a lamp light. It was at night she also said she was not able to see well.

In the morning she went to police station and she was told her husband had died. She further testified that the people who came for him she could not see them in the court at the time of Trial. Later she attended an identification parade she did not see the person she had seen in her house the day her husband was collected and taken away. She said Gitonga used to abuse her she knew him and he is one who told her they were going to bring police officers. Gitonga was not among the accused. She also said her husband used to go to work at 7 Pm and return at 6 Am.

On 10/1/2007 she said she had gone to Majimbo Prison with the wife of first accused but she was going to see her brother Elan Njeru but cross examined further he said she had not made any deal with the wife of first accused.

PW3 Salome Wambura was also residing in the same village with Mary Muthoni (PW2) and deceased and others on 12/2/2006 at about 5.00 p.m some 5 young persons who were drunk came. They wanted to see Mogaka also known as Munene. They wanted to be shown his house. They were shown by Kabiro and 3 of them entered the house. PW3 heard them ask the deceased to move out but he resisted. The 5 men surrounded the house, then 3 went away and 2 were left behind.

The accused was not drunk but these people said that the police would come.

PW3 said at about 8 Pm some others came she did not see them clearly because there was only moonlight, PW3 did not identify the people who came at 8 Pm she heard them say there are police officers and they took deceased away.

PW3 went to police station on 24/3/2006 to attend an Identification parade she was not able to identify any of the accused. On cross examination she said she went to police station only once and she was transported in a police vehicle, none of the accused were in the vehicle.

PW4 Charles Kabiro a casual labourer said in 2006 he was at Miriri a tea center. On 12<sup>th</sup> and 13<sup>th</sup> night February 2006 he was there at 6 Pm. At about that time 5 persons came armed with pangas and rungas, they found PW4 and another person Gachagua and deceased and his wife. They said they would call the police. 2 of them were left there. They entered into the house of Munene.

The witness (PW4) could hear what was being said in the house of deceased as he was in the next room and he saw them at 8 Pm. He heard "Toka police imekunja". He got out of his house. He thought they were police but they were not dressed in police uniform. He further testified "the people I saw are not in court". He further said that he attended an Identification parade but was not able to identify any person. In cross examination he said he could identify those men who came at 6 Pm if he saw them.

PW5 was David Gachagua residing in Muriri on 12/2/2006 he was residing with deceased, PW4 Kabiro, Lucy Muthoni and Salome Wanja were also residing there. At about 9 Pm 5 people came and forced the door of deceased who came out with 2 pangas and made some noises. The people ran away saying they were going to call the police. 3 of them went and 2 remained. Later persons came. It was dark. This witness could not identify any of the persons and he said the 3 in the dock were not present at the scene. He participated in the Identification parade but was not able to identify any suspects. He also said he did not see the 3 men in the dock at the scene.

The Assistant Chief Davis Ndwiga also gave evidence. He confirmed that the 3 accused and the deceased were from his area and on 12/2/2006 at about midnight he received a report that there was a person lying on the side of the road dead. He traveled with the person who reported and found that the report was true. He reported the matter to Police Post and the body was taken and taken to hospital. He was not involved with the arrest of the 3 accused persons. It was after 3 days he received report of deceased death.

In cross examination he said that the people who came to report were referred to him by police at Kaitheri. Evidence of postmortem was produced by a doctor under provisions of section 33 Evidence Act without any objection from the defence counsel.

I have already remarked on the post mortem report. The report was produced as exhibit 4.

Further evidence is by PC 40656 John Munyunji who received information of death and tip off and he went to the suspect's house and arrested first and 2<sup>nd</sup> accused.

Then they arrested 3<sup>rd</sup> accused on 24/2/2006. On cross examination he denied having transported

the suspects together with passengers and further he disclosed that the tip off was by the people who had given evidence in this case.

The officer who took photographs of the deceased body also gave evidence and produced the photographs.

Another important witness was Stanley Ruria an army officer at Embakasi Garison.

On 12/2/2006 he was at Kamagami going home driving his private vehicle. As he was driving one Karege stopped him and asked for a lift. He dropped him near home and drove to his home to sleep. It was on 13/2/2006 he traveled to place of work from where he telephoned OCS to check if there was any problem. OCS confirmed that only one person who was stabbed. Then on cross examination he said OCS said there were suspects who were arrested. He also volunteered that he knew Mogaka as a watchman and that the brother of Zachary Ngunyi was stabbed by Mogaka.

The last witness was Michael Ruto PC No. 71123 at Runyenjes Police station. He was on that night in the duty Crime Office. He received report of assault and that the victim was lying unconscious somewhere along Imari/Kimari Road. He proceeded to the scene. They found him (victim) still alive. They rushed the victim to Consolata hospital. This witness came to know that person as James Munene Marita the deceased. He was being treated at the hospital. Information was received that led to the arrest of 1<sup>st</sup> and 2<sup>nd</sup> accused on 16/2/2006. Third accused was arrested on 24/2/2006. Then with the victim's relatives he went to hospital mortuary for post-mortem examination. He also took the 3 suspects to doctor for mental assessment.

On cross examination he said there are others still at large. He confirmed that the first accused did not meet with any witnesses, he further said he found the evidence of PW1, 2, 3, and 4 Identified the suspects by names and appearances. There is no such evidence on record. It was at this stage that the Prosecution closed its case.

No submissions were made by Advocates.

On the issue of Identification PW2 said she saw only 1 person who entered the house and it was at night she was not able to see clearly but she said the people who came were not in court at the trial of the case. She said at the Identification parade she did not see the person she had seen in her house on that night. She mentioned one Gitonga who was at the scene but he was not in court.

PW3 also was not able to identify any of the suspects.

PW4 did not identify any one at Identification Parade. However the Identification Parade forms shows that these witnesses identified accused persons. Mary Muthoni identified first accused, Salome unable to identify first Accused, 3<sup>rd</sup> witness Charles not able to identify first accused, 4<sup>th</sup> witness David was unable to identify first Accused. Joseph Ileri identified by 3<sup>rd</sup> witness Charles Kabiru. Other witnesses were unable to identify him.

For Joseph Muriithi Muchiri;

Identified by,

- (1) Salome Wambura
- (2) Charles Kabiru

This evidence is not supported by Evidence at Trial which was tested by cross examination. Therefore it is of no value or it is major contradiction in prosecution evidence

The other aspect is that the deceased was collected at night from his house but no one saw the

deceased assaulted. He died in hospital after receiving some treatment. There is no evidence as to how the injury in the head was inflicted.

Although the police witnesses said they received a tip off from the witnesses who gave evidence in the case none of the witnesses testified having known or seen the accused in the dock.

It is my finding that there is no evidence given at the trial to connect the accused with the offence.

The witnesses who were at the scene seem to say that the people who took deceased away were not arrested and were not in the dock. This exonerates the 3 accused persons.

Therefore although there is evidence of the death of deceased, there is no evidence that he was killed by the persons in the dock.

It is my opinion that there is no evidence that the accused or any one of them committed the offence. I apply section 306 (1) Criminal Penal Code. The accused are not guilty of the offence charged. I order that they be set at liberty forthwith unless otherwise lawfully held.

Dated 13<sup>th</sup> May, 2008.

**J. N. KHAMINWA**

**JUDGE**

**13/5/2008**

**Khaminwa – Judge**

**Njue- Clerk**

**Mr. Omwega for State**

**Mr. Okello for 1<sup>st</sup> Accused**

**Mr. Momanyi for 2<sup>nd</sup> Accused**

**Mr. Mutahi for 3<sup>rd</sup> Accused**

**3<sup>rd</sup> Accused present**

Ruling read in open court in their presence.

**J. N. KHAMINWA**

**JUDGE**