



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

**Criminal Case 41 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES KAMAU WAINAINA.....1<sup>ST</sup> ACCUSED**

**PETER MUYA KAMOTHO.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The accused persons were charged with the offence of **murder** contrary to **section 203 as read with section 204** of the **Penal Code**. The particulars of the offence state that on the 15<sup>th</sup> day of December, 2002 at Central Farm Kuresoi in the Nakuru District of the Rift Valley Province jointly murdered Peter Kinuthia Thuku. The prosecution called evidence from a total of ten witnesses who gave evidence in support of the charge against the accused persons.

On the 14<sup>th</sup> day of December 2002 Peter Kinuthia Thuku (*hereinafter referred to as the deceased*) was well. He escorted his wife Florence Wairimu Kinuthia PW1 to the bus stage where she boarded a matatu together with his two children, they travelled to Njoro. On 21<sup>st</sup> day of December 2002 the body of the deceased was found murdered and buried in a grave that was dug inside the bedroom of his house under the bed. The deceased was left behind with his two workers who are the 1<sup>st</sup> and 2<sup>nd</sup> accused persons.

When PW1 travelled to Njoro she left the deceased with the two accused persons at their home in Kuresoi. The deceased had employed the two accused persons and they were working for him in the business of brewing Changaa which the deceased used to sell within his homestead. PW1 testified that she had agreed with the deceased that she would visit her family in Njoro and then on Monday she would attend a funeral of an uncle at Elburgon. The deceased was supposed to join with PW1 at the funeral; however, the deceased did not show up at the funeral. PW1 returned to her home in Kuresoi on the 18<sup>th</sup> December 2002. She found the 2<sup>nd</sup> accused person selling at the Kiosk which ordinarily used to be operated by the deceased. PW1 enquired from the 2<sup>nd</sup> accused person where the deceased was. The 2<sup>nd</sup> accused person told her that the deceased had gone on a Safari the same day she left and he had left the Kiosk business for him to run.

This surprised PW1 because the deceased did not mention to her that he was going on a safari. Moreover the deceased never used to leave the business of the kiosk to the worker it was only operated by the deceased or PW1. PW1 decided to inform the deceased's sister. The deceased sister advised PW1 to enquire about the deceased whereabouts from the deceased's friends whether they had seen him. PW1

made enquiries from the deceased's friends, she enquired from **Evans Mukui Mbiyu, PW3** who was also a neighbour of the deceased. Evans told PW1 that on the 15<sup>th</sup> December 2002 at about 10.00 p.m. he was informed by a child that they heard a scream from the household of the deceased. Somebody was groaning in pain and it was a cry of a man. PW3 decided to check on the household of Kinuthia why there were screams but he found the gate locked from inside. The following day he went to Kinuthia's homestead to inquire what was happening the previous night. He met the 2<sup>nd</sup> accused person in the compound who informed him that the police officers were beating somebody on the road and the person who was being beaten escaped with the deceased. At the time the 2<sup>nd</sup> accused person was operating inside the deceased's kiosk and when Evans enquired why the deceased left the kiosk with the 2<sup>nd</sup> accused person, he told him that the deceased had ran away to Nakuru or Kisumu to set up a new business and left the kiosk to the 2<sup>nd</sup> accused person to take charge. On the 21<sup>st</sup> December Evans accompanied PW1 to the police station, they reported the matter the police arrested the 2<sup>nd</sup> accused person; it is the 2<sup>nd</sup> accused person who led the police to the place where the body of the deceased was exhumed.

**Benson Nyandusi, PW2** testified that on the 15<sup>th</sup> December 2002 at about 8.30 p.m. he was walking home and when he arrived, his child informed him that there was screaming from the neighbourhood that is from the household of the deceased. PW2 ignored the screaming because in the household of the deceased they used to sell illicit brew and they thought the noise was by the drunkards. After a few minutes they decided to pass by to check who was screaming but they found the gate locked from inside. They could hear as if somebody was digging a hole inside the house that they thought it was the illicit brew being buried. The next day at about 1.00 p.m. PW2 met with PW3 and they discussed the noise that was from the neighbourhood. PW3 said that he was informed by the accused persons that the deceased disappeared with the person who was screaming outside his home. Another surprising thing according to PW2 was, on the 19<sup>th</sup> December 2002 the 2<sup>nd</sup> accused person collected cow dung from his compound to smear on the floor of the house. This was also extra ordinary because PW2 had never seen the deceased smearing his house with dung.

**James Mutua Kinuthia, PW7** the son of the deceased also testified that he had accompanied PW1 when they went to visit their grandmother in Njoro where they stayed for about five (5) days. They left the deceased with the two accused persons who were working for them. They returned home and found the accused person selling at the deceased's kiosk. The following day the 2<sup>nd</sup> accused person asked the children to help him smear the house with cow dung. PW7 noticed that the 2<sup>nd</sup> accused person was putting more emphasis on an area that had a bump but it did not occur to him that his father was buried there. **Paul Thuku Kinuthia** also a son of the deceased gave a similar account of how they went to Njoro, returned with PW1. They did not find their father at home and they were asked by PW2 to help him smear the floor of the house with cow dung.

**PC Richard Langat** was attached to the Molo police station on the 23<sup>rd</sup> December 2002 when they received the report of murder in Kuresoi. He accompanied the DCIO and the Scenes of Crime Officer. They were led to the house of the deceased where they exhumed the body of the deceased which was buried under her bed. They found that the floor of the house had been smeared with cow dung. They removed the body which was photographed by the scenes of crime personnel. They brought the body to the mortuary. The body was identified for purposes of post-mortem by **Michael Peter Njoroge, PW9** on 24<sup>th</sup> December 2002. The body was identified for purposes of post-mortem examination by PW9 who said he knew the deceased from when he was a child because they were relatives.

Unfortunately the prosecution did not adduce evidence on the post-mortem. The doctor who performed the post-mortem examination was not called as a witness. The investigating officer was also not called in this matter, only the arresting officer.

Put on their defence both accused person denied any involvement in the death of the deceased. They claimed that they were arrested by the Police in connection with Changaa brewing. The 2<sup>nd</sup> accused person was arrested when he had gone to check on his colleague who had earlier been arrested for changaa. They however alleged that they were tortured by the Police and forced to sign statements

admitting that they were responsible for the death of the deceased.

Counsel for the accused persons also submitted that the prosecution had failed to establish beyond reasonable doubt that it was the accused persons and no other was responsible for the death of the deceased. There were no witnesses who saw the accused persons inflicting the injuries. Moreover they submitted that the investigating officer was never called as a witness and his evidence was crucial as to how the body of the deceased was discovered buried under the bed. Also the pathologist who performed the post-mortem examination did not testify on the cause of death. Finally, the counsel for the accused persons submitted that the fundamental rights of the accused persons were infringed upon when they were arrested because they were arraigned in court after 25 days instead of the 14 days which is prescribed by the constitution.

The charge sheet shows that the accused persons were arrested on 21<sup>st</sup> December 2002 and were arraigned in court on 15<sup>th</sup> January 2003. It is common knowledge that between the times the accused persons were arrested and when they were arraigned court; there were many public holidays in between which should be excluded from the computation of the 14 days. The other reason that I find from the facts of this case is the circumstances under which the body of the deceased was found buried under the bed contributed to difficulties that may have caused delay of a day or two which in my view is not a breach of the fundamental rights of the accused persons and could not have denied them a fair trial. I will disregard that submission.

I now evaluate the evidence before the court to establish whether the prosecution have discharged their duty to the required standard that is beyond reasonable doubt. It is clear from the evidence that there was no eye-witness who saw the accused persons killing the deceased. This case is purely based on circumstantial evidence that on the material day the deceased was with the accused persons. Neighbours namely PW2 and PW3 heard a scream of a man groaning in pain. When they went to check they heard people digging but they thought changaa was being buried. The 2<sup>nd</sup> accused person told PW1, PW2 and PW3 that the deceased had gone on a safari. The 2<sup>nd</sup> accused person also smeared the floor of the house where the body of the deceased was found buried with cow dung. This was obviously meant to conceal the death of the deceased and to divert the attention.

When PW1 and PW3 reported the matter to the police station, the 2<sup>nd</sup> accused person was arrested; he immediately led the police to the place where the body of the deceased was recovered. For the prosecution to succeed with a charge based on circumstantial evidence the facts in support of the case must be incompatible with the accused's innocence and incapable of any other explanation or any other hypothesis other than it is the accused persons and no other person was responsible for the death of the deceased person. See the case **Simon Musoke v. R [1958] EA 715** where the Court of Appeal held:

***“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”***

See also the case of **Republic Vs Kipkering Arap Koskei & another 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”***

In this case the two accused persons were the last one's to be seen with the deceased person. The second accused person kept diverting the attention of the witnesses who enquired about the whereabouts of the deceased. He misled them that the deceased had gone on a safari. The second accused person took over the business of the deceased. The smearing of the floor of the house where the body was buried was meant to conceal the body of the deceased which was found dead.

Obviously the prosecution did not avail crucial evidence on the cause of death of the deceased

person. In a recent Court of Appeal decision in the case of **Omar Rajab & Anor. -vs- R. Criminal Appeal No. 231 of 2006 (Nakuru) (unreported)** it was held at page 6 that:

***“Besides, in absence of a post mortem report on the deceased a finding of guilty for the offence of murder cannot be sustained, because as we stated earlier, it is not possible to say what the immediate cause of the deceased’s death was.”***

It is for those reasons that I find the evidence on record disclose a cognate offence of conspiracy to conceal the murder of the deceased person against the provisions of **Section 224** of the **Penal Code**. The two accused persons are accordingly convicted. It is so ordered.

Judgment read and signed on 16<sup>th</sup> October, 2008

**M. KOOME**

**JUDGE**