



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 95 of 2004**

**REPUBLIC .....PROSECUTOR**

**-VERSUS-**

**JOSIAH NYANGARI ORERO.....ACCUSED**

**JUDGMENT**

**A. BACKGROUND**

In the information from the Attorney-General's office dated 2<sup>nd</sup> July, 2004 the accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the accused, **Josiah Nyangari Orero**, on 17<sup>th</sup> May, 2004 at Park Road, Nairobi murdered **Elizabeth Musembi**.

After a plea of not guilty was recorded before **Mr. Justice Osiemo** on 12<sup>th</sup> July, 2004 this matter came up for mention on several occasions: before **Ombija, J** on 8<sup>th</sup> December, 2004; on 16<sup>th</sup> December, 2004; and on 20<sup>th</sup> December 2004; before **Rawal, J** on 31<sup>st</sup> January, 2005; before **Ombija, J** on 12<sup>th</sup> May, 2005; before **Rawal, J** on 12<sup>th</sup> October, 2005; before **Ombija, J** on 24<sup>th</sup> October, 2005 and again on 2<sup>nd</sup> November, 2005; before me on 22<sup>nd</sup> February, 2006.

Trial began with assessors before me on 7<sup>th</sup> June 2006; but in the course of the trial, on 6<sup>th</sup> November, 2007 I discharged the assessors. The legislature had, during the pendency of this case, passed the *Statute Law (Miscellaneous Amendments) Act, 2007* which brought to an end the role of assessors in criminal trials, and the Judge was henceforth required to write judgment on his or her own, without the opinions of assessors.

**B. PROSECUTION EVIDENCE**

The first witness, **Robert Musembi Kalia** (PW1), was the father of the deceased. He and his family, about the material time, lived at Baba Dogo Estate in Nairobi. The deceased had something to report to PW1 on 13<sup>th</sup> May, 2004 at 9.00p.m. The deceased went into PW1's room at that time, and expressed to him her anxiety, that there was a young man harassing her, and intimidating her. PW1 at that time awakened his son who was already in bed, to accompany him, along with the deceased, as he tried to locate the residence of the young man complained about by the deceased. With the help of persons in the neighbourhood, PW1 was able to find the house where the accused herein lived, in Baba Dogo Estate. In that house, PW1, his son and the deceased found a man, **Kenneth Ongwae Nyangari** (PW2), his wife, and a young lady; and after he introduced himself and said he was looking for the accused, the man said he well knew the accused, who was his brother, and was residing in his house. PW2 went outside, and called

the accused who then entered the house; but *as soon as he saw PW1 and his son*, the accused turned back and went out straightaway. PW2 intervened, and was able to return the accused into the house; and this time the accused shook hands with PW1, the deceased, and PW1's son.

In the conversation that took place, PW1 asked the accused if he knew him and his two children who were present. The answer was in the affirmative. PW1's words to the accused, at this point, may be set out:

“ I told [the accused] that I hadn't met him before, and I did not know him. I told him I had come to settle a dispute which my daughter had told me about. I asked [the accused] why he was threatening and harassing my daughter. He said it was my daughter who was following him; and he had asked her not to do so. I asked my daughter to clarify the position.....[And] she asked: “How come then I didn't know where you stay? You *always come to my school*, and you *always come to our house* when my dad is absent.” [The accused] kept quiet. He was *angered* and agitated by those words. He *stormed out* of the room”

When PW2 and his wife followed the accused to bring him back into the house, he at first refused to return, though he subsequently did. Further discussion then took place on the relations between the deceased and the accused, and PW2 gave the promise that he would, in his capacity as guardian to the accused, take appropriate actions to solve the problem in hand.

On the following day, 14<sup>th</sup> May, 2004 at 6.00a.m. there was a knock on the door to PW1's room, and when he opened, he saw the accused who said to him in Kiswahili:

“*Mzee, nataka tuongee kuhusu hayo maneno*”, meaning “Sir, I would like us to talk further on the pending issue.” The accused uttered these words *without facing PW1*, and he appeared to be *on edge* as he spoke to PW1, as he *left the house immediately* without awaiting PW1's word. PW1 said to the accused who was already outside the gate: “ I had told you not to come to my plot.”

Three days later, on 17<sup>th</sup> May, 2004 the deceased was fatally stabbed as she made her way to *school*. On that day at 5.00p.m. as PW1 was at Matuu, travelling from his rural home to Nairobi, he met his brother **Samson Kalii**, who broke the bad news to him. PW1 asked his brother to accompany him, and they travelled together to Nairobi, and went straight to Pangani Police station, where they met the OCS at 7.30pm. Later they reported at Ruaraka Police Post, where the two were given three Police officers to take them to the residence of the accused herein. They found PW2 and his wife, who informed them that the accused had *not turned up* in the home since *morning*. PW1 recorded a statement at Pangani Police station on 19<sup>th</sup> May, 2004; and **Dr. Wasike** (PW11) conducted a post-mortem examination of the deceased at Chiromo Mortuary on 21<sup>st</sup> May, 2004. The body of the deceased was then released to PW1 for burial arrangements. PW1 testified that the deceased was aged 22 years, and was a *student* at Nairobi Technical Training Institute in the area of Park Road, in Nairobi.

PW1 gave further testimony, upon cross-examination by learned counsel **Mr. Kanyangi**. He (PW1) had learned that the accused had been coming to his house and “harassing” his daughter, but he did not know for how long the accused had been following the deceased. The deceased had told PW1 that she did not want affairs with the accused, but the accused had been issuing threats at her. The deceased told PW1 that she had only known the accused *since late 2003*. PW1 felt that if there was a *relationship* between the deceased and the accused, it was *not going on well*; because the deceased was reporting to him that the accused had issued *death threats* at her.

The accused's brother, **Kenneth Ongwae Nyangari**, gave evidence as PW2. He said the accused was living at his (PW2's) residence at Baba Dogo Estate, during the material month of *May, 2004*. On 13<sup>th</sup> May, 2004 at about 9.00pm, PW1, accompanied by a boy and a girl, had visited PW2's house, with the object of finding the accused herein. The accused was already asleep, but PW2 awakened him, and asked him if he knew the three evening visitors. PW1's complaint was that the accused was *disturbing his daughter at her school*. At the end of the talk, it was agreed that the accused must stop his acts of

harassment against the deceased.

Some days later, PW1 accompanied by three Policemen visited PW2's house, and they were looking for the accused herein. PW2 did not know why the Police wanted the accused, but on 18<sup>th</sup> May, 2004 he went to Kenya Institute of Highway and Building Technology, where the accused was a student. PW2 was concerned that the *accused had not returned home* for some time, and so he was trying to trace the whereabouts of the accused. PW2 was clearly anxious, for he now went up to Ruaraka Police Post – even though he did not know then that anything was the matter. His intention then was to report that his brother, the accused, had gone *missing*.

Now by a completely fortuitous channel, PW2 later, in the evening of 18<sup>th</sup> May, 2004, was able to speak on telephone to “Evangelist Margaret” (not called as a witness) who happened to have been offering prayers for patients who were admitted at *Kiambu District Hospital*. It is in the said telephone communication that PW2 learned there was a *patient being treated* at Kiambu District Hospital; and this patient, who was *light-skinned*, was “not speaking”. PW2 carried this fortuitous information to Ruaraka Police Post, and made a report; and thereupon PW2 was given a Police officer who accompanied him to Pangani Police station. From Pangani, three Police officers accompanied PW2 to Kiambu District Hospital, and they found *the accused* admitted as one of the patients. The accused could not speak, and there was a large envelope placed next to his bed.

PW2 had no knowledge of how the accused came to be at Kiambu District Hospital; and he knew nothing of what had befallen the deceased on 17<sup>th</sup> May, 2004. He only heard about the deceased from the Police officer who was with him at the accused's bed-side. PW2 later accompanied Police officers to Pangani Police Station, and he recorded a statement there in relation to the accused.

PW2 recalled that the accused had left his home for school *in the morning* of the material date, 17<sup>th</sup> May, 2004 but did not return as was expected. When PW2 next saw the accused, the accused was an *admitted patient* at Kiambu District Hospital.

Responding to cross-examination by learned counsel **Mr. Kanyangi**, PW2 testified that the accused while in hospital, had a face injury, resembling the consequence of a fall, and he could not speak. The witness said the accused was then *aged 24 years*, and was a student.

Of the deceased, **Elizabeth Nzisa Musembi**, PW2 saw her for the first time several days before the material day, when she and her brother had accompanied PW1 to PW2's house at night. Not even her name had been mentioned in PW2's house, in his presence.

PW2 had learned when he visited Kiambu District Hospital, that the accused's injury arose from a *traffic accident* which had taken place along Kiambu Road. But at the hospital, the accused was nameless, and he was under treatment for *injury and poisoning*.

PW3, **Daniel Kariuki Githaka** is and at the material time, was on the staff of Nairobi Technical Training Institute which the deceased attended. Fairly early in the morning, at *about 7.00a.m.* on 17<sup>th</sup> May, 2004, while in his office at the said institute, PW3 heard screams in the neighbourhood. When he came outside his office, PW3 saw people responding to the alarm, all heading to a place only a short distance away from the institute's gate. When he approached the place, he found a number of people gathering around a *woman who lay prostrate on the ground*, writhing in pain, and blood oozing from her chest. PW3 ordered that the injured lady, who was still alive, be taken to the nearest hospital in the institute's pick-up truck. PW3 ordered the *Institute's guard to guard the scene*, and sent the Dean of Students to go with the deceased to hospital. Police from Pangani Police Station came along and secured the *locus in quo*. When PW3 went with Policemen to the hospital, he learned that the injured lady was *one of his students*, and she was by then already dead.

While at the *locus in quo*, PW3 learned from those in the crowd that the deceased *had been talking to somebody* who then stabbed her with a knife, and ran away.

PW4, **Abdul Ng'ang'a Wainaina** who was at the material time Principal Lecturer at the said Institute, arrived at the Institute at about 7.15am; at that time he had driven up to the *Institute's gate* and was waiting for the gate to be opened. And, while PW4 was at the gate he saw a man and a woman who were engaged in a physical struggle; the man was forcing the woman to move on, but the woman was reluctant to move. At that point the gate opened, and PW4 drove into the compound. He went into his office, and was settling down to work when, about 15 – 20 minutes later, he was called to the Principal's office. PW4 was informed that one of his students, **Elizabeth Nzisa Musembi**, had just been killed outside the gate; and this immediately caused him to remember the struggle between a man and a woman which he had just witnessed at the gate.

PW4 saw the struggle between a man and a woman. But did he observe the two? Pw4 testified:

*"I would recall the person who was struggling with the deceased, by height and complexion. I am 5 feet 4 inches; he was shorter than me; he could have been 4 feet 8 inches or so. He was light – skinned; he was stout, not thin; not fat; fairly strong ..... There in the dock is the man who was struggling with the deceased at the gate. He is, by complexion, the one. His colour is almost like mine – light-skinned."*

Responding to cross-examination by learned counsel **Mr. Kanyangi**, PW4 said his car was stationary at the gate when he saw the struggle between a man and a woman at the gate, on the material morning. He confirmed that the time was 7.15am. and he came towards the Institute's gate driving at the low speed of 10 k.p.h. PW4 said his view was clear as he observed the morning incident which was about 50 metres away, as nothing and nobody obscured his view of the man and woman in question. PW4 did not at the time recognise the lady; in his words: "I just saw a lady and a man struggle."

PW5, **Tecla Chemogo**, a teacher at Nairobi Technical Training Institute, testified that she had arrived at the Institute at 6.30 am on the material morning, and she had proceeded to the Principal's office for a meeting. PW5's meeting with the Principal and Deputy Principal on the said morning was interrupted when, at about 7.30am they heard the scream of a female voice saying: "Help me, I am dying". The Deputy Principal dashed outside the gate, and returned with the account that a student had been stabbed, and the assailant had run away. PW5 was part of the team that took the deceased to Radiant Hospital; and they were asked to wait outside, only to be told a short while later, at the hospital, that the deceased had died.

At the *locus in quo*, certain things were recovered: the deceased's books; a small bottle of poison – malathion; and a sharp kitchen knife with a plastic handle. The knife was laced with blood. PW5 identified the knife exhibited in Court as the one which had been recovered at the *locus in quo*. The witness said the bottle of poison had been recovered a short distance from the spot where the deceased lay in pain.

PW6, **John Kumuru Chege**, a clinical officer at Kiambu District Hospital was working at the Casualty Section on the material date, at about 8.00am, when a male patient was brought to him by a passenger mini-bus crew. Those who brought the patient informed PW6 that the man had jumped into the road just in front of the bus, at the Kiambu bus stage.

PW6 after taking the history from the mini-bus crew, examined the patient, and ordered blood examination for malaria. Upon finding the accused positive for malaria, PW6 admitted him. The patient had no bleeding; he had one notable characteristic: he was "quite violent, and wanted to jump from the bed; he would not submit himself to full medical examination." PW6 testified that the accused was frothing in the mouth and had the smell of organo-phosphate issuing from both mouth and nose. PW6 said he had worked with the Ministry of Health for 23 years, and was familiar with organo-phosphates, to which he had been introduced in the course of his work experience. The witness noted that organo-phosphates are used as insecticides applied to cattle-dips for killing ticks, and in farms to kill pests and vermin afflicting plants. PW6 said he had not known of such organo-phosphates being used to treat humans.

After the mini-bus crew had brought the accused to the hospital, they searched his clothing for any

identification, in the presence of PW6. The witness saw a *note being retrieved from the accused's pocket*. This note was, in PW6's perception, just an ordinary item which had no special significance; but his helper-nurse noticed it bore the words, **Eliza**, and, for hospital staff, that could have been seen as referring to the Eliza HIV-testing method. But this note, after the word **Eliza**, carried more detail; the note referred to "Oh my lover Eliza". PW6 said if he saw the said note, he would be able to identify it.

Several days later, a Policeman came to the hospital, and wanted to see PW6; and from this officer, PW6 learned that one **Elizabeth Nzisa Musembi** had been killed on 17<sup>th</sup> May, 2004. PW6 later noticed that the patient was no longer at Nyayo Ward, Bed No. 17 where he had been admitted. PW6 recorded a statement before the visiting Police officer.

Of the note which had been found on the patient, PW6 did not remember its content well, as three years had elapsed; but he remembered that the said note was *somewhat ruffled*; was written in *blue* ink; referred to "*Eliza, My lover*"; said something like "*I will die, but I will not die alone.*" When a note was shown to PW6 in Court, he said *this* is the note which had been found on the patient on the material date. He confirmed that the note is written in *blue* ink, and refers to "**Eliza, my lover**"; the note was *untidy*; and the note thus read, in full:

*"I was told that I should die at Kiambu. I got a call from home, that I should not die alone, but with someone else; so she is Eliza, my lover."*

When PW6 opened the said note, he saw it had more details inside, which he had not given attention when it was recovered from the patient on the material date.

PW6 did not know how the patient in question left the hospital; but the Police officer who took his statement told him that the patient would be taken to Mathare Mental Hospital.

On cross-examination by learned counsel **Mr. Kanyangi**, PW6 confirmed that he is the one who had, on the material date, received the patient in question at the hospital. About three members of the mini-bus crew searched the patient's pockets in the presence of PW6. The patient was both semi-unconscious and violent, when he was brought into the hospital. PW6 suspected that the patient was unwell, and this is why he ordered the malaria test to be carried out. The witness said he could not have know the period during which the patient had had malaria; but malaria when it has infected, presents in divers ways: shivering, vomiting, violence, etc. The patient in this case was not vomiting, but was frothing in the mouth. PW6 was not aware that the said froth was subjected to any laboratory test, but from his own knowledge, the patient had the *smell* of organo-phosphates. The patient was trying to toss himself onto the floor as he was being examined.

PW7, **Solomon Chege Mbiriri**, the driver of the minibus whose crew had taken the patient to hospital on the material morning, said he was at the Kiambu stage, driving to Nairobi, when *somebody suddenly jumped into the road*, forcing him to swerve; and the said person hit the ground on his forehead. PW7 with the help of the passengers picked up the person, and took him to Kiambu District Hospital, where a search was conducted, and *two photographs and a letter* found on his person. Medical staff at the hospital asked PW7 and his companions to *report the matter to the Police station*, as they thought there had been an attempted suicide. PW7 and his colleagues reported the matter at the Police station, where they left the recovered *letter and photographs*. The Police did not detain PW7 and his colleagues, as it was not considered there had been a vehicle accident; in PW7's words:

*"We were told that, since [our] motor vehicle had not hit the man, we could go our way."*

But subsequently, PW7 and his conductor, **Peter Ng'ang'a** (PW8), had been called to Pangani Police station to record statements. PW7 said he is the one who had delivered at Kiambu Police station the *photographs and letter* recovered from the accused's clothing, following the accused's admission in hospital; but he had not attempted to read the said letter, though he *would be able to identify* it if he saw it again: he remembered that on the back of the letter, which was written in *English*, there were *blue ball-point-pen writings set horizontally*. When a letter was shown to PW7 in Court, he said *this* was the one,

and he said straight away that it would have writings running across, in blue ink colour.

Of the photographs which PW7 and his group had recovered from the patient's pockets, he said:

*"I looked at the two photographs; one was the picture of a lady; the other had many people; the lady was photographed in a sitting posture. The one with many people, I don't remember its details; it's a long time ago."*

PW7 said if he saw the two photographs he would be able to identify them; and he remembered that they had been recovered from "the pockets of the Jeans trousers which the patient wore." PW7 was able to *identify the two photographs in Court*, and he testified that he had taken both to Kiambu Police station. He also identified *the accused* herein as the person he and his mini-bus crew had delivered at Kiambu District Hospital, on the material date.

On cross-examination by learned counsel **Mr. Kanyangi**, PW7 said he had been a driver for some 12 years, and it was the *first time* he saw, on the material date, a pedestrian leap into the road in front of his vehicle, something which truly shocked him. PW7 thus recorded his reaction when the said incident occurred.

*"I didn't see it as coming from a normal person. That was not the act of a normal person. He just leapt, without uttering a word. So we took him to hospital. Before the doctor started treating him, he was already vomiting."*

PW7 said he had been accompanied to Kiambu District Hospital by his conductor and two passengers; and it is *the medical officer* who had recovered the several items from the patient's clothing. The medical officer had read to himself the letter recovered; and he had then said the patient appeared to have taken poison, judging by the *smell* from his mouth. The witness said he only delivered the effects recovered from the patient at the Police station, but he *did not know the persons who were in the photographs* recovered from the patient.

Pw8, **Peter Ng'ang'a Wanjau** testified that he was the conductor on PW7's mini-bus, on the morning of 17<sup>th</sup> May, 2004, and they were plying the Githunguri – Nairobi Road, through Kiambu town. On that day, at Kiambu bus stage, a man just *leapt on to the road, in front of the moving motor vehicle*; and he hit himself on the tarmac road, but the motor vehicle did not hit him. PW8, PW7 and passengers quickly consulted, and agreed that the said man be taken to Kiambu District Hospital; and at the hospital, this man started vomiting, and the medical officer said he was *reeking of poison*. The medical officer conducted a search of the patient, and "removed from [his pockets] some *photographs and a letter*." The mini-bus crew took the recovered items to Kiambu Police station and recorded them accordingly. One of the photographs had the image of a lady, while the other had images of some four or five persons; "the one with [several] people also [carried the image] of the [same] lady who appeared alone in the second photograph." The witness gave a description of the said two photographs:

*"Where the lady was alone, she was either seated or squatting. In the other photo, I can't remember .....*"

PW8 said he *would be able to identify the two photos* if he saw them again; and he was shown two photographs which he *identified* as the ones in question. He said a *letter*, with one whole page written-up, was also recovered from the patient's pocket; *the other side of the paper had only a few writings* – but he could not remember the ink colour that was used on the letter. PW8 could recall that he had read the said letter: *"It was about a lady the man was friends with; but he found her with other men. The back of the letter stated that he had received a message from home – that he would die in Kiambu."* When shown a letter, PW8 testified that the said letter "was talking about **Eliza** and there were *writings at the back*; so *this is the letter*." PW8 said he is not able to read English, but he had read the said letter together with the driver (PW7). The Police officer also read the letter, and told the mini-bus crew the content. PW8 *identified* the accused in Court, as the man the mini-bus had delivered at Kiambu District Hospital, on the material morning.

On cross-examination by learned counsel **Mr. Kanyangi**, PW8 said he had been a mini-bus conductor for some four years, but had not witnessed an incident on the road such as that of a pedestrian leaping right in front of a moving motor vehicle. PW8 said the patient he and his companions delivered at the hospital was vomiting, and had a *strange smell*. It was not at the time possible to identify the patient, and the medical staff at the hospital were particularly keen to find an *identification card* on him; and this is how the search was done which yielded *two photographs and a letter*.

PW9, **Rose Nabwana Sikuku** who works as an analyst at the Government Chemist, and having some ten years of experience as a forensic biologist, on 25<sup>th</sup> May, 2005 received a request to analyse certain items from Police Force No. 29779 **Police Constable Julius Marere** and Police Force No. 72034 **Police Constable Sammy Mbarani**. The said items were as follows:

- (a) a knife in a khaki envelope, marked Exh. A;
- (b) blood sample in a bottle, marked Exh. B – deceased, **Elizabeth Musembi**;
- (c) blood sample in a bottle, marked Exh. C – accused, **Josiah Nyangari Orero**;
- (c) a navy-blue jacket in a green polythene bag, of accused marked Exh. E.

PW9 was asked to generate DNA profiles, and to determine the source of blood stains.

PW9 in her report stated that the knife (Exh. A) was moderately stained with blood of human origin; but there were no blood stains on the navy-blue jacket (Exh. E). She found the DNA profile generated from blood stains on the knife (Exh. A) to match the DNA profile generated from the deceased (Exh. B).

PW10, Police Force No. 76938 **Police Constable Michael Kiplagat Aiyabei** was deployed at Pangani Police Station at the material time. On 17<sup>th</sup> May, 2005 PW10 reported at his station at 7.00a.m., and, some 30 minutes later, two persons came to see him, one of them being the Deputy Principal of Nairobi Technical Training Institute (PW3). PW10's account was entered in the Occurrence Book, and his statement was recorded; he reported that a lady had been stabbed near his Institute, and the assailant had escaped. The OCS of Pangani Police Station instructed PW10 to visit the *locus in quo* and, when he got there, he saw *two spots of blood*, each with *splash marks* – which indicated to him that the *blood came forth under pressure*. At the scene, PW10 found a *table knife, sharpened on both sides* and with a *white handle*; he also found books in a paper bag, which he learned, belonged to the deceased, as one bore the name **Elizabeth**. Some 10 metres from the spot where the knife lay, PW10 found a *bottle, which was brown in colour*. PW10 heard from persons standing around, that the said bottle had been cast away by a person who was running away, following the stabbing incident. This bottle was 100mls in capacity, and its label showed that its content was *Malathion* insecticide. The witness took custody of the knife and the bottle, which was *open and had no top, looked freshly emptied*, was empty but *stained inside*, and had the *odour of an insecticide*. The *knife had fresh blood on its blade*. The deceased had already been taken to hospital and PW10 who went up to the said hospital, found that she had just died. The witness noticed that the deceased had a *wound on one side of the neck*.

For *several* days the Police at Pangani Police Station had not been able to trace the assailant who caused the death of the deceased. Then on 19<sup>th</sup> May, 2004 PW10 received information from Kiambu Police Station about *a man who had been involved in a road accident but was being treated for poisoning*. PW10 proceeded to Kiambu Police Station and was then given two items: (i) a *note* found in the patient's pocket – which PW10 perceived as a suicide note; and (ii) *two photographs* – one being a group photograph (of ladies). *At the suggestion of officers at Kiambu Police Station*, PW10 went up to Kiambu District Hospital, to see the patient. He found that the patient was unable to talk, though he made his *communications in writing*, and by *signs*. The clinical officer explained to PW10 the circumstances in which the patient had been brought to the hospital, and indicated that the patient's physical injury was not serious; what was serious was the *effect of poisoning*, and for this, treatment was being dispensed.

When PW10 looked at the *photographs* which he had obtained from Kiambu Police Station, he

immediately saw that *a lady appearing in the photographs resembled the deceased*, whom he had seen at the hospital; and this led him to form the opinion that the patient at Kiambu District Hospital was a *suspect*. On that footing, PW10 took the patient into custody. He communicated with the OCS Pangani Police Station, who asked him (PW10) to arrange for the guarding of the patient while the patient underwent treatment.

PW10 testified that the patient, *after making a recovery* at the hospital, had become *aggressive and unmanageable*; and, on the recommendation of the Medical Officer in charge of the hospital, he was transferred to Mathare Mental Hospital. Subsequently, Mathare Mental Hospital released the patient to PW10, and a charge was then laid against the patient.

PW10 testified that the knife found at the *locus in quo* was like a *table knife*, except that it had been sharpened on both sides; and he *identified* the knife in Court; it was about seven inches long, with a white plastic handle, and a three-inch-long blade.

PW10 confirmed that he received *two photographs* which had been recovered from the patient, and *each of these carried the deceased's image*, save that in one of them she was in a group, whereas in the other she was alone.

As PW10 investigated the incident, the father of the deceased came along, looked at the photographs recovered, and confirmed that the *deceased appeared in both*. One of the photographs bore a date, *14<sup>th</sup> February, 2003* – slightly over a year to the date of the incident. I noted on the record that the deceased appeared, in both photographs, *dressed in the same mode*.

PW10, while at Kiambu Police Station, was given *a letter* written on a ruled white sheet; it was *somewhat ruffled and slightly torn*; the writing was in *blue or black ink* or a ball-point pen. The witness remembered that he had read the letter, and that it stated the writer had to die together with somebody – *Eliza*, his lover; and it was signed. PW10 said he would be able to *identify* the letter if he saw it and when he was shown a note in Court, he testified that it was the one, and he even showed the signature on the note. He read out the content, as follows:

*“When diplomacy fails, we use alternative ways”* – this was at the bottom. And at the back, the following writings appeared –

*“ I was told I should die at Kiambu.*

*“I got a call from home that I should not die alone, but with someone else, so it's Eliza my lover.”*

There was another line of writing on the note, as follows:

*“I have terminated my profession.”*

On cross-examination by learned counsel **Mr. Kanyangi**, PW10 stated that the stabbing incident had taken place at *about 7.15a.m.* on the material date, near Nairobi Technical Training Institute. PW10 had only overheard people at the scene saying it was the assailant who had dropped the brown bottle of *Malathion*, but he was unable to identify the specific persons who had said that. The witness did not hear anyone say the assailant had drunk the content of the brown bottle; but the bottle looked *freshly emptied*, there were traces *still in the bottle*, and the bottle produced a *strong odour*; the witness was *familiar* with the smell of *Malathion*.

PW10 had found that only *one assailant* had attacked the deceased. It was a morning of dry weather, and the checks conducted at the scene by the witness did not show any of the content of the brown bottle to have spilled onto the ground. At Kiambu District Hospital, PW10 found the accused being treated of *organo-phosphate poisoning*; this is what he was told by the clinician in charge, **John Chege** (PW6).

When PW10 saw the reference to **Eliza** in the note recovered from the patient at the hospital, he believed

it to be short form for **Elizabeth**; he expected **Eliza** to be a lady, even though he knew many ladies going by the name **Elizabeth** but not **Eliza**. In the course of his investigations, PW10 found that at Nairobi Technical Training Institute, the deceased was commonly referred to as **Eliza**, and this was the name known to the deceased's classmates. PW10 showed the *photographs* recovered from the accused to the deceased's father and her classmates; and this enabled him to make a *connection between the deceased, and the accused*. During investigations, PW10 learned from the deceased's father that the deceased had had an *affair with the accused*.

PW11, **Dr. Jane Wasike Siminyu**, a pathologist attached to the National Public Health Laboratories, and working at the City Mortuary, testified that she had conducted a post-mortem examination on the body of **Elizabeth Nzisa Musembi** on 21<sup>st</sup> May, 2004. The body was that of a *21-year-old female* African, of good physical and nutritional status. External examination showed a *penetrating wound in the right anterior neck*, measuring 3cm, just above the clavicle. This wound entailed a *severing of the carotid vessel*, and it *penetrated the chest cavity and perforated the upper lobe of the right lung*. In PW11's opinion, death resulted from *severe hemorrhage* occasioned by neck injury caused by a sharp object.

On cross-examination by learned counsel **Mr. Kanyangi**, PW11 testified that the body of the deceased had only *one injury, one perforation, one stab-wound* – and this was occasioned by a *sharp object*, such as a knife or sword. This injury could not have been caused by an axe, as that would only lead to a cut. The witness could not say from what range such a perforation to the body of the deceased could have been caused.

PW12, **Dr. Zephania Kamau**, a Police surgeon, saw the accused on 21<sup>st</sup> June, 2004 and examined him for injuries; assessed his age; and assessed his mental status. PW12 found that the accused was then aged *24 years*; he had head bruises, and bruises on the left side of the upper lip; and he had healed bruises in the anterior of the right neck, on the chin, and on the tip of his nose. The accused informed PW12 that "he had been told that motor vehicle had hit him on 17<sup>th</sup> May, 2004." The history from the Police was that the accused had taken poison, and that he had been admitted at Mathare Mental Hospital. PW11 found the accused *mentally fit*, and he prepared a report as required.

On cross-examination by counsel, PW12 said he had noticed that the accused had healed bruises, but he could not estimate the age of the bruises. PW12 had no way of obtaining an accurate account on the causation of the said bruises; but the accused informed him these bruises originated from a traffic accident. The witness did not know what kind of attention the accused was receiving at Mathare Hospital, since that hospital provides treatment *other than mental treatment*. PW12 formed the opinion that the accused was "a mentally-sound person", and he was *not told at any time that the accused had ever suffered from mental disease*.

### C. WAS THERE A PRIMA FACIE CASE? THE COURT'S RULING

With the testimony of PW12, the prosecution closed its case; and learned counsel **Mr. Kanyangi** asked that the Court should go on to give a preliminary ruling, whereupon I gave a ruling as follows:

**"Trial in this matter began on 7<sup>th</sup> June, 2006; and to-date twelve prosecution witnesses have been heard. Each of these witnesses has added something to the picture of the circumstances in which the offence could have taken place.**

**"The outcome of this case will rest on whether or not the prosecution has proved its case beyond any reasonable doubt. That requires a careful analysis of the evidence, to determine if only one finding must be made. However, the path to such a finding runs through an aggregation of facts which may begin to show if a *prima facie* case has emerged at this stage.**

**"In my basic assessment of the prosecution evidence, it is clear that a *prima facie* case has been made out.**

**“Whenever such a position is achieved, the law requires that the accused is to be put to his defence. I hereby put the accused to his defence.”**

#### D. THE ACCUSED’S LINE OF DEFENCE

Learned counsel **Mr. Kanyangi** informed the Court that the accused had elected to make an unsworn statement, and subsequently the accused made his statement.

The accused said he was afflicted with malaria during the week of the material incident, and, on 17<sup>th</sup> May, 2004 as he was making his way to school, he felt dizzy, and subsequently, just found himself hospitalized at Kiambu District Hospital. When he was discharged, the accused was taken to Mathare Mental Hospital; and then, on 3<sup>rd</sup> June, 2004 he was taken to Pangani Police station.

The accused devoted a significant part of his statement to his experience in the Police cell; he found hostile persons there; these persons ordered him to remove his clothes; some of them threatened to shoot the accused, even as two of them were writing away; these persons ordered the accused to reveal the identity of the assailant who caused the death of the deceased; but he knew nothing about the death of the deceased; he was subjected to torture, and he sustained injuries to his arm, necessitating he should periodically go for physiotherapy; the two men who had been writing claimed their writings were the recorded statements of the accused; he was held at Pangani Police station and was later arraigned before the Court. That was all, and learned counsel then closed the defence case, and sought an opportunity to make submissions.

#### E. DEFENCE SUBMISSIONS

**Mr. Kanyangi** submitted that the prosecution had failed to prove beyond any reasonable doubt that the accused committed the offence charged.

Learned counsel submitted that PW1 had contributed little towards the proof of the charge, because he never witnessed what transpired on the material day, just as was the case with PW2. Similarly, counsel urged that PW3 only heard screams outside the fence of Nairobi Technical Training Institute, but he did not see how the deceased met her death. Counsel also expressed doubts that PW4 did perceive the circumstances surrounding the stabbing of the deceased, on the material morning. Of PW5 who had accompanied the deceased to hospital, **Mr. Kanyangi** said: “She saw a knife and a bottle of poison at the scene; but she knew not who had them.”

**Mr. Kanyangi** discounted PW6’s testimony too; in his words: “PW6 also said a letter was found in the patient’s pocket. The letter allegedly retrieved from the patient (accused) was not examined by a document examiner or hand-writing expert; so nobody can confirm who wrote it, and for what purpose.”

**Mr. Kanyangi** discounted all the remaining testimonies: of PW7, PW8, PW9, PW10, PW11 and PW12. Of PW9, the Government Analyst, counsel urged that no proof had been given that it is the accused who stabbed the deceased using the knife which was recovered at the *locus in quo*. Of PW11’s testimony as a pathologist, learned counsel urged that this witness’ findings would be no less consistent with a scenario in which the deceased was injured after falling all by herself on a sharp object.

**Mr. Kanyangi** submitted that the accused’s evidence was largely unchallenged, and no witness had identified him as the one who stabbed the deceased; and no witness had shown that he is the one who had the bottle of poison recovered at the *locus in quo*. Counsel urged that the poison bottle “could have been part of the general rubbish which was scattered all over the place”; and he submitted that no witness saw the accused drink poison as alleged. Counsel submitted that there was “no evidence showing why the accused could have stabbed the deceased.” Counsel submitted that there was no reason why the accused could have leapt into the road in front of a moving motor vehicle, and that the leaping thesis could have come from PW7 in his attempt to ward off responsibility for careless driving in the course of which he injured the accused.

**Mr. Kanyangi** disputed the clinician, PW6's assessment that the accused was suffering from organo-phosphate poisoning; in his words: "His evidence is only suspicion; it should be disregarded; no analyst examined it"; and he asked the Court to take judicial notice that "those who suffer from malaria sometimes vomit."

**Mr. Kanyangi** submitted that there was "no concrete proof of who stabbed the deceased to death, and why." Counsel contended that "the evidence shows that the deceased was stabbed to death by an unknown assailant, as she went to school; the accused was hit by a speeding *matatu*, then admitted to Kiambu District Hospital."

Counsel also contended that the prosecution had not proved malice aforethought on the part of the accused – and hence this ingredient of proof in a murder case was lacking. He urged that the circumstantial evidence available fell short of the required standard of proof, and that the prosecution had not achieved proof beyond reasonable doubt.

It was also **Mr. Kanyangi's** submission that there had been delay in charging the accused in Court – and that this was "illegal, oppressive and unconstitutional." He urged that the accused be acquitted.

#### F. STATING THE PROSECUTION CASE IN SUBMISSIONS

Learned counsel, **Ms. Wafula** submitted that the accused was the author of the death of **Elizabeth Nzisa Musembi**, and he should on that account be held criminally responsible, on the basis of the murder charge. Counsel underlined specific aspects of the evidence as showing the accused's complicity: he had stalked the deceased for days, at school and at home; he had, by the evidence of PW1, threatened to kill the deceased, and PW1 had sought a meeting with the accused to diffuse this threat; PW2 had come to an agreement with the accused that he must cease to pose a threat to the deceased; following the stabbing incident, the accused had taken poison, and several witnesses testified that he was being treated at Kiambu Hospital, on the material date, for poisoning; PW4 had witnessed the accused being in a struggle with the deceased at the *locus in quo*, on the material date and at the material time; at the *locus in quo*, and soon after the incident, PW10 recovered a bloody knife which was the instrument of killing, as well as a bottle of poison which appeared to have been emptied then, into a receptacle other than the ground; the medical officer (PW6) who treated the accused sensed a strong smell of organo-phosphate poison issuing from the accused's orifices, and the accused was being treated for poisoning; PW6 recovered from a violent and unruly patient, the accused, photographs of the deceased, demonstrating a connection between him and the deceased; PW6 recovered from the accused a note describing the said link, and indicating that the accused had pledged himself to commit suicide and to cause the death of the deceased at the same time. Counsel submitted that, from the evidence of PW6 it was clear that the accused had not wanted to be treated, but wanted to die; that PW7's and PW8's evidence shows that the accused readily hopped onto the road in front of a moving vehicle, well knowing such action could lead to his death; and that PW10's evidence showed a clear link between the accused, the deceased, the bloody knife found at the *locus in quo*, and the bottle of *Malathion* insecticide which was recovered from the scene.

Learned counsel then addressed herself to the thrust of the prosecution case, in the light of the unsworn defence statement. Counsel submitted that the evidence on record showed a young man (the accused) who, "with careful planning, plans to kill a woman who has rejected him, and then commit suicide."

Counsel urged that on the evidence, the accused had been warned on 13<sup>th</sup> May, 2004 to keep away from the deceased; but *four days later*, with ample time to plan his attack and to find the necessary equipment, he "accosted the deceased at the gate of [her] college"; "having stalked her for a long time, he knew her timing, hence the attack at the college gate."

Learned counsel discounted the accused's unsworn statement: that he had fallen sick, with malaria, and found himself hospitalized at Kiambu. Counsel posed the question:

"Was [the accused] pleading insanity from malaria?" That could not be true, counsel submitted, for "the attack on the deceased shows careful planning, and pre-meditation"; and this rules out insanity.

Counsel contested the accused's claim that the injuries he had sustained were from beatings by Police officers; "this is an afterthought to explain the injuries he suffered when he jumped in front of a *matatu*."

Learned counsel submitted that the obligation resting upon the prosecution was not to prove its case "beyond all doubt", but only "beyond reasonable doubt"; and in the instant case there was both a direct eye-witness (PW4), and much corroborative circumstantial evidence; and the circumstantial evidence in its incidence, is both contemporaneous and sequential, pointing unambiguously to the accused as the one who committed the offence.

**Ms. Wafula** contested the point that there had been delay in arraigning the accused in Court, and that this resulted in a breach of any constitutional rights. This point, learned counsel urged, was only being raised "after quite a number of witnesses have been heard"; and in this regard, it was submitted, the accused had sat on his rights, and so the argument deserves to be disregarded.

Still on the constitutional point, learned counsel urged that the right to life as provided for in the Constitution's safeguards, extends to deceased persons whose rights have been violated. Counsel urged that in a just resolution to the set of claims being asserted, the accused herein should be held criminally responsible.

## G. IDENTIFYING CRITICAL POINTS IN THE EVIDENCE

### (a) *Direct Evidence and Circumstantial Evidence*

While it is obvious that direct evidence from witnesses whose demeanour is upright and is by no means impugned, is the easiest way to prove a charge against an accused person, it is well recognized in the law of evidence that *circumstantial evidence*, which of course is *indirect* evidence, when it is accurately put together and it interlocks perfectly, will also provide unexceptionable proof, in certain cases.

Although learned counsel **Mr. Kanyangi** contended that there was practically no credible direct evidence in the instant case, I would hold otherwise. It was PW4's evidence that he witnessed the struggle in the course of which **Elizabeth Nzisa Musembi** was fatally stabbed, at 7.15am on the material date, and the incident was taking place only some 50 metres away from where he had stopped, in his car. PW4 was able to perceive the man and the woman in the fatal struggle quite well: the man was *light-skinned*, and his height could have been *about 4 feet 8 inches, sturdy of build*, and "*not thin*"; this was the man in the Court's dock. PW4 had testified in response to cross-examination, that he had driven at low speed as he approached the Institute's closed gate, from where he observed the happenings at the *locus in quo*; he had clear view of the said struggle, for there was nothing and nobody intervening to obstruct his vision; PW4 was *able to describe* the tussle which he saw being enacted between the man and the woman in the struggle.

In this Court's assessment, PW4 as a witness, presented no problem of credibility; his demeanour was positive and open; I am convinced he was a truthful witness.

What PW4 perceived at the *locus in quo* is to be taken together with the *circumstantial evidence* which was adduced by the majority of the witnesses. I may state at this stage, however, that none of the other witnesses, just like PW4, presented any notable problem of credibility; and in my perception, practically all of the witnesses were of open demeanour, and I did not get the impression that any of them had contrived to distort evidence on the limited part of the jigsaw they were each testifying upon. It is the responsibility of the Court to piece together the several elements of the evidentiary picture, and to see if the evolving pattern establishes proof of the charge beyond any reasonable doubt.

### (b) *Facts Emerging from the Circumstantial Evidence*

It may be stated as a fact, from the testimony of **Rose Nabwana Sikuku** the Government Analyst (PW9), that the deceased herein was fatally stabbed by the seven-inch-size table knife, sharpened on both sides, which was an exhibit in Court, at about 7.15am on the material date. The said knife was the *one* cause of

death in respect of which the pathologist, **Dr. Jane Wasike Siminyu** (PW11) also gave evidence. The stab was a *decisive* one, for, according to PW11, it penetrated the right anterior neck, perforating the upper lobe of the right lung, and severing the carotid vessel. According to PW10, **Police Constable Michael Kiplagat Aiyabei**, the stab would have been followed by a powerful *gush of blood* which left on the ground visible *splash-marks*.

The foregoing facts appear in the context of yet *other* circumstantial evidence, defined by the element of time – *proximity in time*.

Early in the morning, on 17<sup>th</sup> May, 2004 the deceased left her father's home at Baba Dogo Estate, to go to her school, Nairobi Technical Training Institute. When she was almost passing through the school gate, at 7.15a.m., *a man was seen* being involved in a *physical struggle* with her. The accused herein, who lived with his brother (PW2) at Baba Dogo Estate, had also left his brother's home *early the same morning*, to go to his own school which is elsewhere, namely, Kenya Institute of Highway and Building Technology (according to PW2). It is clear that the man who was seen struggling with the deceased at the gate of Nairobi Technical Training Institute is the one who thrust the fatal stab at the deceased, and he ran away and escaped. For the deceased was not said to have been subjected to a further struggle by a different person, on the material morning; and it is at the end of the physical struggle witnessed, that the deceased was brought down, by stabbing. According to PW4 who was approaching the gate in his car, the man who was struggling with the deceased nearby, was *the accused* herein, for he was able to see the man, and he was able to describe *in detail* before the Court, the appearance of the man he had seen with the deceased that morning.

It is the evidence of PW7 and PW8 that, *less than an hour later*, a young man of the *age of 24* was at Kiambu bus stop, some ten or so km. away from the *locus in quo*, and he was gravely *endangering his own life* by diving into the road in front of a moving mini-bus. As the mini-bus swerved and avoided the said young man, he ended up only bruising his face which he bluntly hit on the tarred road surface. The mini-bus crew acting in co-operation with passengers, delivered the said young man to Kiambu District Hospital, for medical attention.

It was the evidence of both PW2 and PW6 that the said young man, who turned out to be the accused herein, was under treatment at Kiambu District Hospital, not so much for the fall-bruises, *as for poisoning*; and when he was brought into hospital he was *frothing in the mouth and vomiting*, strongly reeking, in the medical officer's assessment, or *organo-phosphates*.

The medical officer (PW6) testified that from his experience the accused had *Malathion* poisoning; and he put the accused on a course of treatment which after a few days, led to an improvement.

The chemical *Malathion* also appears in the testimony of PW10 who visited the *locus in quo* only a *few minutes* after the fatal stabbing of the deceased. This Police officer took note of the *pattern of blood splash* which was inscribed on the ground, and recovered the *table knife* which was exhibited in Court, as well as a *freshly-emptied and top-less bottle of Malathion*, which he said he had become familiar with, in the course of his work.

The accused, while at Kiambu, evinced three notable signals: firstly, he had leapt into the road, in front of a moving vehicle; secondly, he was reeking strongly of *Malathion*; and thirdly, he was violent, and would not submit himself to medical attention. Although the medical officer (PW6) found the accused to be infected with malaria, what appeared to preoccupy him, in relation to this patient, was *organo-phosphate poisoning*.

It is a question whether the said organo-phosphate poisoning had an operational connection with the bottle of *Malathion* which PW10 recovered at the *locus in quo*. This puzzle is resolved by the findings which the hospital authorities made, as they sought any identification that might be held by the accused.

From the person of the accused, the hospital authorities, in the presence of the mini-bus crew, recovered *two photographs* and a *ruffled note* written in English. PW1 (father of the deceased) and PW10 (the

Investigating Officer) established as a fact that in the two photographs in question, one constant figure was *the deceased*; in one, she was the sole person photographed; and in the other, she appeared alongside several other ladies; she appeared dressed in the *same mode*; and the date shown on one photograph was roughly one year before the material date (it was dated 14<sup>th</sup> February, 2003).

The written note found with the two photographs was morbid and ominous in tone: it described one *Eliza* as the writer's lover; it alleged rejection by this lover; and avowed that both the writer and *Eliza* must die simultaneously. PW10 in his investigations established that at her school, *Elizabeth Nzisa Musembi* was popularly known by the name *Eliza*. So, was this *Eliza*, the deceased, the name featuring in the premonitory note recovered from the person of the accused?

There could very well be other *Elizas*; but in the life of the accused herein the evidence shows only one, namely the deceased, who according to PW1, had been known to the accused since 2003.

As already noted, the accused had in his possession one-year-old photographs of the deceased (dating back to 2003). How did he get them? There would have been a certain *personal relationship* which would bring the accused into possession of those photographs as these are very personal items – this Court would take judicial notice.

Three days before the material date, PW1 received reliable information that the accused had become a *threat* to the deceased's life. PW1 felt *compelled* to go out in the night, at 9.00p.m., in search of the accused, for the purpose of seeking a solution and providing safety for his daughter. He went with the deceased and his son to the house of PW2 (accused's brother), looking for the accused.

That, indeed, the accused *did* know the deceased, and there was *some relation* between them, became obvious, during the said night visit. It was also apparent such a relationship was going through a *down-turn*, as the accused showed a *reluctance to meet PW1 and his children*. It took quite some persuasion by PW2, to get the accused's hearing and, even then, the accused would *flare into a rage* and bolt out of the meeting-room, without any apparent justification. Subsequently, on the following day (14<sup>th</sup> May, 2004) at 6.00a.m., the accused had visited PW1's house and said he wanted to talk to him; but, *quite oddly*, the accused disappeared before any conversation could take place. The only possible reason at the time, why the accused might want to hold discussions with PW1 would be related to the subject of the previous night's talk, namely *Elizabeth Nzisa Musembi* and her sensation of insecurity.

The logical inference to be drawn is that the accused had some kind of fixation about the deceased, during the week leading to the material day; and it was a matter in respect of which the accused was showing *irrational behaviour*.

PW12, *Dr. Zephania Kamau* testified that the accused herein was mentally sound, and at no time was there a suggestion before him that the accused might be a person of diminished responsibility. It was also PW10's evidence that while hospitalized, the accused had been communicating well, by writing. On that basis it is to be held that the accused's decisions and actions during the week of the material incident were *consciously* taken or done; and this Court will apply the well known principle stated in s. 11 of the Penal Code (Cap. 63, Laws of Kenya):

***“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”***

There are *coincidences* in the happenings of the material date which, in the circumstances of this case, must be held to be part of the *corroborative facts* pointing to the accused as the man who caused the death of the deceased, at the material time.

The accused's angry conduct when confronted with the deceased, on 13<sup>th</sup> May, 2004 was the prelude to his erratic visit to the deceased's father's home at an unusual hour on 14<sup>th</sup> May, 2004; and after a further two days he left home early in the morning, and was seen by PW4 in a struggle with the deceased at the

deceased's school, at 7.15a.m. Then, following that incident, the accused *ran away* and ended up at Kiambu. On his way to Kiambu, the accused did the unusual thing of hopping on to the road, in front of a moving motor vehicle, as if attempting to commit suicide. The suicide thesis is further supported by the constant presence of an organo-phosphate poison, both as the ailment afflicting him when he was hospitalized, and as an item recovered at the *locus in quo* wherefrom he had been engaged in a physical struggle with the deceased. The evidence of the accused's *preoccupation with death*, by his conduct, is strengthened by avowals and premonitions of death, contained in the letter recovered from his person, which makes **Eliza** the intended victim. I find as a fact, on the basis of the evidence adduced, that the name **Eliza** in the letter recovered from the accused, referred to **Elizabeth Nzisa Musembi**; and it follows that the accused had intended to kill the deceased, and the letter in question could only be his handiwork. I find as a fact that the accused *did* fatally stab the deceased on the material date, and at the material time. Apart from the *direct evidence* of PW4, this case is disposed by the intimate linkages in the *circumstantial evidence* which, in their occurrence, bear *contemporaneity* and *close sequence*, and which, by that quality, convey unquestionable probative force. I have carefully considered the defence statement made by the accused, and it is clear to me that it is essentially superficial and evasive, and raises no doubts at all in the prosecution case. I find and hold that the accused, on 17<sup>th</sup> May, 2004, did kill the deceased.

**(c) Does the Killing of the Deceased amount to Murder as Charged?**

Under the law, a person cannot be held guilty of *murder* unless the death in question has been intentionally caused, i.e. the killer was actuated by malice aforethought; or unless he was so reckless he didn't care for the deceased's right to life, and, in that I-don't-care state of mind, causes the death in question. The *intention* to cause the death of the deceased, in a murder charge, may or may not have been announced or communicated in any manner by the accused. *Extremes of brutality* in the mode of executing the killing will be taken to be an expression of intention to kill. The *kind of weapon used* in the killing may also be evidence of intention to kill.

Learned counsel contested the basis of the charge in the instant case, on the ground that the prosecution did not prove malice aforethought. This point, however, was not in my opinion, canvassed with conviction. In my assessment of the evidence I have set out the detail of the brutality with which the deceased's lung was pierced and damaged, using a well sharpened, double-edged kitchen knife. There was, moreover, evidence of intentions to kill the deceased, contained in the letter recovered from the accused's person. I am perfectly in agreement with learned counsel for the prosecution who urged that "the attack on the deceased shows careful planning and pre-meditation." I hold that the conditions of proof of a murder charge, were well satisfied, in the instant case.

Learned counsel **Mr. Kanyangi** contended that the prosecution had failed to comply with the prescribed safeguards for the accused's trial rights under s. 72 (3) (b) of the Constitution, and that on this ground the accused should be set free. It is in the first place not clear how counsel calculated the period which elapsed before the accused was arraigned in Court. As already noted, the offence was committed on 17<sup>th</sup> May, 2004 and the accused was arrested soon thereafter; and then on 12<sup>th</sup> July, 2004 he was brought before the Court for plea-taking. Although it is clear that the accused was held in custody for about one month beyond the period of 14 days which is specified in the Constitution, there had been no complaint at any time about the delay, until now when the Court had fully taken the trial proceedings. This Court has already held in a number of cases (see **Ponnuthurai Balankumar v. Republic**, Nbi High Ct. Misc. Crim Application No. 218 of 2008; **Republic v. Joseph Zakayo Maithia & 4 others**, Cr. Case No. 105 of 2005; **Republic v. Joseph Ndirangu Nungari & Another**, Crim. Case No. 42 of 2006; **Republic v. Peter Githongo Maina & 2 others**, Crim. Case No. 79 of 2005; **Alfred Kimathi Meme v. Republic**, Nbi High Ct. Misc. Crim Application No. 857 of 2007) that the process of hearing a criminal case to completion, or in overwhelming substance, represents a constitutionally - ordained process, which is not to be countermanded but for *good cause*; and such a process, it is to be considered, is itself set to dispense justice to *all parties*. When trial has progressed thus far, the accused should in principle, regard that trial process as the main device of justice in the circumstances.

It is essential that a party who is aggrieved about continuing criminal proceedings against him or her, and

expecting to rely on s. 72 (3) (b) of the Constitution, should raise the matter at the earliest possible stage (see the Court of Appeal decision in ***Dominic Mutie Mwalimu v. Republic***, Crim. Appeal No. 217 of 2005). I have considered **Mr. Kanyangi's** contention in the light of this principle, and, taking into account the gravity of the charge, and the cogency of the evidence adduced in Court, I am inclined to dismiss the objection.

#### H. VERDICT AND ORDERS

I find the accused herein guilty of murder as charged, and convict him. I sentence the accused to suffer death in the manner provided by law.

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 27<sup>th</sup> day of November, 2008

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Huka**

**For the Accused: Mr. Kanyangi**

**For the Prosecutor: Ms Wafula**