



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 54 of 2004**

**REPUBLIC.....APPLICANT**

- VS -

**JOSEPH GATHII NDUNG’U.....RESPONDENT**

**JUDGMENT**

The accused has been charged for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya

particulars of the offence as stated in the information are as follows:

“On the night of 10<sup>th</sup> January, 2004 at Kibera Gatwikira within Nairobi area province murdered GORDON OCHIENG ODERA”.

In her evidence, the PW1 – Judith Achieng Ochieng introduced herself as the widow to the deceased. She recalled that on 9<sup>th</sup> January, 2004 at around 3.00 a.m. while she was in her house with her family, she heard the mud wall breaking. When they woke up, the PW1 saw the accused pouring urine and faeces into their room while using plastic containers. The PW1 further explained that when she heard the wall being broken she lit the paraffin lamp. That apart PW1 also explained that the accused is their landlord and immediate neighbour. Seeing what the accused was doing, the deceased decided to enquire the reasons for what was going on. On the following day at around 10.00 p.m. PW1 and deceased called on the accused. In response, the accused suggested that the deceased should go to his house so that they could discuss about his conduct. Though PW1 initially heard the deceased and accused talking, she later heard something falling. After some silence, PW1 peeped through the hole – only to see the landlord standing. She could not see her husband. On going round, PW1 saw her husband lying on the door. On raising his head, PW1 found her husband bleeding from the mouth and nose. Subsequently, PW1 rushed to inform her in-laws of what had transpired. When PW1 went back with her in-laws she found that her husband was already dead. Since the crowd was annoyed, they broke the house of the accused and at around mid-night police officers from Kilimani Police Station visited the scene. They later collected the body of the deceased before arresting the accused. Prior to that incident, PW1 and her family had stayed in that house for about two years. On the other hand, PW2 – James Atina Adera introduced himself as a brother to the deceased. He recalled that on 9<sup>th</sup> January, 2004 at around mid-night while he was asleep, Walter Odhiambo informed him that his brother had been killed. On going to the house of “Wanyama”, PW2 found that his brother was already dead. Later, PW2 observed that the deceased had blood on the face, while the accused was hiding under the bed. Prior to the above incident, PW2 had known the accused for about 5 to 6 years. From there, PW2 went to see Councillor Opete who rang the police

officers. Earlier, PW2 saw police officers removing the accused from beneath the bed. He also saw a hole in the wall separating the room of the accused from the deceased. On her part, PW3 – Inspector Beatrice Sayo recalled that on 10<sup>th</sup> January, 2004 at around 12.50 a.m. she was instructed by the OCPD, Kilimani to proceed to Olympic Kibera. On arrival at the scene, she saw a crowd of people and a village elder. Reaching the house of the accused, she found the deceased lying about four feet from the door. After instructing PC Mbaramarock to look for the landlord, he found him under the bed and removed him. Subsequently, PW3 called the scene of crime personnel who were assisted by Inspector Nzioka. The PW3 observed that when the shirt of the deceased was removed, there were five stab wounds on the chest and stomach. Further to the above, PW3 also stated that they recovered a blood-stained knife on the floor and that after the scene was photographed they moved the body to the City Mortuary before arresting the accused. In his medical evidence, PW4 Dr. Zephania Kamau testified that on 2<sup>nd</sup> February, 2004 he examined the accused whom he found with a scar below the right eye. That apart, the accused also had a scar on the left forehead and on the right leg. In addition to the above, the accused complained of slight chest pains – about 27 days after the incident. Besides assessing the degree of injury as harm, Dr. Kamau also concluded that the accused was mentally fit. On the other hand, Dr. Jane Wasike Simiyu introduced herself as a Pathologist attached to the National Health Laboratories. She recalled that on 20<sup>th</sup> January, 2004, she performed a post-mortem on Gordon Ochieng (the deceased) who was about 37 years old and was in good nutritional status. Dr. Simiyu observed seven penetrating wounds in the chest with each measuring 2 cm long. The wounds were multiple and perforated both lungs and heart. There were also lacerations of the pericardium. On completion of her examination, she formed the opinion that the cause of death was due to penetrating chest injury due to sharp object. On his part, PW6 – Police Constable William Macharia introduced himself as the investigating officer. He further testified that on 12<sup>th</sup> January, 2004 he was instructed to investigate a murder case at Kibera and was also informed that a suspect had been arrested. Besides the above, PW6 was also given a blood-stained knife by Inspector Nyachio. On visiting the scene with PC Mukebo, PW6 observed four rooms that had been pulled down by members of the public. While there, PW6 was shown one room that was being used by the deceased and the broken wall that was used to pour urinal waste.

In his defence, Joseph Gathii Ndung’u (hereinafter referred to as the accused) explained that in the year 2002 he was staying in Kibera while the deceased was his neighbour. The accused explained that on the night of 9<sup>th</sup> January, 2004 he was attacked by assailants who gained entry by destroying a wall. According to the accused, the three attackers assaulted him while using iron-bars and also robbed him of cash KShs.2,000/=. The accused reckoned that after the attack, he took a panga and hit one of them. When the assailants escaped, the accused hid under the bed since they had wanted to kill him. Subsequently, police officers went to the scene and members of the public told them that they were looking for a suspect who had killed somebody.

After the court delivered the summing-up, all the three assessors returned a verdict of “**guilty**” against the accused for the offence of murder. The assessors were of the view that the killing was intentional and that the act of pouring urine and faeces was an act of provocation to lure the deceased to his house and subsequently murder him. They also referred to the several stab wounds on the deceased.

This court has carefully considered the entire evidence on record. From the outset, it is apparent that the accused, PW1 and deceased knew each other very well. As explained by the PW1 – the accused was their landlord and also immediate neighbour. It is rather unfortunate and sad that the accused dug a hole through the common wall before he poured urine and faeces into the room that was being used by the tenants. The record also clearly show that when the deceased enquired and complained about the unfortunate behaviour of the accused, the latter invited him to his house to discuss the issue. Unfortunately when the deceased went there in good faith, the accused attacked him viciously and mercilessly. It is my considered view that the accused deliberately provoked the deceased by pouring human faeces and urine into the room that he and his family were using. Later, he cunningly lured the deceased to his house before killing him in cold blood. The medical evidence explicitly shows that the deceased sustained the following injuries:

Ø Seven penetrating wounds in the chest with each measuring 2 cm long.

Ø The wounds were multiple and perforated both lungs and heart.

Ø There were also lacerations of the pericardium.

No doubt the above medical evidence completely contradicted the evidence of the accused that he just took a panga and hit one of the assailants. The impression that the accused gave was that he only struck the deceased once in self-defence. Obviously, the wounds inflicted on the deceased were directed to achieve one objective. They were to ensure that the deceased was dead. Completely dead. From the above sequence of events, it is obvious to me that the accused had carefully and deliberately planned to kill the deceased.

Unfortunately, the accused succeeded in his devious plan. Having carefully considered the defence case, I hereby find that the same does not ring true and has no merits at all. The accused never impressed me to be a person who has any respect for the truth at all. Whereas the accused explained that he was injured by people who invaded his house, it is apparent that he was only trying to engage in subterfuge to confuse this court. The evidence of PW6 was crystal-clear that when he went to the scene, he found that four-rooms had been pulled down by enraged members of the public. These people were showing their utter disgust on the brutal killing of the deceased. Given the mentality of “**mob injustice**” in this country, one cannot overrule the fact that the accused was roughed by members of the public. I find as a fact that the injuries that the accused had were not inflicted by the deceased. The deceased had merely gone to enquire on the strange crude and queer behaviour of the accused. The upshot is that I hereby concur wholly with the verdict of the assessors and their reasoning. I also find that the prosecution has proved its case beyond any reasonable doubt. The accused is found “**guilty**” of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The accused is convicted accordingly.

**MUGA APONDI,**

**JUDGE.**

Judgment read signed and delivered in open Court in the presence of the accused, M/S Otieno Defence Counsel and Mr. Njogu, State Counsel.

Order: Assessors to be paid allowances.

**MUGA APONDI,**

**JUDGE.**

**18<sup>TH</sup> MAY, 2007.**