



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 130 OF 2004**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**SAMWEL KARANJA KURIA.....ACCUSED**

**JUDGEMENT**

**I. THE CHARGE OF MURDER, AND THE PLEA**

It is stated in the information laid against the accused, **Samwel Karanja Kuria**, by the Attorney-General and dated 8<sup>th</sup> September, 2004 that he, the accused, on 21<sup>st</sup> June, 2004 at Uthiru Village in Kinoo Location, Kikuyu Division of Kiambu District, in Central Province, murdered **Mathew Mbugua Kimwaki**. The accused pleaded not guilty before **Osiemo, J** on 7<sup>th</sup> October, 2004 and the matter, after being mentioned several times before **Rawal, J. Osiemo, J. and Ombija, J.** came up before me on 13<sup>th</sup> February, 2006 when I selected the assessors, **Wilkins Kirwa Chepkurgor, Mary Kagwanja, and Stanley Mucheru Mwangi**, and then proceeded to conduct the proceedings.

**II. PROSECUTION EVIDENCE**

PW1, **Evanson Kanyungu Kimwaki** was sworn and testified that he lives at Uthiru, and on 21<sup>st</sup> June, 2004 he was at home when **Kimani** (not called as a witness), his brother-in-law who had been living in the same place with the deceased, came to see him. **Kimani** told PW1 that he had been in the company of the deceased, who had attempted to fight him (**Kimani**) but was now lying next to a bar known as Neighbours Bar, where the two of them had been. **Kimani** told PW1 that the deceased was so drunk, he fell asleep on the ground. The deceased was PW1's neighbour, and their houses were only some 200m. from the said Neighbours Bar. PW1 suggested to **Kimani** that both of them should walk over to Neighbours Bar and bring the deceased home; and they did that, only to find that the deceased was no longer lying at the spot where **Kimani** said he had left him, a short while back. While the two were there, in relative darkness, dimly lit by light-sources from a certain neighbouring Checkpoint Bar, somebody who walked unsteadily and supported himself on a wall, came along. This unidentified man, as he approached the dimly-lit area, dropped some metal, and at that stage PW1 recognised him as **Karanja**, the accused. PW1 had known **Karanja** for some six years, and his own mother was **Karanja's** landlady. **Karanja**, in PW1's testimony, dropped the said metal, with a clanking sound, and disappeared. This metal was dropped near the lights, and PW1 picked it up, looked at it, and took it to his mother's house, some 100m away. PW1 found this metal to be a butcher's cleaver, and it was stained with blood. (The cleaver, identified in Court by PW1, was marked MFI 1). PW1 drew the attention of his mother, who switched on electric lights; and he also called his two brothers – **Njenga** and **Ragui** (both of them not called as witnesses) – who were not present at this moment but lived in the same area as their mother.

PW1's brother, **Njenga**, had a house next to that of the accused; and **Njenga** could see there were lights in **Karanja's** house at that moment, even though that house was locked on the outside; and now he (**Njenga**), **Ragui**, **Kimani** and PW1 returned to the neighbourhood of Neighbours Bar, to check on the whereabouts of the deceased. The place was dark, and **Njenga** lit a match-box, which he had; and this showed the deceased lying dead. PW1 testified that when he had seen **Karanja** earlier, at the time **Karanja** dropped the butcher's cleaver and vanished, he (**Karanja**) had come from the direction in which, now, **Mbugua** was lying dead. The deceased had been cut on the face; one of his feet had no shoe; his trousers and his under-wear had been removed. PW1 looked at the dead body, and at that stage saw clearly that it was the body of **Mbugua**. He asked **Njenga** and **Kimani** to remain at the scene, as he went to call his other brothers, **Mungai** (not called as a witness) and **Njuguna** (PW4); and **Njuguna** came with a spot-light which he flashed, showing **Mbugua's** sex organs to have been severed, and about half of his body to bear cuts.

PW1 reported the matter at the local Chief's Post, and thereafter he and his brothers and colleagues went straight to **Karanja's** place, on the basis that it was **Karanja** who had emerged earlier from the direction where the body of the deceased was found. When they reached **Karanja's** house they found that he had now switched off the lights; and a padlock which had earlier been locked on the door to **Karanja's** house, was no longer in place. So PW1 and the others supposed **Karanja** had re-entered his house, from some place; so they called out his name aloud – but **Karanja** did not respond. Labouring under suspicion, they forced open **Karanja's** door; and he was there, on his bed. PW1 and the others observed **Karanja's** physical condition, and they found blood on his hands. They arrested him and brought him out, before the arrival of the regular Police. The Police arrested **Karanja** together with a friend of his in the neighbourhood, called **Mbugua**, who was usually to be found in his company. At this stage **Karanja** needed his jacket and shoes as he had been brought out without these; and it is **Kimani** and **Njuguna** (PW4) who returned to **Karanja's** house to fetch these; and they were found to be stained with blood which PW1 and PW5 also witnessed. The accused's white sports shoes were stained with blood (the shoes marked MFI 2). **Karanja** had been wearing a tee-shirt and red trousers (marked MFI 3).

Responsible Police officers from the Kikuyu Police Station were called, and they and PW1 entered **Karanja's** house. The Police asked **Karanja** to remove his red trousers, and these were found to be stained with blood. The Police officers found inside **Karanja's** house a carton which had blood on it; and they took a cutting out of the bloody section thereof. The police also took away the butcher's cleaver which PW1 had recovered from the *locus in quo*.

On the following day PW1 recorded a statement at the Kikuyu Police Station, and two days afterwards he was called to the mortuary to identify the body of the deceased.

In the cross-examination, conducted by the late learned counsel **Mrs. Siganga**, PW1 testified that his brother **Njenga**, who lived some 200 metres away from his house and much closer to their mother's residence, was a friend of the accused, and these two lived in the same compound. PW1 conceded that his brother **Njenga** is a difficult person to get on with and that **Njenga** and the deceased were not exactly the best of friends.

PW1 testified that the accused is a carpenter and does not work at a butchery; he did not know the owner of the butcher's cleaver which he had recovered in the area of the *locus in quo*. When he had seen **Karanja** in the area where the deceased was killed, **Karanja** had quickly disappeared, but he had heard no commotion in that neighbourhood. On that night, PW1 testified, he had not been drunk, and he very well saw the accused moving while supporting himself on the wall.

When PW1, his brothers and colleagues had broken into **Karanja's** house, following the discovery of **Mbugua's** dead body, they switched on the lights and saw blood on both of **Karanja's** hands.

PW2, **Peter Ng'ang'a** was sworn and spoke in Kikuyu, being interpreted by the Court clerk. He testified that he lives at Uthuru, and, on 21<sup>st</sup> June, 2004 while in the company of others as they came from a funeral gathering, they saw a person lying down in the vicinity of Neighbours Bar. In the moonlight, PW2 and his colleagues approached the person who was lying down, for the purpose of checking who it was. One

of their number, by name **Gatu** (not called as a witness), had a spot-light which he flashed; and PW2 and his group saw clearly that the person lying down, drunk, was **Mbugua** (the deceased). **Mbugua**, who was well known to the witness, and with whom PW2 worked in the same place, was “just drunk, [but alive], and had no injuries.” This was at about 10.00pm. Even as PW2 and his colleagues observed **Mbugua** as he lay on the ground, someone else came along, brandishing a butcher’s cleaver; and he accosted these spectators: in the words of PW2, “he called us dogs, and ordered us to leave, as he was the one guarding **Mbugua**.” The stranger said he was guarding **Mbugua** because “**Mbugua** was their landlord.” PW2 who had some nine other people with him as he observed **Mbugua** lying down, realised that the person ordering them to be-gone was **Karanja** (the accused), whom he had known for some three years and who was a fellow villager.

PW2 averred that **Karanja** was a tenant in the **Mbugua** family house, and he was well aware of the tenancy relationship, with **Mbugua**’s mother as the land-lady. So PW2 and his colleagues supposed that “since **Mbugua** was **Karanja**’s landlord, nothing could go wrong.” As PW2 and his group were being dismissed, in his own words, “**Karanja** went back to where **Mbugua** was; we thought he was taking **Mbugua** home.”

PW2 and his colleagues then proceeded to yet another funeral gathering; and while they were there, sometime between 10.30 pm and 11.00 pm, a cousin of the deceased, also known as **Mbugua** (not called as a witness), and **Njuguna** (PW4) drove in a motor vehicle to the scene of the said funeral congregation. PW2 noticed that the two new arrivals were talking in low tones; and when PW2 and his friends moved closer they learned from the said **Mbugua** and **Njuguna** (PW4) of the death of the deceased; and they then informed the two that they had left the deceased, alive, with **Karanja** (the accused). PW2 and his colleagues learned from **Mbugua** and **Njuguna** (PW4) that **Karanja** had already been arrested.

**Mbugua** and **Njuguna** (PW4) dropped PW2 at his home that evening. And on the following morning PW2 visited the place where he had left the deceased lying down; and “he was not there; there was blood at some point in the corridor; there was blood about three metres from the place where the body had been.”

On cross-examination by learned counsel **Ms. Siganga**, PW2 further testified as follows. It was at about 10.00pm when he and his colleagues had approached Neighbours Bar, on the material night; the lights at the back of the building were switched off – but those in the front were on; and there was moonlight as well. On that occasion PW2 and his colleagues had seen the deceased lying outside the front door, near the path in front of Neighbours Bar, not in the verandah, and his face bearing upwards. There were two entrances to Neighbours Bar, and one of these gates, close to which the deceased lay, had lights attached to it; and **Gatu** (not called as a witness) had a spotlight which he flashed, enabling PW2 and his colleagues to see that **Mbugua** (the deceased) was the person lying down.

PW2 testified that he very well knew **Karanja**, the carpenter, but he did not know if **Karanja** was drunk at the time he chased PW2 and his colleagues away from the place where the deceased lay, still alive. PW2 averred that it did not occur to him that **Mbugua** (now deceased), where he lay, was in any danger; but he did not know the state of relationship between **Karanja** and the deceased.

PW2 testified that blood was found on the morning following the killing of **Mbugua**, not in the exact spot where the deceased had lain at about 10.00pm, but in the verandah nearby. Shown a butcher’s cleaver in Court, PW2 said it resembled the one he had seen with **Karanja** on the material night. On that night, PW2 averred, **Karanja** had chased him and his colleagues all the way, upto the point where there was electrical lighting; so he had quite clearly seen it was **Karanja** who was wielding the butcher’s cleaver. Of their leaving the place where the deceased had lain in the night, PW2 testified:

“We left when [**Karanja**] chased us away because we did not think **Karanja** had any ill-motive. He spoke as if he suspected us to be thieves.”

He further averred that the deceased had had no blood on him “at the time we had seen him at night.” He concluded by testifying that he had not witnessed the accused kill the deceased.

PW3, **Yustus Mbugua Gatengo**, was sworn and gave his evidence in Kiswahili. He testified that he lives at Uthiru and, on 21<sup>st</sup> June, 2004 (which he reckons was at the beginning of the week; I find that it was a Monday) at about 10.30 pm he was part of a group coming from a funeral gathering which had been held for a departed friend, by the name **Gakuru**. His group was walking back home, when they came by a man lying just by the foot-path; and they “thought it wise to check who it was”; and as they approached, they saw that the person lying was **Mbugua**, a neighbour, and he was drunk. A member of DW3’s group, by name **Gatu**, had a spot-light which he flashed showing **Mbugua** lying down, face upwards, and without any apparent injuries. Even as they observed **Mbugua** and were of the general view that **Mbugua** was by no means unsafe, somebody else approached PW3’s group from behind, and this person was **Karanja** (the accused) whose very familiar voice the witness heard. In the words of PW3: “I never saw him [**Karanja**], but I heard his voice. I had known him since childhood.” **Karanja** ordered P3’s group to leave the place and go away; **Karanja** ordered in Kiswahili: “*Mbwa ninyi; aacheni na huyo*” (which translates as “*You dogs, begone!*”) PW3 and his group indeed departed the scene; and they assumed **Mbugua** was safe, as he was **Karanja**’s own landlord.

PW3 thereafter went home; and when on the following morning he went out in search of odd jobs, he walked into a crowd of people, from whom he learned that **Mbugua** had been killed the previous night, only a short distance from the spot where he had been lying and from which **Karanja** had chased PW3 and his group. PW3 proceeded to the spot where he had seen **Mbugua** lying the previous night; and there, at about 8.00 am he found a gathering of people who were in shock as they observed the blood stains at the scene. The blood was not found at the exact spot where **Mbugua** had been lying, but a short distance away. The morning crowd was agitated about the death of **Mbugua** and they wanted to know who had seen the deceased, in the night. PW3 went along with the crowd to Kikuyu Police Station, and wrote a statement on the matter.

PW3 was cross-examined by learned counsel **Mrs. Siganga**, and he gave further evidence as follows. When he and his group saw **Mbugua** lying down in the night, PW2 (**Peter Ng’ang’a**) was also in this group; and as the group approached Neighbours Bar, at about 10.00pm, business had closed, and the outside lights were switched off so there was darkness, except that it was a time of full moon, and this, together with a spot-light which a member of the group had, enabled them to see **Mbugua** quite clearly; in his words: “With the moonlight you could see but not identify a person; and we used a spot-light to identify **Mbugua**.” At that moment, **Karanja** appeared from PW3’s right side, and, in PW3’s words: “His voice helped me to identify him.” Owing to the relative darkness, PW3 did not notice the colour the clothes **Karanja** was wearing. **Karanja** spoke to PW3’s group in Kiswahili; he ordered the group to leave the place, and announced that “he was the guard of **Mbugua**.”

Although PW3’s evidence is that he perceived **Karanja**’s presence at the *locus in quo* through the medium of hearing, he did aver, in my view not convincingly, that **Karanja** as he chased them away was brandishing a butcher’s cleaver which resembled the one in Court (MFI 1). I think this is an inconsistency in PW3’s evidence insofar as all indications are that he was not able to visually register **Karanja** and his effects; PW3’s other evidence appears quite consistent. PW3 averred that he did not know if **Karanja**, who drinks regularly, was drunk on the material night, but that **Mbugua** was drunk. PW3 testified that he had not witnessed **Karanja** kill the deceased.

PW4, **Noah Njuguna Kimwaki** was sworn and gave his evidence in Kikuyu, being interpreted by the Court clerk. He testified that he lived at Uthiru Village, that the deceased was his brother, and that he remembers that at 11.00pm on 21<sup>st</sup> June, 2004 which was a Monday, he was awakened by his brother, **Evanson Kanyungu Kimwaki** (PW1) who had received word that their brother **Mbugua** had been assaulted; so they should search for **Mbugua** and assess his condition. The two proceeded to Neighbours Bar where they were able to see **Mbugua** covered in blood, and injured on the left side of the face, when a spot-light was flashed at the *locus in quo*. **Mbugua**’s teeth had been removed, and there were cuts on his sex organs. PW4 and his brother **Evanson Kanyungu Kimwaki**, with the help of others, reported the matter to the Police; and then PW4 and his cousins went to a place called **Muthoa**, in search of a cousin of his, by the name **Mbugua**; and there they found **Ng’ang’a** (PW2) who feared at the time, and judging from the mode of conversation between PW4 and his group, that the deceased was the subject of discussion. **Ng’ang’a** (PW2) joined PW4 and his cousins, and they went back to the neighbourhood of

Neighbours Bar where they found the Police in attendance, and **Karanja** having been placed under arrest.

**Karanja** at this point needed some clothing; he sent **Kimani** (**Evanson Kanyungu's** (PW1) brother-in-law (not called as a witness) who had been living in the same place with the deceased) to his house to bring him shoes and a jacket; and **Kimani** requested PW4 to accompany him. **Karanja** had specified the exact shoes that should be brought to him ? "because his shoes might get lost in the Police station"; but **Kimani** and PW4 brought him the shoes which their eyes had first fallen upon; and those shoes had blood stains. They brought these shoes close to the light, and found them to have blood spots; they were white sports shoes; **Kimani** and PW4 handed these shoes over to the Police. Both shoes had blood stains, and the Police officer would not allow **Karanja** to wear them, even though he had no shoes on. PW4 knew **Karanja** and he identified him in the dock.

On cross-examination by learned counsel **Ms. Siganga**, PW4 testified that he had been with the deceased some three days before his death. Although the two were living within the same perimeter fence, they occupied different houses; and they had last met at their mother's house which was, together with the house occupied by the accused, in a different, neighbouring compound.

When PW4 and **Kimani** had been sent to **Karanja's** house in the night to fetch shoes, **Karanja's** door was shut but not locked.

PW4 testified that he had not witnessed the act of killing and he did not know who killed **Mbugua**. He testified that during the investigations, his brother **Njenga** had also been arrested as a suspect in the commission of the crime.

PW4 testified that on the night of the death of the deceased, **Karanja** (the accused) was wearing trousers orange in colour, and a tee-shirt grey in colour. When the light in **Karanja's** house had been switched on, on the material night, PW4 saw the blood-stained shoes, but did not see any other remarkable thing. PW4 had not been present when **Karanja** was removed from his house on the material night, but he saw **Karanja's** bloody hands when he was being taken out to the road-side.

PW5, No. 27332 **Police Constable Gabriel Mwaura** was sworn on 14<sup>th</sup> February, 2006 and conducted through the evidence-in-chief by learned counsel **Mr. Njogu**. He testified that he is based at the Kikuyu Police Station where he was on duty at 12.05 a.m. on 22<sup>nd</sup> June, 2004 with **Inspector John Otikiri** (not called as a witness). On that occasion the two received a report of an incident at Neighbours Bar, Uthiru, the report coming from the Kinoo Police Post, through Police VHF radio. The two Police officers proceeded to the scene, and found two Administration Police Officers accompanied by "a lot of people." The A.P. officers took the two Police Officers to the place where the deceased's body lay – in a verandah of Neighbours Bar, facing a small path leading to the village. The deceased's face had been cut on the left side, and was covered with blood; his trousers and underwear had been pulled half-way down; his manhood had been severed; and near the body there was a butcher's cleaver.

The Police officers from Kikuyu Police Station found **Evanson Kanyungu Kimwaki** (PW1), a brother of the deceased, with the crowd at the *locus in quo*, and they interviewed him; they were informed by the A.P. officers that already, three persons were being held – **Karanja** (the accused); **Mbugua** and **Njenga**. The A.P. officers already had in their custody a pair of shoes which were blood-stained, said to belong to **Karanja**.

PW5 and **Inspector Otikiri** took **Karanja** (the accused) into his house, with the Inspector lighting up the path with a spot-light. **Inspector Otikiri** flashed his spot-light on the accused's clothing, and it was found that the accused's trousers had blood stains. The two Police officers got **Karanja** to remove the said trousers, and he was allowed to wear another one from his house. PW5 took custody of the trousers which were removed. The two Police officers found in **Karanja's** house a carton which had a flap bearing blood stains; and PW5 cut out the blood-stained portion with a knife. PW5 borrowed a polythene bag which he used to carry the several stained items from **Karanja's** house.

The two Police officers then returned to the *locus in quo* and took away the body of the deceased; the

blood-stained items recovered; the butcher's cleaver; and the several suspects. The suspects were taken to Kikuyu Police Station and held in custody. The Police officers took the body of the deceased to the City Mortuary.

Subsequently PW5 attended at the City Mortuary for the conduct of the post-mortem examination on the body of the deceased. He requested the doctor to have the blood samples recovered duly analysed. He took the accused to a **Dr. Kung'u** (PW6), to conduct an examination for recent injuries; for mental status of the accused; and for extraction of blood samples for analysis. PW5 later gathered all the exhibits, and packed them duly labelled, for analysis by the Government Chemist. PW5 prepared the information file, and a charge was laid against the accused.

PW5 produced the following items in Court:

- (i) Exh.1 – the butcher's cleaver;
- (ii) Exh.2 – shoes of the accused taken from his house just after the death of the deceased;
- (iii) Exh.3 – trousers which had been worn by the accused on the evening when the deceased died;
- (iv) Exh.4 – blood-stained piece of carton-flap recovered from accused's house during the night when the deceased died;
- (v) Exh.5 – shirt which was worn by the accused during the night when the deceased died;
- (vi) Exh.6 – a pair of Jeans trousers which were worn by the deceased.

On cross-examination by learned counsel **Ms. Siganga** PW5 gave further testimony as follows. He had not found any eye-witness to the killing of the deceased. PW5 had put it to the accused, during investigations, that at about 10.00pm on 21<sup>st</sup> June, 2004 several young men had found him at the *locus in quo*, but "he denied everything"; he kept saying: "I don't know, I don't know".

PW5 testified that when he and **Inspector Otikiri** entered the accused's house on the night of 21<sup>st</sup> June, 2004 they used a spot-light, just before the electrical lighting in the house was switched on. He testified further that the accused had not appeared to be drunk at the time he arrested the accused.

In the neighbourhood of Neighbours Bar, PW5 and **Inspector Otikiri** found the crowd standing some 20 metres from where the deceased's body lay, in relative darkness; there was moonlight; and in front of Neighbours Bar there were electric lights illuminating the place; and some neighbouring houses had lights. The Bar's verandah has a canopy which created darkness where the body of the deceased was lying. Many of the people in the gathering had spot-lights; they flashed these, and the two Police Officers could see the body of the deceased very well.

PW5 and **Inspector Otikiri** merely re-arrested the three suspects who had been held by the Administration Police Officers; they then conducted investigations and recorded statements, and found that two of the suspects were not connected with the criminal incident; the officers inspected their houses and found nothing incriminating.

As regards the accused, PW5 found material which he considered justified the lodgement of prosecution – and this included blood-stained materials. When he sought to know the accused's occupation, he did not say he was a carpenter; he said he was in the business of selling fish, which he would purchase from Gikomba and sell within Uthiru Village. This was a response given when PW5 asked about the blood-stained carton in the accused's house; and the accused said "he suspected the blood was from fish"; but when PW5 opened up the said carton, he found not fish, but clothing.

PW6, **Dr. George Kung'u Mwaura** was sworn and led through the examination-in-chief by learned counsel **Mr. Njogu**. He averred that he has a health facility at Kinoo, near Kikuyu Town; and at this

facility **Police Constable Mwaura** on 6<sup>th</sup> July, 2004 brought to him the accused – for assessment of age, mental status and blood sample. PW6 found that the accused was a person of normal mental status, 26 years of age. He took the accused's blood sample and handed the same to **P.C. Mwaura**; after which he completed a P3 Form and signed it, and he now produced the same as Exh.No.7. Responding to questions in cross-examination, PW6 averred that he had found no fresh injuries on the accused; he only found old, healed scars. Of the healing of wounds, PW6 testified that there was no general rule on lapse-of-time for healing: "If there is no infection, it can heal even in a week."

When PW7, **Dr. Peter Muriuki Ndegwa** was being sworn to testify, on 28<sup>th</sup> February, 2006, learned counsel **Mrs. Ogoma** (holding brief for learned counsel **Mr. Njogu**) made an application under ss.33 and 77 of the Evidence Act (Cap.80): that PW7 be allowed to produce the post-mortem report on the deceased, on behalf of **Dr. Njue** who had personally conducted the examination, as **Dr. Njue** was out of the country and could not be brought to Court without undue delay. As learned counsel **Ms. Siganga** had no objection, I on that occasion made an order allowing PW7 to produce the post-mortem report.

PW7 testified that he worked at the Medico-Legal Services Department of the Ministry of Health, and **Dr. Njue** who was away in South Africa, was his immediate senior. He was familiar with **Dr. Njue's** signature, and he confirmed that **Dr. Njue** had carried out a post-mortem examination on the body of **Mathew Mbugua Kimwaki** on 30<sup>th</sup> June, 2004 after the body had been identified to him by **Evanson Kanyungu Kimwaki** (PW1) and one **Mungai Peter Gicheru** (not called as a witness). In his report **Dr. Njue** recorded that the body was that of an adult African male, 5ft. 6 inches in length; well preserved externally; lots of blood on the face; deep cut on the scalp; fractured skull; deep cut on the penis; testes removed. **Dr. Njue** recorded that the deceased had had an internal fracture of the skull, with a large haematoma, and the bleeding had clotted in the brain. The pathologist's conclusion was that the causes of death were: head injury, and the significant deep cut to the penis which would have been caused by a sharp object. PW7 produced **Dr. Njue's** report as Exh. No. 8.

The prosecution's last witness, PW8, **John Kimani Mungai**, was sworn and gave his testimony on 29<sup>th</sup> March, 2006. He averred, in the examination-in-chief, that he was the holder of an M.Sc. degree in Forensic Science from London South Bank University in England, and was a Government Analyst based at the Government Chemist Department. He had 12 years of experience as Government Analyst.

PW8 testified that he had received from No. 27332 Police Constable **G. Mwaura** of Kikuyu Police Station, on 7<sup>th</sup> July, 2004 certain items for analysis, namely:

- (i) a white/blue pair of sports shoes, in a khaki envelope marked Exh.A;
- (ii) a cleaver, resembling one used by butchers – in an envelope marked Exh.B;
- (iii) a red pair of Jeans in a khaki envelope marked Exh.C;
- (iv) a piece of carton paper, in a khaki envelope – marked Exh.D;
- (v) blood sample in a bottle – marked **Suspect Samwel Karanja** – marked Exh.E;
- (vi) blood sample in a bottle – marked **Deceased Mathew Mbugua** – marked Exh.F;
- (vii) a blue pair of Jeans trousers in a khaki envelope – marked Exh.G;
- (viii) a light blue long-sleeved shirt in a khaki envelope – marked Exh.H.

PW8 examined all these items and came up with the following report:

- (a) Exh.A – [white/blue pair of sports shoes]

and

Exh.B – [cleaver resembling the one used by butchers]

and

Exh.C – [the red pair of Jeans trousers]

and

Exh.D – [the piece cut from a carton flap]

were all lightly stained with **human blood**;

(b) Exh.G – [blue pair of Jeans trousers] was moderately stained with **human blood**;

(c) Exh. H. – [light blue long-sleeved shirt] was heavily stained with human blood;

(d) No DNA profiles were generated from blood stains on the blue Jeans trousers – Exh.G;

(e) Other DNA profiles generated were tabulated in the report.

These findings led PW8 to arrive at certain conclusions, as follows:

1. The DNA from blood stains on Exh.A [white/blue pair of sports shoes]; Exh.B [cleaver resembling the one used by butchers]; Exh.C [the red pair of Jeans trousers]; and Exh.H [light blue long-sleeved shirt] – all matched the DNA profiles from Exh.F [blood sample marked **Deceased Mathew Mbugua**, with a probability of a match of 1 in  $1.55 \times 10^{15}$ .
2. The DNA from Exh. D [the piece cut from a carton flap] matched the DNA sample Exh.E [blood sample marked **Samwel Karanja** – with a probability of a match of 1 in  $1.47 \times 10^{13}$ .

PW8 produced his report in two parts – Exh.9A being the report part, and Exh.9B being the DNA profiling. The witness testified that his opinion on the DNA profiles, when expressed in simple terms, meant that the blood samples in question were accurately assessed as emanating from the persons indicated.

On cross-examination, PW8 testified that DNA profiling was part of his training, leading to his graduation with the M.Sc. degree. The DNA molecule, PW8 testified, is the unit that carries the genetic make-up of a person; and the genes are the units of inheritance which we get from our parents. The DNA make-up of a person is unique, and hence is a special device of identification in respect of blood samples. A DNA molecule is marked by specific “regions” – and these “regions” make the differences between blood samples. It is the analysis of those “regions” which is known as DNA profiling.

It was PW8’s testimony that in a population of  $1.55 \times 10^{15}$ , only one person will have any given DNA profile; and that works out to no more than one person having that particular DNA profile in a population of 1.55 trillion.

PW8 testified that since blood is biological, it is amenable to bacterial activity which can lead to putrefaction, and in that process bacteria will cleave off the DNA molecules. Notwithstanding the said limitation of blood samples as a medium of identification of the genetic make-up of persons, PW8 averred, bone matrix preserves the cell very well, and DNA molecules will remain intact in bone material, teeth, etc.

The witness testified that he was not the one who drew the blood samples which he analysed; he only

received them on 7<sup>th</sup> July, 2004, and so between 21<sup>st</sup> June, 2004 to 7<sup>th</sup> July, 2004 he did not know where the blood samples had been kept. Although PW8 is not the one who labelled the blood samples, he had no reason to think that anyone had tampered with them. He did not know how the samples had been stored, but in his testimony, the blood was fresh when he received it. He confirmed this point during re-examination, by stating: “The blood samples were not putrefied. They were fresh.”

### **III. ACCUSED IS PUT TO HIS DEFENCE**

At the end of the testimony of PW8 the Prosecution closed its case, and learned counsel **Ms. Siganga** sought and obtained the opportunity to make a no-case-to-answer submission. She was not able to do so as she thereafter ailed and, very sadly, died; and so it fell upon learned counsel **Mr. Kanyangi** to make the submissions, which I heard alongside the responses of learned State Counsel, **Mr. Njogu**, and put the accused to his defence. In taking that decision I was guided by the principle of administration of criminal justice which I had earlier set out in **Republic v. Kamiro Chege**, H.C.Cr.Case No. 3 of 2005:

*“It is a well-established principle of law, firstly, that in criminal cases the prosecution is required to prove its case beyond [any] reasonable doubt, as a condition to the conviction of the accused. Obviously, that ultimate position where proof fails or succeeds is, ordinarily, at the end of the trial; but clear failings in the cogency of evidence will lead, by virtue of s.306 of the Criminal Procedure Code (Cap.75), to the acquittal of the accused at the preliminary stage, where a submission of no-case-to-answer is upheld.*

*“Whether or not a submission of no-case-to-answer succeeds is not governed by any unchanging law; it depends on the circumstances of a particular case; on the cogency of the evidence tendered by the prosecution; and on the manner in which the Court assesses such evidence.”*

On that occasion I had taken into account the principle in criminal trials expressed by the Court of Appeal in **Anthony Njue Njeru v. Republic**, Crim. App. No. 77 of 2006, that too detailed an analysis of evidence at the preliminary stage is undesirable where the Court is going to put the accused to his defence – as too much detail in the ruling could then compromise the evidentiary quality of the defence to be mounted. On the basis of my perception of the testimonies, and of the submissions on evidence as then made by learned counsel, I did exercise a discretion to put the accused to his defence. After I had explained the options then open to the accused, he consulted with his advocate and stated that he would remain silent, and would call no witnesses.

This brought the trial process to the final-submission stage, which involved only counsel for the accused, in the light of the options he had exercised. After hearing the submissions, I incorporated their main thrust in the summing-up to the assessors, which I now set out in full.

### **IV. SUMMING-UP TO THE ASSESSORS**

*[done on 30<sup>th</sup> January, 2007]*

#### **“A. INTRODUCTION**

Since the hearing of this case began, on 13<sup>th</sup> February, 2006 you three assessors have always been in Court when the proceedings have been in progress. I take it that you have listened attentively to the unfolding of evidence, and to the contentions which have been made by learned counsel for the defence and for the prosecution. Today we have come to a critical point, in the resolution of the whole question which has been placed before the Court. Very soon, the Court will be delivering the verdict, on whether or not the accused is guilty as charged. Before we get there, however, the Court has to hear the voice and the perception of the three assessors. My task this morning is to give you, the assessors, proper guidance on how you are to look at the material issues, and then give your opinion to the Court. This exercise is known as summing-up to the assessors.

#### **B. WHAT IS EXPECTED OF ASSESSORS?**

(a) Trial on a charge of **murder**, such as this one, is required by law to be conducted by a Judge, with the assistance of **assessors**.

(b) The task of the assessors is to assist the Judge in deciding on the presence or absence of **guilt**.

(c) Whether the accused is **guilty** or **not guilty** depends firstly on the **evidence** given in Court; and secondly, on the applicable **law**.

### C. WHAT IS THE NATURE OF THE CASE WHICH HAS BEEN PLACED BEFORE THIS COURT?

(a) The State's case is that the accused, **Samwel Karanja Kuria**, on 21<sup>st</sup> June, 2004 at Uthiru Village, Kinoo Location, Kikuyu Division of Kiambu District, in Central Province, murdered **Mathew Mbugua Kimwaki**.

(b) Your role as assessors is to take a lay person's common-sense position, looking with clear sights at the **evidence** which has been tendered, and then telling the Court whether you believe **Samwel Karanja Kuria** (the accused) **is**, or **is not** the person who caused the death of **Mathew Mbugua Kimwaki** on 21<sup>st</sup> June, 2004.

### D. ASIDE FROM THE EVIDENCE, WHAT POINTS OF LAW SHOULD THE ASSESSORS TAKE INTO ACCOUNT?

(a) The points of **law** which I am about to state are **enough** to guide you. You will not need to check on any other legal material. The focus of your contribution will rest on the **factual evidence** which has been placed before the Court, in the form of **witness testimonies**.

(b) You recall that the charge brought against the accused is **murder**. Please note that causing the death of a person sometimes amounts to murder, but at other times it amounts to a lesser offence called **manslaughter**. The prescribed punishment for **manslaughter** may be light, depending on how the Court assesses the circumstances; but murder is a most serious offence, for which there is only one punishment, namely, **death**.

(c) Under the law, a person cannot be held guilty of **murder** unless he has **intentionally** caused the death in question; or he has caused the death out of **malice**; or 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, he caused the death of the deceased.

(d) Please note that under the law, the **intention** to cause the death of a person need not have been announced, or written down, or communicated in any way by the culprit. For example, **extremes of brutality** in the mode of killing a person, will be taken in law to be an expression of the **intention** to kill. The kind of weapon used in the killing may also be evidence of **intention** to kill.

(e) **Proof** that a person killed another intentionally – and he thus committed murder – can be provided by **direct evidence**, i.e., the testimony of one who **perceived** the killing with one or more of his or her five senses – by **hearing, seeing, feeling, smelling** or **tasting**.

(f) **But**, proof of **murder** can also be quite properly done by way of **indirect**, or **circumstantial evidence** – i.e., where there is a series of circumstances or events suggesting how the murder was executed, even though nobody had directly sensed that murder with one of his or her five senses. Such indirect proof is achieved when there are different acts or omissions, that can be proved through testimony, which when joined together, clearly **point to the hands of the accused**, in the carrying out of the killing.

(g) Whether proof of intentional killing of a person is done through **direct** or **circumstantial evidence**, it is the singular task of the **State** (the **Prosecution**) to discharge it. The accused does not

have to prove anything, and may even choose to remain silent. The State must **prove** guilt, leaving no doubts at all in your minds that nobody, other than the **accused**, has caused the death of the deceased. If there remains in your mind even a **single doubt, then you must find the accused Not Guilty**.

#### E. GUIDANCE TO THE ASSESSORS ON THE TESTIMONIES GIVEN IN THIS COURT

(a) You have heard all the **eight** witnesses testify in this Court. Now: do you believe these witnesses to have said the truth? Did any of them give untrue accounts?

(b) Which ones of the witnesses are the most crucial, in terms of getting to know who killed **Mathew Mbugua Kimwaki**? What did such important witnesses say? Does their evidence leave **no doubts** at all in your minds, that **Samwel Karanja Kuria** (the accused) is the one who killed the deceased? If **yes**, then you must return a finding of **Guilty**; but if **no**, then you must return a finding of **Not Guilty**.

(c) Consider the following details in the *testimonies of the witnesses* –

(i) PW2 (**Peter Ng'ang'a**) and PW3 (**Yustus Mbugua Gatengo**) told this Court that they personally saw the deceased alive – and only drunk, and lying on the ground – at about **10.30 pm** on 21<sup>st</sup> June, 2004.

(ii) PW2 and PW3 testified that it was a moon-lit night, and there were some electrical lights around; but they and some 6 or 7 colleagues coming from a funeral, had a spot-light – and they flashed it and clearly saw the deceased lying down, face upwards, unhurt.

(iii) PW2 and PW3 testified that there was a person whom they well knew, who approached them and their colleagues as they observed the deceased lying down; that person was **Samwel Karanja Kuria** (the accused); and he insulted them, calling them “*Mbwa ninyi*”, and chased them away, saying the deceased was his landlord, and he was the one guarding the deceased.

(iv) PW2 gave testimony that at the time the accused chased him and his friends away, as they observed the deceased lying down, the accused was carrying in his hands a butcher's knife or cleaver. PW2 testified further that after the accused chased them away from the deceased as he lay, “**Karanja** went back to where **Mbugua** was; we thought he was taking **Mbugua** home.”

(v) Only a **few minutes later**, at 11.00 pm or thereabouts, PW4 (**Noah Njuguna Kimwaki**, brother of deceased) was woken up from his sleep, with the report that something untoward, had befallen the deceased.

(vi) PW4 immediately went with PW1 (**Evanson Kanyungu Kimwaki**) to Neighbours Bar – at about 11.00 pm or thereabouts. And what did they find? They found **Mbugua** killed, and killed in a brutal manner – (a) he was covered in blood; (b) the left side of his face was cut; (c) his teeth were removed; (d) his sex organs had been cut.

(vii) PW1 and PW4 did not find **Mbugua's** body at the exact spot where he had been seen lying by PW2 and PW3; they found the body at the verandah, which was somewhat darkened; and PW2 estimated the distance between the place where blood was found the next morning, and the place where **Mbugua** had been lying the previous evening, as only three metres.

(viii) At the time PW1 and PW4 arrived at Neighbours Bar searching for the deceased, at about 11.00 pm on 21<sup>st</sup> June, 2004 they saw the accused scampering from a place in the verandah area, supporting himself on the wall; but the accused, whom they **did** recognise, decamped, dropping something with a clanking metallic sound. PW1 picked up that metal, took it to the full light, and found it to be a butcher's cleaver, covered in blood. And when PW4 and PW1 went towards the place the accused had come from, in the verandah, they found the mutilated body of the deceased.

(ix) PW1 and PW4 were present when the door to **Karanja's** house was broken, by members of the public, so as to arrest him in connection with the killing of the deceased; and they noticed that **Karanja's** hands were blood-stained.

(x) After **Karanja** was arrested and brought outside, and in the presence of the Police, it became necessary to fetch clothes for him, from his house; and P4 and one **Kimani** went to fetch those clothes. It turned out that the white sports shoes they found in the accused's house, and brought to the Police who had teamed up with members of the public who arrested the accused, were blood-stained.

(xi) It was PW8's (**John Kimani Mungai**) evidence that the blood stains found on the accused's clothing and effects, bore DNA strains from the body of the deceased.

## F. RECALLING THE MAIN ELEMENTS IN THE SUBMISSIONS OF COUNSEL

(a) I would remind you, the assessors, that you had the advantage of hearing all the evidence, and I have merely summarised the key elements therein. You will need to make up your minds appropriately.

(b) But I will remind you of what the learned counsel on both sides have said in this Court, in relation to that evidence.

(c) **Mr. Kanyangi** for the accused, urged that none of the Prosecution witnesses had actually seen the accused kill the deceased, which of course, is true. He went on to submit that the act of the accused, in chasing away PW2, PW3 and his group who were attracted to the place where the late **Mathew Mbugua Kimwaki** had been lying, must have been guided by the accused's drunkenness, and not by any ill-intentions towards the deceased.

(d) **Mr. Kanyangi** also contended that since **Mbugua** was not killed at the very spot where he had been seen lying, it was possible that somebody else (other than the accused) killed him at that other spot.

(e) **Mr. Kanyangi** urged that the accused had not been properly identified as the killer of the deceased. He also doubted the scientific evidence which PW8 had presented, linking the blood found on the accused's effects to the source, in the body of the deceased.

(f) **Mr. Kanyangi** argued that the case had not been proved beyond reasonable doubt, and that the circumstantial evidence relied upon by the Prosecution did not irresistibly point to the accused as the killer. He urged that the Prosecution had proved no malice aforethought (i.e., the intention to kill), on the part of the accused – so as to fix him with criminal liability.

(g) Quite to the contrary, learned State Counsel **Mr. Njogu** noted that the accused had announced publicly **he** was the one guarding the deceased; he had chased away the eight or nine people who were attracted to the place where the deceased had been lying, at about 10.30 pm; he was carrying a butcher's cleaver in his hands; the deceased had been killed a few minutes later; he was seen taking off from the exact site where the body of the deceased lay, with many cuts all over it; the blood stains on the accused's effects had DNA origin in the body of the deceased; the accused had blood-stained hands when he was arrested; he took off stealthily, as he left the scene of the killing; the cleaver which came from the accused was blood-stained. Such blood, **Mr. Njogu** submitted, only got on to the accused and on his clothes while he was killing the deceased.

(h) **Mr. Njogu** submitted that while the evidence was circumstantial, it pointed irresistibly to the accused and to no other person as the killer of the deceased.

## G. THE ASSESSORS' TASK

(a) Clearly, this case is to be resolved on the basis of **circumstantial evidence**. On that basis I will now put this **one** question to the assessors: *Do the circumstances brought out in the testimonies of the eight witnesses, point clearly and unambiguously to the **accused**, as the person who killed the deceased, sometime between 10.30pm and 11.00pm or thereabouts, on 21<sup>st</sup> June, 2004?*

**(b) How are the assessors required to express their opinion?**

It is required that each assessor shall render his or her **separate opinion** orally in Court.

If, however, the three assessors all find themselves in agreement, then their common opinion may be presented in Court by one of their number; but in that case, **each** of the other assessors must personally express his or her agreement with the common finding.

(c) To enable the assessors to understand these directions fully, I hereby supply them with full copies of my summing-up; and I will adjourn the proceedings, to allow them to sit together as they consider their verdict or verdicts, which they will then deliver in Court at the appointed time.””

## V. OPINION OF THE ASSESSORS

The assessors had asked for some 24 hours' break in the proceedings, to enable them to form and to state their opinion in Court; and on 31<sup>st</sup> January they rendered the same, unanimously, in the following terms ?

*“1. PW3 and about eight others, while going for funeral prayers on the fateful day and while on the way, saw the deceased lying near Neighbours Pub and decided to check if they could identify him. They saw it was **Mbugua**, who was drunk. While they were there, **Karanja** emerged with a butcher's panga, and he was [all] alone. They ran away and they were about nine. They sensed danger. How come they ran away and **Karanja** was ...alone. A fight could have [taken place, in such a situation] and...**Karanja** [would] run away [so they would be] left alone with the drunkard [deceased], and anything might have happened.*

*“2. When **Njenga**, **Mbugua** and **Karanja** were [arrested and held by the Administration Police] as suspects, the [officers] visited **Karanja's** house ...but did not visit the other suspects' houses. They found blood stains in **Karanja's** house; but since they didn't visit the other suspects' houses, we don't know what they could have found in [those other] houses. They could find blood stains [in those other houses] too. So it raises a big question as to why the other suspects' houses were not visited, if they were suspects just as **Karanja** was. It is said that **Njenga** and **Karanja** had beaten the deceased a month [earlier].*

*“3. The Government analyst is not the one who drew the blood samples and he did not know where it was stored [even though] when he received it, it was very fresh. He received them on 7<sup>th</sup> July, 2004; between 21<sup>st</sup> June, 2004 and 7<sup>th</sup> July, 2004 how could [this blood] remain fresh? His evidence cannot be relied on.*

*“4. The summing-up [of] 30<sup>th</sup> January, 2007 was NOT from the evidence; no one saw [the accused] do the actual act of killing. The evidence has no proof. We submit that the accused may be acquitted of the murder [charge].”*

It is quite obvious that there is a fundamental misdirection in the assessors' opinion. For one thing, they have not taken the directions in my summing-up statement which I had carefully read out to them, and then availed to them in writing. They have even contested the summing-up as an outcome of the evidence which is embodied in the testimonies on record.

The assessors have raised their own evidence which is not part of the record ? regarding the clearance procedure adopted by the Police in respect of some two persons who had been arrested by the members of the public but were subsequently not prosecuted.

The assessors have not at all addressed themselves to the crucial evidence of PW1, PW2, PW3, PW4, and PW5 which so clearly links the accused and his butcher's cleaver to the chain of circumstances attending the last moments in the life of the deceased; to the particular manner in which the killing was executed; to the inculpatory conduct of the accused from the time of the killing of the deceased up to the time he was arrested in his house with gory hands and effects.

The assessors' challenge to the forensic procedures adopted in the taking of blood samples, and in their testing and analysis by PW8, is, with respect, not only amateurish, but most superficial and completely unrelated to the character and weight of the evidence adduced.

Although the assessors were required to give an opinion based on the summing-up statement delivered in Court, they went off at a tangent, and questioned why the officers who arrested the accused did not also conduct certain lines of investigation on those who had been arrested by members of the public as suspects. They failed to take into account the testimony of PW5 (**Police Constable Gabriel Mwaura**), that in the process of investigation, the Police had become convinced that the likely culprit was but one person – the accused herein.

The assessors also involved themselves in an irrelevant conjecture which had no place in the scheme of the evidence, or in the directions which the Court had given in the summing-up: they were querying how come PW2, PW3 and their team, on the material night, did not confront the accused when he ordered them to vacate the area surrounding the *locus in quo*.

This is a case in which the three assessors have not, with great respect, either listened attentively to the proceedings of the trial, or addressed themselves to their prescribed role with the keenness and competence required. I have to reject their opinion as one that flows not from the dictates of the evidence on record, nor from a commitment to the discharge of adjudicatory duty.

## VI. ANALYSIS, AND VERDICT OF THE COURT

### (i) *Circumstantial Evidence*

The question before the Court is whether, by *circumstantial evidence*, the prosecution has proved beyond any reasonable doubt that **Samwel Karanja Kuria**, the accused, it was who, with malice aforethought, killed the deceased, **Mathew Mbugua Kimwaki**, on 21<sup>st</sup> June, 2004.

**Mr. Kanyangi**, the learned defence counsel, in his submissions may have conveyed the impression that, the fact of witnesses not having seen the accused actually commit the act charged in the offence, in some mode lessened the weight of the prosecution evidence. However, the law on that point is quite to the contrary. The pertinent principle is clearly stated in the English case **R. v. Taylor, Weaver and Donovan** (1928) 21 Cr. App. Rep. 20:

***“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”***

The foregoing principle is certainly in good standing in Kenyan judicial practice, as it has been cited with approval by the Court of Appeal in the recent case of **Margaret Wamuyu Wairioko v. Republic**, Criminal Appeal No. 35 of 2005.

### (ii) *Causing Death with Malice Aforethought*

“Murder”, of course, means causing the death of a person with “malice aforethought”. But, malice aforethought is by no means an abstruse or technical category which requires any complex matters to be specifically proved. The legal position is thus stated in **Sir John Smith and Brian Hogan, Criminal Law** (8<sup>th</sup> ed. by **Sir John Smith**) (London: Butterworths, 1996), p. 356:

*“The mens rea of murder is traditionally called ‘malice aforethought.’ This is a technical term and it has a technical meaning quite different from the ordinary popular meaning of the two words. The phrase, it has been truly said, ‘is a mere arbitrary symbol., for the “malice” may have in it nothing really malicious; and need never be really “aforethought” [Kenny, Outlines (15<sup>th</sup> ed.) 153].”*

“Malice aforethought”, therefore, for the purpose of the law relating to murder, may be taken to mean no more than the *intentional killing* of the deceased person; and as the Court of Appeal has remarked in *John Muchiri Gathumbi v. Republic*, Criminal Appeal No. 224 of 2005, “malice afterthought” is “*inferable from the circumstances.*” The appellate Court, in that case, remarkable:

*“We agree [with the trial Judge] and ourselves add, that the degree and nature of the injuries which were noted on the deceased’s body and the fact that there was a rope tightly tied around his neck is clear evidence of a premeditated and intentional brutal killing of the deceased.”*

### **(iii) Appraisal of the Evidence: The Main Part**

There is no reason to disbelieve the evidence of PW2 and PW3, that at about 10.30 p.m. on 21<sup>st</sup> June, 2004, by means of light emitted by the full moon, with the additional aid of several fluorescent electric light bulbs in the neighbourhood, and with the direct help of a flashed spot-light, they saw the deceased lying on his back, drunk but unhurt, on the ground just outside the verandah of Neighbours Bar, at Uthiru Village. PW2 and PW3, who were in the company of several other persons, had to leave in a rush, as someone very well known to them, a village-mate and an acquaintance, **Samwel Karanja Kuria** (the accused), forced them out and chased them away, wielding a butcher’s cleaver and hurling insults at them, and declaiming his authority to keep guard over **Mathew Mbugua Kimwaki** (the deceased) who, as he asserted, was his landlord. PW2 and PW3 were well aware that the deceased’s mother was the landlady of the accused; and so they assumed the deceased was safe in the hands of the accused. As PW2 and PW3 departed from the neighbourhood of Neighbours Bar, they left the accused moving towards the deceased, where he lay.

In the short period between 10.30 p.m. and 11.00 pm., somebody had moved the recumbent **Mathew Mbugua Kimwaki** to the verandah of Neighbours Bar (which PW5 – **Police Constable Gabriel Mwaura** testified was canopied and so was not well lit by the electric-light bulbs which were switched on, on neighbouring buildings), and killed him by means of a sharp object which cut his face and fractured his skull; which also extracted his teeth; which severed his sex organs; and which left his remains in a pool of blood.

Nobody saw the killing of the deceased take place, but there were good reasons to suspect the accused as the culprit. Soon after the killing, a brother of the deceased, **Evanson Kanyungu Kimwaki** (PW1) was woken up from his sleep, with the report that some mishap had afflicted the deceased; and he went out with his brother **Noah Njuguna Kimwaki** (PW4) to do a search, next to Neighbours Bar. Apart from the rather limited lighting in the front area of Neighbours Bar, PW1 and PW4 had a spot-light, which they would flash, for better visibility. Next to Neighbours Bar, the two saw somebody they knew, **Samwel Karanja Kuria** (the accused), who was moving along unsteadily, while supporting himself on the wall of Neighbours Bar, coming from the darker area of the canopied verandah. When **Samwel Karanja Kuria** noticed PW1 and PW4, he decamped, and disappeared from their sight; but as he did so, he dropped an object, with a clanking metallic sound. PW1 and PW4 picked up the metal, brought it to the light, and found it to be a butcher’s cleaver, which was covered with blood. Checking, with the aid of the spot-light, the area of the verandah from which **Samwel Karanja Kuria** had come, the dead body of **Mathew Mbugua Kimwaki** was found.

After PW1 and PW4 had notified the local Chief’s Office of the murder, members of the public and Administration Police gained entry into the house of the accused. As he would not open up, the arresting group broke into his house and found him on the bed. It was PW1’s testimony that the accused was arrested when he had bloody hands. He was brought out without shoes, and later, after crime prevention Police officers came along, a further search was done in his house. Both PW4 and PW5 testified that the

accused's white sports shoes were covered with blood, and his trousers were blood-stained. These items were taken to the Government Analyst (PW8 – **John Maina Mungai**) who conducted tests, and found the blood samples taken from the accused's effects to have DNA origin in the body of the deceased (i.e., *deoxyribonucleic acid* ? the body's minuscule carrier of genetic information).

Even though learned counsel **Mr. Kanyangi** questioned the blood tests, on the basis that no guarantees had been made regarding perfection in the mode of extracting and storing the blood samples used, **Mr. Njogu** for the prosecution submitted that there was no basis for imputing any impropriety to the blood-handling process; and he submitted that blood of DNA origin in the body of the deceased, could only have got onto the accused and his effects while he was in the process of killing the deceased – and that this may be taken as conclusive proof that he, the accused, is the one who killed the deceased, on 21<sup>st</sup> June, 2004.

#### **(iv) Appraisal of the Evidence: Further Reinforcing Testimonies**

The key evidence of PW1, PW2, PW3, PW4 and PW8 which is in many respects mutually-interlocking and corroborative, provides an uncontroverted account of the accused, a carpenter and not a butcher, aggressively brandishing at a group of apparently-harmless passers-by a butcher's cleaver, chasing them away from the spot near Neighbours Bar where **Mathew Mbugua Kimwaki** lay, at about 10.30 pm on 21<sup>st</sup> June, 2004, and declaiming his rights of guardianship over **Mathew Mbugua Kimwaki**. The accused, in the course of such altercation, is clearly noticed by those he chases away, who are village-mates and who have known him for long; and they notice that he has thereafter returned to the man lying on the ground. Only a few minutes thereafter, **Mathew Mbugua Kimwaki** has been moved a short distance away, to a darker spot under the canopy of the verandah, and there, most brutally cut up with sharp metal. And then very shortly afterwards, most likely before 11.00 pm. that night, the accused is the one who emerges from the direction of the scene of the killing; and he contrives to avoid contact with anyone else; he sneaks away, though, unfortunately for him, he drops tell-tale evidence in the shape of a bloody butcher's cleaver. The accused quickly accesses his house, where he is later arrested, bearing bloody hands and clothes; and the samples of blood tainting his apparel, when scientifically tested, are found to have origin in the body of the deceased. Clearly, this is a classic example of the application of circumstantial evidence to prove the commission of a crime; this class of evidence, in a proper case, as stated by the English Court of Criminal Appeal in **R v. Taylor, Weaver and Donovan** (1928) 21 Cr. App. Rep 20, at p. 21 "is capable of proving a proposition with the accuracy of mathematics."

The said core evidence is, in my assessment, effectively supported by other evidence. PW5 (No. 27332 – **Police Constable Gabriel Mwaura**) and his superior officer, **Inspector Otkiri** (not called as a witness) visited the *locus in quo* less than two hours after the deceased was killed. They found the body lying in a somewhat darkened verandah, shielded from the shining electrical lights by an overhead canopy, the body covered in blood and bearing savage cuts. The two Police officers re-arrested the accused, conducted investigations and released those considered not to have been involved in the commission of the crime. PW6 (**Dr. George Kung'u Mwaura**) took blood samples from the accused, together with samples from the blood stains on his effects, for analysis by the Government Chemist, by PW8 (**John Kimani Mungai**). PW7 (**Dr. Peter Muriuki Ndegwa**) produced the pathologist's post-mortem report, which showed the severity of the lethal cuts which the deceased had suffered: deep cut to the scalp; fractured skull; deep cut on the penis; testes removed; internal fracture of the skull, etc.

The evidence of PW8 was all-important. It showed that the blood stains taken from the accused's effects which he had, soon after the killing of the deceased (from accused's pair of sports shoes; from the cleaver which had been seen with the accused; from the red pair of jeans trousers which were recovered from the accused; and from the light-blue long-sleeved shirt also recovered from the accused), perfectly matched the DNA profile taken from the blood of the deceased.

I would see no basis for objections to important information which came to the witnesses, though from persons not called as witnesses: **Njenga** informed PW1 that the accused's house was well-lit, but padlocked on the outside, sometime between 10.30 pm and 11.00 pm on the material night; **Kimani** had accompanied PW4 when the accused's bloody clothes were recovered from the accused's house, after the

accused had been placed under arrest by members of the public and the Police; PW5 had been accompanied by his superior officer, **Inspector Otikiri**; however, neither **Njenga** nor **Kimani** nor **Inspector Otikiri** was called as a witness. It is apparent to me that the perceptions of such persons not called as witnesses, either fully coincide with the first-hand perceptions of those who were called, or form together with the evidence on record, single transactions which are well proved under the concept of *res gestae*.

*Res gestae* is thus defined in **Osborn's Concise Law Dictionary**, 6<sup>th</sup> ed. (London: Sweet & Maxwell, 1976) (p.289):

***“The facts surrounding or accompanying a transaction which is the subject of legal proceedings; or, all facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it one continuous transaction. Evidence of words used by a person may be admissible on the ground that they form part of the res gestae, which might otherwise be inadmissible as hearsay.”***

Part of this common law principle is embodied in the Evidence Act (Cap.80), s.7 of which thus provides:

***“Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afford an opportunity for their occurrence or transaction are relevant.”***

There is evidence that the accused in this case was seen decamping from the verandah where the body of the deceased was found. There is evidence that soon thereafter, the accused had gained access to his house and taken refuge on his bed, where he was thereafter found and arrested. It is relevant that just before the said arrest, one **Njenga** had reported to PW1 that lights had been shining in the accused's house, though the door was padlocked on the outside. The accused was in the darkness on his bed; there was no longer a padlock on his door; and he refused to respond so that it became necessary for his door to be broken, and then he was found stained with blood, inside his house. **Njenga's** very relevant information, in that regard, may be admitted as part of the *res gestae*, even though he was not called as a witness.

#### **(v) Conclusions and Verdict**

I consider it absolutely clear that the circumstantial evidence adduced in this case is mutually corroborative in a substantial sense, and points to the accused as the one who killed the deceased, by cutting him up repeatedly on the material night.

In **Sawe v. Republic** [2003] KLR 372 the Court of Appeal considered those situations in which circumstantial evidence is to be taken to properly discharge the prosecution's burden of proof in a murder trial; the learned Judges thus stated the law:

***“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances that weaken the chain of circumstances relied on.”***

I have already recounted the circumstances in which the train of events leading up to the killing of the deceased unfolded: the accused, at 10.30 pm on 21<sup>st</sup> June, 2004 emerging threateningly with a butcher's cleaver; he, the accused, being left with the deceased while alive; within only a few minutes the deceased's body being mutilated with a sharp object; the accused escaping from the spot where the body of the deceased is found; the accused suspiciously locking himself up in his house, but when reached, found to have blood on his hands, and also soiling his clothes and effects; and such blood when analysed, found to have origin in the DNA profile of the deceased. The inculpatory facts here are consistent, and cannot be reconciled with the accused's innocence; and there are no circumstances testified to, I would hold, which go to weaken the inevitable conclusion, that the accused was the person who killed the

deceased.

In all the circumstances, there was but one person who had the *opportunity* to commit the offence charged, namely the accused. He had dispatched PW2 and PW3 and their friends who had shown curiosity about the deceased before he died, as he lay next to Neighbours Bar; and he was left alone with the deceased, as he wielded a lethal weapon, claiming to be guarding the deceased, in a tenant-landlord capacity. This was a special opportunity which there is no evidence that any other person had; and in *Malonza v. Republic* [1986] KLR 426 the Court of Appeal had thus held:

***“Mere opportunity to commit an offence does not itself amount to corroboration. However, the opportunity may be of such a character as to bring suspicion, so that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration.”***

That proviso, I would hold, properly applies to the instant case, to provide corroboration to the well-founded case, that the accused had caused the death of the deceased.

In the light of the evidence as adduced in this case, and of my assessment thereof, in the context of the applicable law, I find that the accused, ***Samwel Karanja Kuria***, on 21<sup>st</sup> June, 2004 at Uthiru Village, Kinoo Location, in Kiambu District, murdered the deceased, ***Mathew Mbugua Kimwaki***. I find the accused guilty as charged, convict him accordingly, and sentence him to suffer death in the manner prescribed by law.

**DATED and DELIVERED at Nairobi this 8<sup>th</sup> day of February, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Ndung’u**

**For the Prosecution: Mr. Njogu**

**For the Defence: Mr. Kanyangi**