



**REPUBLIC OF KENYA**

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

**Murder 6 of 2006**

**RAPHAEL MBUVI KIMASI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING UNDER SECTION 306 OF CPC**

The attorney General informed the court by information dated 28/8/2006 that Accused, Raphael Mbuvi Kimasi is charged with the offence of murder the particulars of which are that on 5/8/2006 at Gategi Market Mbeere District he murdered Lazarus Mutuku Nzau. The trial was conducted with assistance of assessors. The prosecution called 5 witnesses to support the charge.

PW1, Josephine was a seller of Native Liquor at her house in the market. On 5/8/2006 at about 7.30 she went to her home from the market. She found customers drinking beer outside the house including the accused, Kithuka Johana and Masaku. When she entered Lazarus Mutuku was standing among the people taking beer. He was drinking. He asked “**Gakeri where is he?**” He was told by Johana. “**He was not there**”. Her daughter Agnes Mwikali was selling beer to Raphael, the accused. Raphael’s home was near the house of PW1. PW1 said that Accused went to his home and returned twice. When he returned he sat down on the ground. The PW1 went inside her house to put her child to be. As she was doing so her daughter Agnes came and told her that Accused Raphael had stabbed a person and he has ran away and that the person stabbed was laying there outside. PW1 got outside and found the accused about to enter into his house. She also saw that it was Lazarus laying on his stomach. She turned him up and saw blood flowing on his clothes. PW1 sent Agnes to get a bicycle to take Lazarus to hospital bicycle was obtained and PW1 and Lazarus mother carried Lazarus to a nearby hospital. It was about 7.30 p.m. It was not dark and there was moonlight she knew deceased over a long time he had employed him for sometime PW1 also knew the accused. The PW1 added that she knew the accused and the mother of deceased had quarreled earlier in the same day in the market. After taking Lazarus to hospital he died and the accused and others were taken by mob to the hospital. PW1 was arrested for brewing and selling native liquor when the police visited the scene to investigate murder. This evidence was supported by PW2, Agnes Mwinza the above mentioned daughter of PW1. She admitted that on 5/8/06 she was selling liquor on behalf of her mother at her mother’s house. She was selling to customers Nzeki James, Johana Masaku and Eli. She said the accused is called Raphael Mbuvi. She said on that day at about 4.00 p.m. she saw accused and also the deceased. At 7.30 p.m. Raphael came and was standing on the road. Raphael sent another person to tell Lazarus he was awaited by the roadside. Raphael came and moved around the compound and sat at the back. He was speaking to Masaku. At that time Lazarus was talking to PW1 inside the compound. Lazarus returned to where the people were drinking there when he was sitting down he was stabbed. Agnes said she saw him being stabbed with a knife. The accused had come with a knife. Agnes testified that Accused had not drunk. She had not sold him any beer but that deceased had take some 40/= liquor, not much. Deceased had been in the scene for ½ hour. Agnes

testified that the men did not quarrel but were just talking. There was moonlight it was not dark and accused was wearing jeans and a T shirt blue in colour. Deceased was wearing red and grey sleeveless sweater top with a shirt inside. Agnes identified the clothes in court. She also identified a knife marked MF1 2. It was Agnes who went to look for a bicycle to take deceased to hospital. However PW1 first went to call the mother of deceased. She came and started screaming, then people (public) came and took Lazarus away. Agnes testified that she knew accused well as they were neighbours for about 4 years. The stab injury was on left side of the chest. On cross-examination she demonstrated and where stab wound was on left upper chest. She testified that the knife she had mentioned was a bread knife and it was the only knife at the scene. The knife did not indicate any blood stains but it had some red (rust) stains not red like Judges gown but it had marked letters “E.M.M.” She denied the knife was of her mother’s home. She answered that Maina is their neighbour but he had quarrel with Raphael not deceased. She answered another question “**he wanted to stab Maina but knifed deceased**” again on cross-examination she confirmed that she saw accused stab the deceased with the knife. She contradicted PW1 saying deceased was wearing black trouser.

On re-examination she confirmed that she and her mother were making different statement because they were not together.

PW3 Anna Ngilai was the mother of deceased. On 5/8/2006 at about 6.30 p.m. she was in the market she heard a fight outside. She went to see and found it was accused and another person who were fighting. There were people there. She called accused, she was going to stop the fight. The people who were around there told her to leave them alone. However she pulled accused away and thus separated them. She paid for the avocado fruit which was said to have been the source of the fight. The accused went away. Then the PW3 started parking her things away when she saw PW1, Josphine Ciowai who came to inform her that her son Lazarus had been stabbed by accused in the chest. She has why and she had helped the accused over the fight of avocado. PW3 went to PW1’s home found her son lying down. She lifted him up and saw that he was stabbed on upper left chest. She then screamed and people came and helped her to take her son to the hospital. At the hospital gate she learned that her son had died.

Police were called. They went to the house of PW1 to look for the knife. The knife was found. His son’s body was taken to Embu Mortuary where postmortem was done and she was given the body for burial. She confirmed that her son deceased was not at that scene at the market. On cross-examination she said she had had no dispute with Accused and her son and did not know why accused killed Lazarus.

PW4 Dr. Alex Ombati testified as to the mental status of the Accused and produced report Exhibit 4. He also performed postmortem on the body of deceased Lazarus then found stab wound on the left front of chest below collarbone. He opened the body and found massive blood in the chest cavity. His opinion was that the cause of death was cardiac blood in the chest cavity as a result of fatal stab injury caused by sharp instrument. The post mortem was Exhibited and numbered 5. Next witness was John Mdiwo Wambua. This witness was treated hostile at the request of State Counsel.

On cross-examination he said he met Raphael who said he had met Maina who had beaten him. He met him on the road. This witness spoke in a confused state. It is to be noted that the witness had been brought from the custody of police on another offence. The next witness was a police officer Evanson Mutunga. He went to the scene after receiving report and found deceased lying on the ground. He checked him and found he was already dead. He went to the house of Accused found him asleep. He also arrested PW1 for brewing native liquor. He kept together Raphael PW1 and dead body of deceased until they were collected by a police in a vehicle. PW6 Inspector Walter Odhiambo is the one who led the others to the scene to collect deceased, accused, and PW1 Josephine.

I have considered the evidence tendered by the prosecution the accused is implicated in the Commission of the offence. I consider therefore as provided under section 306(2) CPC there is evidence against the accused person and has a right, to address the court either personally or by his advocate to give evidence on his own behalf or to make unsworn statement or to call witnesses in his defence. The accused through his advocate says:

Mr. E. Njiru I have talked to accused in cells. He states that the accused will be making unsworn statement. He will call witnesses.

**J. N. KHAMINWA**

**JUDGE**

**24/4/2007**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Kimathi for State**

**Mr. E. Njiru for Accused**

**Accused present**

**1 Assessor present -Joseph I. Mwangi**

**Ruling read in open court**

**J. N. KHAMINWA**

**JUDGE**