



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)
CRIMINAL CASE NO. 63 OF 2005

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

ANTHONY KINYANJUI KIMANI.....ACCUSED

JUDGEMENT

A. TRIAL ON A CHARGE OF MURDER: BACKGROUND

The accused, *Anthony Kinyanjui Kimani*, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63, Laws of Kenya

an information lodged by the Attorney-General on 15th June, 2005. The particulars were that the accused, on 22nd March, 2005 at Dandora Phase V in the Nairobi Area, had murdered *Francis Kamanja Ndubai*.

The accused pleaded not guilty before *Rawal, J* on 5th July, 2005. The matter was subsequently mentioned before *Ombija, J* on 25th October, 2005, before *Apondi, J* on 21st February, 2006, and before me on 19th June, 2006. On 20th June, 2005 I selected as the assessors the following persons: *Mr. Francis Aluoch; Ms. Mary Musyimi; and Ms. Beatrice Chege*; and thereafter hearing began.

B. ACCUSED AND ACCOMPLICES FATALLY BATTERED DECEASED, DUMPED BODY IN THE NIGHT: PROSECUTION EVIDENCE

PW1, *Tabitha Muthoni Mwangi* was sworn and gave her evidence in Kiswahili. She said she worked as a housewife, at a place in Nairobi known as Dandora-Jua Kali, where she and her husband had several housing units, and they had availed some of them for letting. These housing units are enclosed in one compound which has one gate. On the early morning of 22nd March, 2005 she was in her house when somebody knocked at the gate-entrance. When PW1 went to answer the gate, she found a guest (*Kamanja*, the deceased) of *Baba Kim*, one of her tenants. She admitted the guest, for whom *Baba Kim* (a nick-name for the accused herein) opened the house door. The guest remained at the accused's house for a short time, and then left for a shop just outside the compound; but he soon returned to the house of the accused. The gate had been left open, and the accused's door too had been left open; thus the guest

needed no help in getting out and then returning.

Only some 20 minutes since the guest had first been allowed in, the accused walked over to his landlord's and landlady's house, for the purpose of awakening the landlord. The accused had a *complaint* to report: the said morning guest (who was also the accused's friend) had *stolen* his jacket, with Kshs.600/= in its pocket. The accused was asking his landlord to help him follow-up on the complaint. The landlord, **David Waite Mugo** (PW2) then went out with the accused, and at about 7.30 a.m. they had already traced **Kamanja** who they now brought back into the compound. The three went into the *accused's house*, and remained there for a short time before the landlord walked out of the compound. Soon after the landlord left, *two young men* who PW1 saw through the wall-timber holes of her house and whom she knew by appearance, came in through the gate and entered the *accused's house*.

What then took place in the accused's house, according to PW1, was a *thrashing* of **Kamanja** (the deceased). PW1 heard **Kamanja** explain the missing money of the accused; "**Kamanja** was saying he left the money with somebody called **Michelline**. After the concerted assault on **Kamanja**, the said two young men and the accused left the house, **Kamanja** not joining them as they left. The three went to an unknown place, but then returned, and resumed the *beating-up* of **Kamanja** inside the accused's house. **Kamanja** screamed for help, and this attracted neighbours. The coming of curious neighbours led to a halt in the assault on **Kamanja**. It was now about 10.00 a.m. The three who had been battering **Kamanja**, now carried him, and *dumped him* in an unoccupied housing unit of the same landlord. They shut that door and left the compound.

The accused returned into the compound alone, at 12.30 p.m.; and PW1 then told him she had gazed at **Kamanja** through the holes in the wooden walls, where **Kamanja** had been dumped, and it appeared to her as if **Kamanja** was *dead*. The accused then opened the door where **Kamanja** lay, *looked in*, and came out to announce to PW1: "*This friend is okay. It's only that he had been drunk. He is just asleep.*" The accused went on to tell PW1 that even he, the accused, whenever he is drunk, sleeps the whole day. But he also told PW1 that he had just been to the *Police station to report*; he showed PW1 the Police Occurrence Book number of his report; but he "*didn't say what report he had made.*" The accused told PW1 that his reporting to the Police was a precaution, for his own protection: "so if the friend wants to report on him to the Police, he will himself have already reported on **Kamanja**." This explanation apparently satisfied PW1, and, in her words: "I went on with my own chores."

The *whole day*, of some ten hours, passed with **Kamanja** still lying in the landlord's unoccupied house where he had been dumped in the morning. PW1 testified that she gave that matter no attention, while she remained at home. But at 8.00 p.m. she noticed something unusual, touching on her housing unit in which **Kamanja** had been dumped. It was dark, and she did not get outside her house. Through the window, PW1 saw several young men carrying *something like a mattress*: "It was like there was something on the mattress. It was held on both sides by the young men. They put it on a hand-cart. They went away with the hand-cart." At this time, PW1 was hearing sounds, "including that of **Baba Kim**"; "they were speaking softly." Of her visual perception at the time, PW1 said: "I did not see much. [There was] ... darkness. There are no lights there. They went with the hand-cart."

Soon thereafter, at 9.00 p.m. the landlord, who had left in the early morning after which two young men joined the accused in battering the deceased, now returned to his wife (PW1). And it is only now that PW1 came to learn of the whereabouts of her husband during the whole eventful day: he told his wife he had gone to Kariobangi Water & Sewerage Works, where he works.

At 9.00 p.m., even as the landlord settled down and was being briefed by his wife, someone knocked on their door, the *accused*, who appeared anxious. The accused's anxiety necessitated the landlord asking his wife to find some other place to pass the time, leaving him alone with the accused. *Between 9.00 p.m. and 10.00 p.m.* PW1 remained in a neighbour's house, and then her husband accompanied by the accused went to bring her back to her house. During that hour marked by heavy rain, the two men who were *dripping with water*, had bought some meat, which they now asked PW1 to cook for them. This meal was ready for the table at about 10.45 p.m.

Such *unusual scenarios* were deepened by the mysterious way in which the accused and his landlord related to each other when food had been served. The accused insulted the landlord, and a fight almost broke out between them. In the words of PW1: “My husband [ordered] **Baba Kim** to leave. The whole plot is ours. My husband forced him out and closed the gate behind **Baba Kim**.” The accused went away as he issued a threat. “*Utajua mimi ni mume, na nitakufunza adabu leo!*” (meaning: “You will know I am Man, and I’ll teach you a lesson today.”).

From the time of the making of the accused’s threat, it took just *under an hour* for the *Police* to come knocking on the landlord’s gate. The Police officers were in the company of **Baba Kim** (the accused). They entered the landlord’s house, awakened PW1, conducted a search in the house, and took the landlord with them as they entered the accused’s house. The Police officers took the landlord, PW1 and their child to the Police post, on the way passing by Dandora City Council Dumping Site, in the neighbourhood of Texas Garden Bar, to which the landlord led them. It was the *landlord* who showed the Police the spot where the body of **Kamanja** had been dumped. The Police took the corpse, getting to Kinyago Dandora Police Post at about 4.00 a.m. PW1’s statement was taken by the Police officers, and she was released to return home.

On being cross-examined by learned counsel **Mr. Mutisya**, PW1 gave further testimony as follows. PW1’s and her landlord-husband’s plot carries four housing units, and the distance of the unit the two occupy from the unit where the deceased was locked-in, after being battered, is only some 8 - 9 metres. PW1 had not intervened, when she saw the deceased being battered; in her words: “it was not a matter for mothers and housewives”. Her husband who left home just before the battering of the deceased began, did not say where he had gone: “He only gave me an explanation when he came back.” PW1 had not heard the deceased scream when he was first assaulted, but later he *screamed in pain*. PW1 did not go to the Police post to report on the battering incident. She said she felt confused about the matter. PW1 said a *metal bar* had been used to hit the deceased; the accused was using the metal bar, while his two accomplices were boxing the deceased. The screams of the deceased attracted neighbours, who entered through the gate. These neighbours just watched in amazement, but did not enter the accused’s house.

PW1, in cross-examination, said that even when she *saw the deceased’s body lying still*, she did not rush to the Police post to report the matter: because she was not sure he was dead, and then *at that moment the accused came*, and stated he had already been to the Police station. PW1 said she did not know where the metal bar used by the accused in hitting he deceased was kept. She also said she did not know who invited the two young men who joined the accused in beating the deceased to death.

When, at 8.30 p.m. PW1 saw a suspicious situation, in which a loaded mattress was being carted out, what action did she take? Her answer was: “The area is a new settlement, I could not just come out at night. I was with my child.” At that moment, PW1 testified, she heard the accused speak; in her words: “I knew the voice of **Baba Kim** [the accused]; we had stayed in the same plot for five-six months. So when I heard his voice I could recognise it.”

PW1 testified that although there was no electric lighting in the compound, she had definitely seen something that looked like a mattress; and it was clear to her that the accused was not a departing tenant that night; because he *had only recently paid his rent*, and so he could not be going away with a mattress at that time.

PW1, on the material night, noticed also the remarkable fact that her husband when he arrived home at 9.00 p.m., wanted to be *alone with the accused*. At the time PW1 made her statement, at the Kinyago Dandora Police Post, her landlord-husband and the accused had been taken by the Police officers to Buru Buru Police Station, several kilometres away. Thereafter, for some two months, the landlord was kept in Police custody, though he was thereafter released, and no charge was brought against him.

On re-examination by learned State Counsel **Mrs. Ouya**, PW1 testified that her husband had *looked shocked*, when he returned home at 9.00 p.m. and PW1 told him what she had perceived, in the course of the day.

PW2, **David Waite Mugo Kamau**, the landlord-husband of PW1, was sworn on 20th June, 2006 and gave his testimony in Kiswahili. He said he is a Nairobi City Council askari, and lives at Dandora Jua Kali, Block B in the Nairobi Area. Of the early morning (6.00 a.m. – 7.00 a.m.) of the 22nd March, 2005, PW2 said he was at home, sleeping, when a tenant of his, **Baba Kim** (the accused) came to tell him that his property had been stolen. The accused told PW1 that his jacket, with Kshs.600/= in its pocket had been stolen, and *he knew the thief* – one **Kamanja**. He asked PW1 to go with him to fetch the thief so the stolen property may be recovered. PW2 and the accused then went to a liquor chamber where the deceased, **Kamanja**, was suspected to be taking alcohol that early hour. They found him drinking *chang'aa*, and brought him to the *accused's house*. The accused then demanded of the deceased the jacket and the sum of Kshs.600/= which were the subject of *complaint*. As the deceased did not then have those items, PW2 suggested a return to the liquor chamber, for a check. This was not agreeable to the accused who launched a *fight with the deceased* – to which *PW2 objected* and advised the accused to report the matter to the Police if theft had taken place.

PW2 left two apparently - drunk men, the deceased and the *accused*, holding each other by the shirt, and *fighting* it out. PW2 left a *friend of the accused also present*, as the fight progressed. He saw no tool or weapon being used, during the fight. As he left to go to the Kariobangi Water & Sewerage Works offices, the fight had subsided, in response to his request that the matter be reported to the Police.

PW2 had not gone out on duty when he left the accused and the deceased fighting; he was going to look for one **Mr. Onuko** who owed him some money. **Onuko**, who was PW2's workmate, could not be easily reached, as he had been transferred to a different station; so it took the whole day to find him, and only as late as 9.00 *p.m.* was PW2 able to get back to his house.

When PW2 arrived home he was told by his wife (PW1) that those who had joined the accused in the morning, in battering the deceased, were followers of an outlawed organisation known as Mungiki. Even as PW1 recounted the day's events to PW2, the *accused arrived, looking "very worried"*; the accused told him: "that friend of ours – **Kamanja** – *had died.*" The accused told PW2 he (the accused) had *already reported the matter to the Police*, and so PW2 should not be worried. PW2 asked his wife to go and stay in a neighbour's house, as he discussed the matter with the accused. What was PW2's reaction? In his words: "I was shocked and I had fear. I told [the accused] I could not believe it, unless I saw the body itself." So the *accused took PW2 to the dumping site*, near Texas Garden Hotel, and he saw the body, lying half-naked. PW2 said he felt very much *afraid*, and did not ask how the body of the deceased ended up at the dumping site. The body lay on a *mattress*, and could be seen with the aid of the faint lights of the estate. The accused told PW2 that this was a *secret* which he "must keep." The accused *claimed to have already reported the matter to the Police*, and showed PW2 an Occurrence Book number, as proof that such a report, indeed, had been lodged with the Police. The accused then wanted to buy alcohol for PW2, as what they had just seen was, in his own words, "a bad sight". The accused took PW2 to the liquor chamber, where he bought a lot of *chang'aa*; the two drank alcohol until it got *the better of the accused*, and he started becoming "nasty and insulting". PW2 asked that the two do leave, and they did, buying some meat on the way which they asked PW1 to cook for them. Just as they were preparing to have dinner, the accused became *very nasty towards PW2* who fought him, sent him away and locked the gate. As he left, the accused warned PW2 he would teach PW2 a lesson. This caused anxiety, as PW1 at this stage informed PW2 that the accused used to associate with a secret organization, Mungiki. PW2 *feared* that the accused might unleash Mungiki upon him.

So when, soon thereafter, there was a knock at the gate, PW2 came out worried and ill-tempered, as he *feared* it might be Mungiki; but as he peeped from a distance, he saw that it was the Police in uniform. He *felt safe*, the moment he realised it was the *Police*. He opened for the four Police officers, who entered and conducted a search. He did not know what the Police were searching for. They asked to see the *unoccupied house* in PW2's compound. They *wanted to see the body* which had been lying in the said vacant housing unit. Since PW2 had been shown where the body was, he took the Police there.

The Police took the accused, PW2 and one **Michelline**, the lady who owned the liquor chamber already referred to, to the dumping site where the body of the deceased was found. **Michelline** identified the body, and the Police officers took it away to the mortuary. PW2 was taken to Buru Buru Police Station,

where he recorded a statement.

On cross-examination by learned counsel **Mr. Mutisya**, PW2 further testified as follows. On the material day the accused had awakened PW2 from his sleep at 7.00 a.m., complaining about *theft of his property by the deceased*; and the two of them then went over to **Michelline's** liquor chamber, but they only found **Michelline** and her friend. The accused had indicated to PW2 that he knew the deceased would be found at **Michelline's** place. They were able to trace the deceased, and they went along with him, even as he appeared drunk, to the *accused's house*. PW2 said he had only listened to the dialogue between the accused and the deceased, but he had made no remarks. PW2 then left, while *the drunken deceased was still alive but drunk*, being battered by the accused. PW2 saw no weapon used at the fight waged by the accused against the deceased. PW2 went away, and had no occasion to talk to his wife (PW1) about the circumstances leading to the fight. There was no further communication between PW2 and PW1 (neither had a cellphone) until his return at 9.00 p.m. Upon his return, PW1 told him that *people* associated with Mungiki had come and beaten up the deceased.

PW2, upon his return, had not gone to the unoccupied house where **Kamanja** had been killed, since the accused had come along and told him what had taken place; PW2 only went into that house, on the material night, in the company of the Police officers.

PW3, **Peter Muchoki Ndubai**, was sworn and gave his testimony on 19th September, 2006. He said he is an artist, employed by one **John Boit** at Kilimani. The deceased was PW3's brother and, on 22nd March, 2005 at 7.45 a.m. he had called PW3 on telephone, from Dandora. At that time PW3 was at his house in Eastleigh, and he was asked to remain at home, so that the deceased would come and see him there, in connection with some problem affecting him (the deceased). PW3 waited until 12.00 noon, but the *deceased did not arrive*. PW3 had to go away to work, so he left his door key in a local shop known to the deceased, for the deceased to pick it up and gain access into his (PW3's) residence.

It was after some one-week-and-a-half (during which searches were mounted for the deceased) that PW3's sister, **Jane Wairimu Ndubai** asked him to visit Kinyago Police Post at Dandora; and when he did, he met the said sister in the company of Police officers who informed them that the *body of the deceased* was lying at the Nairobi City Mortuary where it had been taken on 23rd March, 2005. PW3 was able to confirm that it was the body of his brother, when he visited the mortuary on 6th April, 2005.

PW4, Police Force No. 67955 **Police Constable Muyekho Wamela** was sworn and gave his testimony on 19th September, 2006. On 22nd March, 2005 he was on crime stand-by assignment at the Dandora Police Post, working under one **Inspector Muya** who was the Duty Officer. Sometime *after 11.00 p.m.* the accused came along to *make a report implicating his own landlord in crime*: the accused "reported *having seen his landlord, while in the company of other people, beating his fellow-tenant*"; and later the "landlord and [his accomplices] *carried the tenant who was still being beaten, in a hand-cart, to an unknown destination*"; and the name of the said landlord was given as **David Maina Waite**. After PW4 entered this matter in the Occurrence Book, he and **Inspector Muya** and the Police driver (**Police Constable Ahmed**) accompanied the accused to Dandora Jua Kali where the accused lived. They *found the landlord and his wife at home*; and the landlord told them he had only one tenant, namely **Anthony Kinyanjui Kimani** (the accused). The Police officers inspected the houses in the compound, as the accused had insisted that the landlord had two tenants. They found only an empty house, what the accused claimed was his fellow-tenant's housing unit. Later, both PW2 and the accused led the Police officers to the *Dandora dumping site*, where the body of the deceased had been discarded. The body, half-naked, rested on a *mattress*. From the information then in their hands, the Police officers arrested both PW2 and the accused. The Police officers were able to interview **Michelline**, who had last seen the accused, the deceased and PW2 together.

On cross-examination by learned counsel **Mr. Mutisya**, PW4 testified that PW2 had known the *exact point* where the deceased's body had been dumped, and he had taken the Police officers there without any mistake. The Police officers had thought that both PW2 and the accused knew how the deceased met his death, and he was surprised only the accused had been charged.

On re-examination by learned counsel **Mrs. Ouya**, PW4 testified that at the time PW2 took the Police to the Dandora dumping site, where the body of the deceased lay, the *accused had kept quiet and made no contribution*. PW2 had told PW4 and the other Police officers that the body of the deceased had been dispatched at the dumping site by means of a hand-cart, but he had not said how many people had moved that hand-cart to the dump-site.

On 19th September, 2006 PW5, No. 231167, **Ex-Inspector of Police Francis Sembe** was sworn and gave his testimony. He was formerly based at CID-Buru Buru, and was the Officer-in-charge of the Homicide Unit, Buru Buru Police Division. On 7th April, 2005 PW5 was in office when the deceased's sister, **Jane Wairimu Ndubai** came along to report that the deceased, **Francis Kamanja Ndubai**, had been found dead on 22nd March, 2005 within Dandora Estate. PW5, accompanied by one **Constable Patrick Mbuvi**, then accompanied **Jane Wairimu Ndubai** to Dandora Jua Kali Estate. Already there were two suspects held in connection with the offence – PW2 and the accused. PW5 and his colleagues visited the alleged scene of crime and conducted a search, but found nothing of any significance. In the house of the accused, a cardboard structure, *items were found strewn all over the place*, and there was a gaping hole in the wall. Members of the public were not co-operative in giving information; PW5 said: "I noted an element of fear in each and every person we tried to talk to."

PW5 briefed Divisional Criminal Investigation Officer, who in turn called for the Police file from the Dandora Police Post. On the basis of the content of the Dandora Police file, PW5 prepared the documentation on the basis of which the accused was arraigned on a charge of murder.

On cross-examination by learned counsel **Mr. Mutisya**, PW5 testified that in the searches which he had conducted, he had found no weapons, and no signs of blood stains. He explained the non-co-operation of members of the public as believed to be occasioned by a fear of "the Mungiki menace." PW5 testified that the facts he found during investigations pointed to *group involvement* in the killing of the deceased; but on those facts, the Attorney-General had exercised his discretion to bring a murder charge against *the accused*, and not against the accused's landlord (PW2).

PW6, **Dr. Peter Muriuki Ndegwa**, was sworn and gave his testimony on 13th March, 2007. He is a pathologist with the medico-legal section of the Ministry of Health, and is attached to the Nairobi City Mortuary. On 14th April, 2005 he conducted a *post-mortem* examination on the body of the deceased, which was identified by the deceased's sister, **Jane Wairimu Ndubai**, and presented to him by one **Police Constable Mbuvi** (PW7).

PW6 gave testimony on the *cause of death* of the deceased. The deceased had been *hit with blunt objects causing instant death*. Externally, the body had *multiple bruises everywhere*. The body had sub-cutaneous haematomae on the left leg muscle; and subcutaneous and intramuscular haematoma on both hands. The internal organs were mostly normal. PW6 drew the conclusion that the cause of death was *exsanguination following multiple blunt traumatic injuries, resulting in loss of blood and haemorrhage*.

On cross-examination by learned counsel, **Mr. Mutisya**, PW6 clarified that *loss of blood*, resulting from injuries to the body, was the cause of death. Due to bruising, blood had exited out of the vascular system; and blood had clotted in the tissues, with the result that there was a failure of blood-conveyance of oxygen for the use of the body.

PW7, No. 47720 **Police Constable Patrick Mbuvi** was sworn and gave his testimony on 13th March, 2007. He is attached to the C.I.D. Buru Buru Police Division. On 14th April, 2005 he had teamed up at the Nairobi City Mortuary with the deceased's relatives, for the identification of the body of the deceased for purposes of a post-mortem examination by PW6.

With the testimony of PW7, the prosecution case closed, and both learned State Counsel **Mrs. Ouya** and learned defence counsel **Mr. Mutisya** agreed that, without any submissions, the Court do, on the basis of its perception of the evidence, give a ruling on whether or not there was a case to answer.

C. DO THE TESTIMONIES DISCLOSE A CASE TO ANSWER? - PRELIMINARY RULING

On the basis of the evidence tendered by the prosecution, I gave a considered ruling, on 13th March, 2007 as follows:

“The accused faces a charge of murder, contrary to section 203 as read with section 204 of the Penal Code (Cap.63, Laws of Kenya). The particulars are that the accused committed the murder of one Francis Kamanja Ndubai, on 22nd March, 2005 at Dandora Phase V, in the Nairobi Area.

“The prosecution case has been presented through seven witnesses.

“The law governing murder trials is well known: the prosecution must prove their case beyond reasonable doubt.

“However, the stage at which it is ascertained that proof-beyond-reasonable-doubt has been achieved, is not arrived at until the full case has been heard.

“At the present stage, only the prosecution has been heard.

“The law, however, provides that if, at this preliminary stage, there is a clear lack of pointed evidence such as predisposes the trial to the definite course of acquittal, then the Court can terminate the case prematurely, by acquitting the accused.

“The principle that guides the Court in taking such a decision is that of the prima facie case. Whenever the prosecution has been able to identify clear and specific turns in the evidence, which touch on the accused as having his hands in the circumstances of the death in question, then this means a prima facie case exists: and there is a legal duty resting upon the Court to put the accused to his defence.

“On the evidence as it has been adduced in this case, there are points and milestones which have involved the hand of the accused, in the circumstances attending the death of the deceased – in my perception.

“There is, therefore, a duty bearing on this Court, to create an opportunity for the accused to explain.

“Accordingly, I now put the accused to his defence, as I consider that there is a case to answer.”

I then gave directions, as to the line-of-defence options available to the accused, following which learned counsel, **Mr. Musyoki** informed the Court that the accused would be making a sworn defence, though without witnesses.

D. BATTERY WAS ON LANDLORD’S PROPERTY, I WAS AWAY AND NOT PART OF IT: ACCUSED’S SWORN DEFENCE

The accused was sworn on 2nd May, 2007 and proceeded to testify as follows.

On 22nd March, 2005 the accused had woken up at 7.00 a.m. He went out of the compound for a short while, to buy milk for making his tea. He had left his house door open, but he had locked the gate. When he returned to his house, he found that his jacket was missing. Since the people he had left in the compound were only the landlord and his wife, the accused sought to know from them if any new person had entered through the gate. According to the accused, the landlord had blamed a man by the name **Kamanja**, who had earlier-on wanted to rent one of the unoccupied housing units in the compound. The landlord told the accused he knew where **Kamanja’s** sister lived, and he would help the accused to trace **Kamanja**. The landlord and the accused then left the compound, in a search for **Kamanja**. The accused, while still out searching, then parted company with the landlord, and went to Kinyago Police Station to

report the alleged theft of his property. The accused *later* saw the landlord, but had to leave for the city centre where he had work to do. The accused said he remained in town for most of the day, and only returned home at 7.30 p.m. The accused said that when he arrived back home in the evening, *he found a group of eight people who included the landlord (PW2) battering somebody*; he (the accused) had nothing to do with the beating-up; all he did was to walk across to Dandora Police Post and report the incident. He remained at the Police Post until 11.30 p.m. when the Police now escorted him back to his house. The accused said that he and the Police found people in the compound asleep, though the landlord opened the gate for them. The Police then conducted searches – in the unoccupied house, and in his house; and later the Police arrested him and the landlord. The landlord then led the Police to the Dandora Dump site, where a dead body was found. The accused said he and the landlord were later held at the Buru Buru Police Station for some three months, after which the landlord was released. He (the accused) was detained further, and later charged with murder. He said he had never met **Kamanja**, and that he did not kill **Kamanja**.

On cross-examination by learned State Counsel **Mrs. Ouya**, the accused testified that he had been out of his house for only five minutes, at 7.00 a.m. when his property had been stolen. He denied that he had left with the landlord at 8.00 a.m. to go and fetch **Kamanja** (the deceased). He acknowledged that he is usually referred to by the nick-name, **Baba Kim**, and maintained that he reported the theft of his property to Kinyago Dandora Police Post at 10.00 a.m., and then did not see his landlord's wife, as he had gone to Mokhtar Daddah Street in the centre of the city, "near Kencom House." The accused said his work was to "sell radios and other small things" along Mokhtar Daddah Street. He did not return home until 7.30 p.m.; and at that time he found an unknown person being beaten in his landlord's compound. He said he was in the compound at around 8.00 p.m.; and so it was not strange if anyone heard his voice at the time; but he then left the compound, with the unknown man still being battered.

The accused *denied* that he had told the landlord that a person who had been beaten in the compound in the morning hours, had died. He said the fact that both the landlord and his wife had been arrested, was the reason the two had given evidence that implicated him (the accused) in a criminal act. When asked how come his advocate had not challenged PW1 and PW2 on their inculpatory testimony towards him (the accused), he thus said: "*It was not for my advocate to ask them questions on those points. I was not given a chance to ask them the questions myself.*"

In *re-examination*, the accused now said his place of work was *Accra Road* in the City-centre, where he was selling goods in his own right. He also said that the battering of the man he saw being assaulted in the compound, was taking place *in a house belonging to the landlord and his wife*.

E. ACCUSED HAD MALICE AFORETHOUGHT, KILLED DECEASED, DISPOSED OF BODY: SUBMISSIONS FOR THE PROSECUTION

Learned counsel **Mrs. Ouya** urged that the prosecution had established the case against the accused beyond reasonable doubt, and that all the ingredients of murder had been proved: the fact of killing (the *actus reus*); the responsibility for causing the death of the deceased; and the attendant malice aforethought.

Mrs. Ouya submitted that the key witnesses were PW1 and PW2 – wife and husband. The two were in their house when the deceased knocked at the gate, seeking to see the accused who lived in the same compound as them. Only 20 minutes later the accused claimed that the deceased had stolen from him. PW2 did join the accused, in seeking out the deceased at a liquor chamber nearby. Soon thereafter, after the deceased was brought into the accused's house, the accused fell upon him with beatings. PW1 testified that others entered the compound from the outside, and joined the deceased in battering the deceased. The deceased had mentioned the name of the lady running the liquor chamber, as the one who had the accused's property alleged to have been stolen; so those battering the deceased went to check with that lady; but when they did not find the lost property, they returned, and moved the deceased to an unoccupied house in the same compound – at about 10.30 a.m. To PW1's fears that the deceased could have been dead, at about 12.30p.m., it is the *accused* who said the deceased was only having a long slumber.

Learned counsel recalled PW1's testimony, that when dusk set in on the material day, several people, among them the *accused*, were removing something from the unoccupied house where the deceased had been laid at 10.30 a.m., on a mattress, and loading it onto a hand-cart. Counsel urged that the accused would have been part of the group that dumped the corpse of **Francis Kamanja Ndubai**, in the evening, and so the deceased would have been dead in the *morning hours*, when the accused, after staring at him as he lay, represented to PW1 that the deceased was only in deep slumber.

Counsel noted the proximity in time between the carting away of the item on a mattress, at about 8.00 p.m., and the accused's anxiety and irritability as he came to see PW2 who had been away the whole day, but had returned to his house only at 9.30 p.m. Why did the accused want to talk to PW2 in the absence of his (PW2's) wife (PW1) at 9.30 p.m.? And why was the accused so restless, following his departure in the night with PW2, and would even precipitate a fight with his landlord (PW2), so that PW2 had to order him out and lock him out of the compound altogether? On PW2's testimony, the accused confessed to him that **Francis Kamanja Ndubai** had died; and indeed he showed PW2 the place at the Dandora dump-site where he had disposed of the body of the deceased.

Mrs. Ouya submitted that even though the most crucial evidence in this case is from husband and wife (PW1 and PW2), each of their testimonies is independent, and free of contradictions.

Mrs. Ouya showed as a major flaw in the defence testimony, the insistence of the accused that the mere of the compound in which the deceased died, being the property of PW2 and PW1, would necessarily suggest that PW2 is the one who had killed the deceased. Learned counsel noted that PW2 had given a full account of his movements on the material day; he was nowhere near the *locus in quo*, having left in the early morning when the accused was already battering the deceased, and returned only much later, at 9.30 p.m.

Learned counsel noted that the accused, after showing PW2 the place where the body of the deceased had been dumped, became quarrelsome and threatened to teach his landlord a lesson.

The accused in his testimony said he had gone to work at the City centre in the early morning, and returned only at 7.30 p.m.; yet it is the testimony of both PW1 and PW2 that he had come to PW2, in an agitated condition, at 9.30 p.m.

Counsel noted that the accused had much difficulty identifying to the Court the place in town where he worked on the material day.

Mrs. Ouya submitted that no reason had been shown as to why PW2 could have participated in a battering of the deceased to death; and on the contrary, it is the accused who had alleged that the deceased had stolen his jacket and his Kshs.600/=. In these circumstances, it was urged, it was unlikely, contrary to the accused's claim, that he it was who left for his place of work when PW2 had set upon the deceased and was in the course of beating him up, to the point of death.

Learned counsel submitted that the Court should reject the accused's testimony as not being truthful; and that, instead, the Court should accept the testimonies of PW1 and PW2 as giving the true account. She urged that the Police had investigated the incident carefully, and had come to the conclusion that the accused was the offender. She urged that the accused be found guilty, convicted, and sentenced accordingly.

F. THE ACCUSED HAD NO MALICE, HE WAS ELSEWHERE, THE LANDLORD BE HELD RESPONSIBLE: SUBMISSIONS FOR THE DEFENCE

Learned counsel **Mr. Mutisya** contended that the instant matter had so many unanswered questions, that it ought not to be so resolved as to land the accused with conviction. Examples of such unanswered questions, counsel urged were: (i) Did PW1 see the killing of the deceased take place? (ii) Is PW1 trying to cover up for her husband (PW2)? (iii) Why did PW1 not call the Police, or report to the Chief? (iv) As landlady, why did PW1 not intervene when strangers were entering her compound? **Mr. Mutisya**

proposed as the answer to all these questions the contention that “*the accused did not murder the deceased.*”

Learned counsel stated: “*PW1 did not see the accused murder the deceased*”. Such a contention, I think, on the basis of the evidence, is not entirely accurate. While it is true PW1 did not see one single, critical act transforming **Francis Kamanja Ndubai** from state of life to state of death, it was her evidence that the death in question would have been progressive. She was aware that on the morning of 22nd March, 2005 two strangers joined the accused in the accused’s house, in the battering of the deceased; and it was her evidence that the deceased was being hit with an iron bar – even though this item was not recovered during the investigations. It was PW1’s evidence that by about 10.00 a.m. on the material day, the deceased had been badly battered by *the accused* and two other persons. It is also PW2’s evidence that on the morning in question, he had left *the accused* battering the deceased.

The evidence on record, particularly that of PW1 and PW2, shows that the beating-up of the deceased was so comprehensive, and so painful, he screamed, and members of the public were attracted into the compound. This interest by outsiders apparently made *the accused* and his collaborators anxious, and they took the deceased (whether alive or already dead) from the accused’s house and locked him up in an unoccupied, neighbouring house in the same compound.

If by 10.30 a.m. the deceased had already died, PW1 did not know. But, at 12.30 p.m. *she* had peeped through the wall-holes on the house where the deceased lay, and seen signs that he could be dead. When PW1 mentioned her fears to the accused, who was her tenant, it is only *the accused* who looked at the recumbent man, and then announced to PW1 that “*This friend is okay. It’s only that he had been drunk. He was just asleep.*”

Since nobody is reported to have looked into the room where the deceased lay, from the time the accused looked in at 12.30 p.m., it must be the case – and I so find – that the deceased was either already dead at that time, or was in a critical condition and died thereafter. It follows that the accused’s claim about “*this friend [being] okay,*” at 12.30 p.m. was a *false statement*. Why did the accused not tell PW1 the truth? Who was he protecting, when he told PW1 something not true, about the *condition of the deceased*?

Learned counsel **Mr. Mutisya** submitted that the testimonies of PW1 and PW2 were not *corroborated* by the evidence of an independent witness. He did not, however, explain what “independent witness” in this regard meant; and he did not cite any legal principle which would require a special mode of corroboration for a certain representation of facts, where it comes through the testimony of a wife and also that of her husband. I do not think counsel was right on this point, for PW1, just as PW2, was a person *sui juris*, with the full competence to testify as a witness under the Evidence Act (Cap.80), s.125(1).

Learned counsel sought to discredit the testimony of PW1, on the grounds that she did not intervene when, as she had testified, strangers came into her compound and joined the accused in battering the deceased. PW1’s integrity was also impugned, on the ground that she had not gone to the Police Post to report the incident of assault on the deceased, on the material day. Her integrity as a witness was questioned also because, when at 8.00 p.m. on the material day, she heard strange movements in the compound, and sensed that a mattress carrying some weight was being loaded onto a hand-cart, she did not endeavour to find out what exactly was happening.

Mr. Mutisya also contended that it was improper for the Police to release PW2 (the landlord), while charging the accused with the offence of murder; for PW2 was the person who had shown the Police the place where the deceased’s body had been dumped, at the Dandora dump-site.

Counsel’s contention in this regard is, I think, and with respect, not well-based; for he fails to address the more straightforward testimony of PW2, that after he arrived home at 9.30 p.m. on the material day, the accused came to report to him that **Francis Kamanja Ndubai** had died following the assaults of the morning, and the accused even led him to the exact spot where he (the accused) and others had dumped the body of the deceased. Counsel also fails to deal with the truculent demeanour of the accused after he is said to have shown PW2 the place where the deceased’s body lay; he had threatened PW2 with

unspecified, painful consequences; he had fought PW2; he had rushed to the Police post to accuse PW2 as the landlord owning the premises where the deceased had been battered, of being responsible for the death of the deceased.

Learned counsel did raise in aid of the accused's case, an element in his testimony which, paradoxically, shows his untruthfulness as a witness. Counsel urged; "*The accused in his defence said that on the day of [the killing of the deceased] he was on Accra Street in the City Centre and so could not have committed the offence.*" Where exactly, at the City Centre, had the accused gone? Many times he said he was doing his normal work along *Mokhtar Daddah Street*; but it turned out he had no knowledge of the location of that street, and Accra "Street" was now coming up merely as an afterthought. Moreover, there was overwhelming evidence that the accused was in the Dandora area, certainly upto some time *after midday*, when he had spoken to PW1 about the *condition of the deceased* as he lay in the unoccupied house in PW1's and PW2's compound.

The claim by **Mr. Mutisya** that the accused had no *mens rea* for the battering to death of the deceased, flies in the face of the more consistent testimony of PW1 and PW2, that the accused had held the deceased responsible for the *theft* of his jacket and his Kshs.600/=, and had already begun thrashing the deceased early in the morning of the material day.

Learned counsel urged that the accused be acquitted of the offence of murder, as he had not been proved beyond reasonable doubt to have caused the death of the deceased.

G. DIRECTIONS ON EVIDENCE AND LAW: SUMMING-UP TO THE ASSESSORS

On 19th July, 2007 I had summed-up to the assessors, on evidence and law, as follows:

I. WHAT IS EXPECTED OF THE ASSESSORS?

- (1) Trial on a murder charge, such as the one in this case, is required by law to be conducted by a Judge with the aid of assessors.
- (2) The task of the assessors is to assist the Judge in determining whether, on the basis of the testimonies given in Court, the accused is guilty or not guilty.
- (3) Whether the accused is **guilty** or **not guilty** depends firstly on the *evidence* produced in Court; and secondly, on the *applicable law*.

"II. WHAT IS THE CASE NOW BEFORE THE COURT?"

- (1) The prosecution case which has now been heard in Court is that the accused, **Anthony Kinyanjui Kimani**, on 22nd March, 2005, at Dandora Estate Phase V in the Nairobi Area, murdered **Francis Kamanja Ndubai**.
- (2) Your role as assessors is to take a *lay person's common-sense* position, looking with clear sights at the evidence which has been laid before this Court – and then to tell the Court whether you believe the accused is, or is not, a person who caused the death of **Francis Kamanja Ndubai** on 22nd March, 2005; and, if you find that indeed, the accused is a person who caused the death of the deceased, then you must further consider certain things which have been defined by *law*; and so, apart from the evidence (i.e., the testimonies given in Court), you must take into account certain *points of law*, which I will now explain to you in very simple terms.

"III. WHAT ARE THE POINTS OF LAW TO GUIDE THE ASSESSORS?"

- (1) The *points of law* which I am about to state are *enough* to guide you. There will be no need for you to seek out any further legal material, as you decide whether the accused is guilty or not guilty. The focus of your contribution will be the *factual evidence*, which has been placed before the Court in the form of

witness testimonies — and which I will recall for you in a moment.

(2) You remember that the charge brought against the accused is **murder**. Please note that causing the death of a person *sometimes* amounts to *murder*; *sometimes* it amounts to **manslaughter**; and sometimes the killing of a person is not **murder**, not *manslaughter*, but instead, is held in law to have been **justified killing**. If the killing of a person is held to have been justified, then, in that case, *no offence* has been committed, and so the accused is to be set free.

(3) *Murder* is a serious offence, for which there is only one penalty, namely **death**.

(4) But if an accused person kills another person, in circumstances in which the legal conditions that qualify the killing as murder do exist, *but* then it is found that the accused had been *provoked*, or that the accused was *defending* himself when he caused the death, then that killing *ceases* to be murder, and it becomes **manslaughter**, or sometimes, **justified killing**.

(5) Under the law, a person cannot be held to be guilty of murder unless he has **intentionally** caused death, or he has caused death out of *malice*, or, when he caused the death, he was so *reckless* he never cared about the deceased person's right to life.

(6) A person who kills another while defending himself, his family or his home from a dangerous attack, will benefit from the defence known as **self-defence**, and will be held to have been *justified* in committing that killing, *unless* it is shown that he used far more force than was necessary. If, in defending himself, he uses excessive force and this is how he comes to cause the killing, then he will have committed not murder, but **manslaughter**.

(7) *Manslaughter* is a lesser offence than **murder**, and the maximum penalty for it is *life imprisonment*, though the Court has a wide discretion and will decide the question with a free hand, depending on the circumstances of each case.

(8) Proof that an accused person killed another intentionally, and he thus committed *murder*, can be done in *two* ways: (i) by direct evidence – i.e., the testimony of one who perceived the killing with one of his or her five senses (such as: hearing, seeing, or feeling); or (ii) by *indirect* or *circumstantial* evidence. Where proof of murder is done by circumstantial evidence, it means that there is no person who saw, heard or felt the killing as it took place, but there is evidence of *circumstances*, of different acts which, when put together, clearly and unmistakably point to the hands of the *accused*, in the carrying out of the killing.

(9) Whether proof of intentional killing is done through *direct*, or through *circumstantial* evidence, it is the singular task of the State (the *prosecution*) to discharge it. The accused does not have to prove anything, and he may, indeed, even choose to remain silent throughout. The State must prove *guilt*, leaving no doubts at all in your minds, that the accused caused the death of the deceased, and that the death was so caused as to mark out the accused's act as **murder** and not **manslaughter** or **justified killing**. If there remains in your mind even a single doubt as to whether the accused killed the deceased, or as to whether **murder** is what happened, then you must find the accused not guilty of *murder*.

(10) Should you find that the **intention** required for **murder** was present in the accused, but there was provocation, or he was defending himself but used excessive force, then in place of **murder**, you would find a commission of the lesser offence of **manslaughter** – even where **manslaughter** as such was *not in the charge* brought by the prosecution.

“IV. CONSIDERING THE EVIDENCE ADDUCED IN COURT

(1) The assessors must pay keen attention to the *turns in the evidence* adduced before the Court.

(2) Evidence on the side of the prosecution was given by *seven* witnesses; and the accused gave *sworn* evidence on his own behalf.

(3) Now, do you believe the prosecution witnesses to have said the truth, or the substantial truth? Did any of them give untrue accounts? Which ones of the prosecution witnesses are the most crucial, in terms of getting to know how **Francis Kamanja Ndubai** was killed? What did such important witnesses say?

(4) The following statements in the prosecution evidence are to be noted:

(i) PW1 testified that on 22nd March, 2005 at about 7.00 a.m., the deceased had come into her compound, and gone into the rented house of the accused; the deceased shortly after, left for a neighbouring shop, but soon re-entered, and returned to the house of the accused.

(ii) After his return from the shop, back into the accused's house, the deceased seems to have *left again* through the gate, which was left open. This is so because, PW1 said, some 20 minutes since the deceased had first come into the compound, the accused came to the landlord (PW2), complaining that the deceased had stolen his jacket and his money. It means that at this stage, the deceased had left the compound.

(iii) While *complaining of theft* by the deceased, the accused awakened PW2, to accompany him in a search for the deceased.

(iv) PW2 accompanied the accused as they searched for the deceased; they found the deceased, and *brought him to the accused's house in the compound*.

(v) PW1, **Tabitha Muthoni Mwangi**, testified that soon after her husband (PW2) and the accused had found the deceased and brought him into the accused's house, her husband *left the compound*, from that time at about 8.30 a.m., and did not return home until 9.00 p.m. at night.

(vi) In the testimony of PW2, **David Waite Mugo Kamau**, the accused had launched a *fight* against the deceased immediately he (PW2) and the accused found the deceased and brought him in to the accused's house. PW2 said he left the *accused* and the *deceased* fighting, in the presence of a *friend* of the accused, and he advised them to resolve the matter by reporting to the Police.

(vii) According to PW1, soon after her husband left the compound that morning, *two young men* whom she only knew by appearance, walked into the compound, and joined the accused in the battering of the deceased.

(viii) From the evidence of both PW1 and PW2, it would then be that while the deceased was being battered, there were at least *five men* in the accused's house: the accused himself; his friend whom PW2 had left with him; the two young men who joined the accused after PW2 left; and the deceased.

(ix) PW1 testified that there was a concerted battering of the deceased after PW2 left, and after some time, the two young men who had entered the accused's house, *and the accused himself*, left and went to an unknown place, only to return later and *resume* the beating-up of the deceased, inside the accused's house. The deceased *screamed in pain*, and this attracted neighbours who started approaching the compound at about 10.00 a.m.

(x) The coming of neighbours changed the situation: apparently the deceased *stopped screaming*; and the accused and the two young men who had come to join him, now *carried the deceased out of the accused's house*, and dumped him in an unoccupied house in the same compound; and they *shut the door* and departed from the compound – at about 10.00 a.m.

(xi) It is for the assessors to consider the possibility that the deceased *may have died* at about 10.00 a.m. on the material day.

(xii) It is PW1's evidence that *after 10.00 a.m.* she peeped into the unoccupied house where the deceased had been laid, through a hole in the wall; she saw *no sign of life*. And she expressed this

concern to the *accused* who re-entered the compound at 12.30 p.m.

(xiii) At 12.30 p.m. on 22nd March, 2005 **Anthony Kinyanjui Kimani** (the accused) opened the door to the room where *he and his friends* had dumped the deceased at 10.00 a.m.; he looked in; and he came out to announce to PW1: “*This friend is okay. It’s only that he had been drunk. He is asleep.*”

(xiv) The *accused* not only made the said report about the deceased, he also advanced a *theory*: even he, the accused, whenever he is drunk, sleeps the whole day.

(xv) Even as the accused told PW1 that the deceased was only asleep, he informed her that *he had already been to the Police Station* (which certainly must have been between 10.00 a.m. – 12.30 p.m.) *to make a report*. He even showed PW1 a *Police Occurrence Book number* as evidence that he had *made a report to the Police*. He told PW1 that his reporting to the Police was a *precaution*, “so if the friend [deceased] wants to report on him to the Police, he will himself have already reported on [the deceased]”.

(xvi) In the evidence of PW1, a *whole day* of some 10 hours passed, with **Francis Kamanja Ndubai** (the deceased) still lying in the unoccupied house where he had been *dumped at 10.00a.m.*

(xvii) Was the deceased still alive, at 8.00 p.m. in the night? At that time, PW1 noticed that *something weighty* was being taken out of the said unoccupied house, on a mattress, and loaded onto a hand-cart which then left through the gate; and she heard the *voice of the accused* at the *locus* of that transaction. He (the accused) was with several young men who were holding the mattress-like object, on both sides. The people involved in the movement of the mattress into the hand-cart were endeavouring to *speak softly*.

(xviii) It was the testimony of both PW1 and PW2 that PW2 returned home, since he had left in the morning, only at 9.00 p.m; and, just as he settled back in his house, the *accused*, who had apparently gone with the hand-cart team only *an hour earlier*, came to see PW2, with much anxiety on his face, and with *confidential agenda* of great urgency, which necessitated PW1 having to spend some hours of night-time in a neighbour’s house, to create room for an important briefing between the two men.

(xix) PW2 testified that while his wife was away in a neighbour’s house, some time *after 9.00 p.m.* on the material day, the accused informed him that **Francis Kamanja Ndubai had died**, and that he (the accused) and others had *disposed* of the body at the Dandora garbage dump. PW2 had insisted on visually confirming this report, and so the accused took him to the dump and showed him the body, *lying on a mattress*.

(xx) It was PW2’s testimony that the disclosure to him of the fate of the deceased led to immediate drinking of *alcohol* for “Dutch courage”, and thereafter to considerable *irritability and hostility* on the part of the accused. After seeing the body of the deceased, and then returning to PW2’s house, the accused had become so quarrelsome he fought PW2, who then shut him out of the compound, for the night. The accused resorted to utterances of intimidation against PW2, and PW2 indeed developed *fear*, as he suspected that the accused would unleash on him vicious members of an outlawed group known as *Mungiki*. But instead, the *accused went to the Dandora Police Post*, sometime *after 11.00 p.m.* and made a report *implicating PW2* in the killing of **Francis Kamanja Ndubai**.

(xxi) Remember the *threat* which the accused is said to have issued to PW2 on the *night of 22nd March, 2005*. Consider whether the accused could have been carrying out that threat when he went to Dandora Police Post, and *laid blame* at the doors of PW2, for the death of **Francis Kamanja Ndubai**.

(xxii) It must be *true* that the accused went to the Police Post at night, at about 11.00 p.m., to report

on PW2; because soon thereafter there was a *Police visit at the residence of PW2*, and indeed, *PW2 was arrested*.

(xxiii) Remember that by the testimony of PW1, this night-visit to the Police post was the second visit by the accused, to the Police, that day. At *12.30 p.m.*, when it appeared that **Francis Kamanja Ndubai** was already *dead*, the accused *told PW1 that he had already gone to the Police Post*, to make a *pre-emptive report*, for his own protection.

(xxiv) By the evidence of both PW1 and PW2, it was *PW2* who pointed out to the Police the spot at the Dandora dump-site where the body of the deceased lay.

(xxv) It was PW1's testimony that her husband (PW2) looked shocked when he returned home on the material day at 9.00 p.m., and learned of the things *that happened during the day*, in relation to the deceased. PW2 became particularly *anxious* as his wife (PW1) told him that after he left home in the morning *two young men* who belonged to the outlawed organization known as *Mungiki*, had teamed up with the accused in battering the deceased.

(xxvi) It was PW2's testimony that when the accused took him to the Dandora dump-site and showed him the body of the deceased, he felt very much *afraid*, and *did not ask* how the body got there. The accused, after showing him (PW2) the body, urged upon him that this was *a secret he "must keep."*

(xxvii) PW4, Police Force No.67955 **Police Constable Muyekho Wamela** testified that he was on crime stand-by assignment at the Dandora Police Post, on 22nd March, 2005 when, sometime after *11.00 p.m.* the *accused* came along to make a report *implicating his landlord*. The accused had reported that PW2 and others had beaten up a "fellow-tenant" and then transported the said "fellow-tenant" in a *hand-cart* to an unknown destination.

(xxviii) PW5, Police Force No.231167, **Ex-Inspector of Police Francis Sembe** who at the material time had been based at the Buru Buru Police Division, gave testimony on the investigations which he had conducted on the killing of **Francis Kamanja Ndubai**. He found that members of Dandora Estate Phase V were *unco-operative* in giving information on the matter. In his words: "I noted an element of *fear in each and every person* we tried to talk to." He explained the non-co-operation of members of the public as believed to be occasioned by a fear of "the *Mungiki* menace." He formed the impression that there was *group* involvement in the killing of the deceased.

(xxix) PW6, **Dr. Peter Muriuki Ndegwa**, the pathologist who conducted the post-mortem examination on the deceased, gave testimony that the cause of death was, being hit with blunt objects which occasioned *instant death*. Externally, the body had multiple bruises everywhere. PW6 came to the conclusion that the cause of death was *loss of blood*, following *multiple blunt traumatic injuries*, resulting in *haemorrhage*. Due to bruising, blood had exited out of the vascular system, and had clotted in the tissues, with the result that there was a failure of the oxygen-conveyance system for the use of the body.

(xxx) On the basis of the foregoing *evidence*, I had ruled at a preliminary stage that the accused had a *case to answer*. I used the following words:

"On the evidence as it has been adduced in this case, there are points and milestones which have involved the hand of the accused, in the circumstances attending the death of the deceased..."

"There is therefore a duty resting on this Court, to create an opportunity for the accused to explain."

(xxxi) The accused opted to give *sworn evidence*, in which case he could be *cross-examined* on his testimony. What was the essence of his evidence?

(xxxii) The accused *contradicted* all the testimonies of the key prosecution witnesses. Completely contrary to the testimony of PW1, that she saw, and indeed spoke to the accused several times in the course of the material day, 22nd March, 2005 he said he had gone to his *place of work* on *Mokhtar Daddah Street* (later, during re-examination, he said it was *Accra Street*, instead), in the City Centre, at 10.00 a.m. and only returned home at 7.30 p.m.

(xxxiii) The accused testified that on the material day, 22nd March, 2005 his jacket with Kshs.600/= in its pocket had been stolen early in the morning while he was away at a kiosk; and when he made an inquiry with his landlord (PW2), *the landlord* blamed it on **Francis Kamanja Ndubai**. And the accused and the landlord then went out to search for **Kamanja** (the deceased).

(xxxiv) The accused said he left the landlord, and went and reported the loss of his property to the Police Post, early in the morning.

(xxxv) Remember that the accused says he went to the City Centre at 10.00 a.m.; so, did he report to the Police post at that time, before travelling? Remember also that PW1 said she saw the accused at home several times in the morning, including at 10.00 a.m., and then *spoke to the accused* again at 12.30 p.m. when he told her he had made a *pre-emptive report to the Police*, for his own protection.

(xxxvi) The accused said he returned from the City Centre at 7.30 p.m. – and found his landlord (PW2) and others battering the deceased; and that he, the accused, had nothing to do with that assault on the deceased; all he did, at 7.30 p.m., was to go to Dandora Police Post and to report that matter.

(xxxvii) But remember, PW1 and PW2 have said that PW2 did not return home until 9.00 p.m.

(xxxviii) And remember, that PW1 testified that the deceased could have been killed at 10.00 a.m., when the accused and his friends dumped him in the disused housing unit. Remember, PW6 (**Dr. Peter Muriuki Ndegwa**) the pathologist testified that the death of **Francis Kamanja Ndubai** was *instantaneous*, when he was battered with blunt and sharp objects. So, was it possible, as the accused says, that at 7.30 p.m. on the same day, the same deceased person was *still being battered* by PW2 and others?

(xxxix) The accused says he went to the Police post at 7.30 p.m., and *remained there throughout until 11.30 p.m.*, when the Police escorted him to go and check on who was battering **Francis Kamanja Ndubai**. This is in conflict with the evidence of PW1 and PW2. PW1 had heard the accused's voice at 8.00 pm. when a loaded mattress was being placed on a hand-cart. And at 9.00 p.m. the same accused is alleged to have come to PW2's house, and had reported on the death of **Francis Kamanja Ndubai**, apart from *showing PW2* where the body had been dumped. What the accused says is quite inconsistent also with the testimony of PW4, **Police Constable Muyekho Wamela**, who testified that the accused *went to the Police Post well after 11.00 p.m.*, for the purpose of *implicating his landlord* (PW2) in the battering of the deceased, and in carting the body of the deceased away. That happens to be the time when he had fought PW2, when PW2 had ordered him out and locked the gate behind, and when he (the accused) had *warned PW2* that he would teach PW2 a lesson – according to the testimonies of PW1 and PW2.

(xl) So, the assessors should ask themselves whether the accused's account is a truthful one.

(xli) The assessors should also consider whether truly, the accused had left Dandora Estate Phase V in the morning of 22nd March, 2005 (10.00 a.m.) and spent the whole day on *Mokhtar Daddah Street* or even *Accra "Street"* in the City Centre. There is clear evidence that the accused has *no familiarity* with the location of Mokhtar Daddah Street in the Nairobi City Centre; he has never known the geographical connection between that road and Jeevanjee Gardens; he maintained that the main landmark along Mokhtar Daddah Street was Kencom House; judicial notice would be taken that such a claim is untrue.

(5) Those are the averments in the evidence which, during this whole trial, were made before the Court. Consider such evidence carefully, and ask yourselves: Who is telling the truth, the accused? Or PW1, PW2, PW4 and PW6?

(6) *When* was the deceased killed? *Who* killed him? *Who* had the intention to kill the deceased? Was the killing *lawful* or *unlawful*? Was the killing *murder*? Was the killing *manslaughter*? Or, was the killing *justified killing*?

(7) By prosecuting the accused, has the prosecution isolated the right person to be prosecuted in this case?

(8) Has the prosecution proved with certainty and beyond doubt, that the accused either by himself, or jointly with others, did kill the deceased?

“V. HOW ARE THE ASSESSORS TO EXPRESS THEIR OPINION?”

(1) 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 opinion may be presented in Court by one of their number; but in that case, each of the other assessors shall personally express verbally his or her agreement with the common finding.

(2) A trial such as this, carries far-reaching implications for the accused, and for the public interest. Therefore, the assessors are under duty to *reflect most carefully* on this summing-up, and be *guided by it*, as you form the opinion which you will render here in Court. I will, therefore, provide each one of you with the written summing-up, so that you may keep reminding yourselves of all the points which I have raised.

(3) I now adjourn these proceedings, to allow the assessors to sit and deliberate together, before forming an opinion to be delivered in Court, at the appointed time.”

H. GUILTY AS CHARGED: OPINION OF THE ASSESSORS

The Court convened on 23rd July, 2007 to hear the opinion of the assessors which consensus-opinion was read out by one assessor, **Mr. Francis Aluoch**, and verbally concurred in by the other two assessors.

Not only had the assessors very well apprehended the directions in the summing-up, they had also followed the turns in the evidence in a detailed manner; and now they came up with an opinion which may be set out in points as follows:

(i) On 22nd March, 2005 the deceased had fallen victim to *murder*.

(ii) The deceased was alive between 7.00 a.m. and 8.30 a.m. on the material day.

(iii) The deceased was alive and was inside the accused’s house at 8.30 a.m. on the material day and he was at the time undergoing assault and battery at the hands of the accused and the accused’s accomplices.

(iv) As the fight and the battery took place at 8.30 a.m. on the material day, in the accused’s house, the deceased managed to call his brother **Peter Muchoki Ndubai** (PW3) on the cellphone and to tell him that he (the deceased) had a problem and was not at liberty to move and meet PW3 that morning, as had been planned; and so PW3 waited at home in Eastleigh Estate for the deceased, who didn’t turn up at all.

(v) The accused was lying when he said he had never met the deceased in his (the accused’s) lifetime.

(vi) The accused did not say the truth when he testified that he had accompanied PW2 in the early

morning of the material day, to look for the deceased who had stolen his jacket, but that the deceased could not be found, and so he (the accused) only reported the matter to the Police, and left for his usual work-place in town, returning only later at 7.30 p.m.

(vii) When the accused and the Police from Dandora Police Station came to the *locus in quo* after 11.00 p.m. on the material day, they were clearly acting on the basis that the accused *had died*; and so the accused was well aware of that fact.

(viii) The absence of the accused, in the company of PW2 for about one hour just after 9.00 p.m. on the material day, and their return while soaked in rain-water, corroborated PW2's account that he (PW2) was being shown by the accused the place where the body of the deceased had been dumped, a short while back.

(ix) Whereas PW2 who had left the accused with the deceased on the morning of the material date, had accounted for his whereabouts during the day, the accused had only attempted in a disjointed and incoherent manner to show the places he had been to on that day.

(x) While claiming that he had reported the loss of his jacket to the Dandora Police Post, and then immediately left for his work-place on the morning of the material date, he was unable to describe the City-Centre work-place which he had gone to that morning; he had no knowledge about Mokhtar Daddah Street in the City Centre which he averred, was his regular work-place.

(xi) Between the accused and his landlord (PW2), the one who had a grudge against the deceased was the accused – on account of a jacket and moneys which he believed the deceased had stolen in the early morning of the material day.

(xii) When PW5, Ex-Inspector of **Police Francis Sembe** visited the *locus in quo* the accused's house, unlike his landlord's (PW2) house, was found to be in a state of disarray, with a large hole in the walling, and with items scattered all over the floor – and this showed a history of commotion and fighting, thus corroborating the testimonies of PW1 and PW2 regarding the assault on the deceased which had taken place in the morning of the material date.

(xiii) PW6, the Government Pathologist had found the body of the deceased to have been hit with blunt objects which had led to blood clots; the body had bruises all over, and this was consistent with the testimony of PW1 that an iron bar had been used to hit the deceased.

(xiv) The *accused* acting jointly with others, caused the death of the deceased.

(xv) The evidence shows guilt of *murder*, on the part of the accused.

I. THE COURT'S DECISION

At an earlier stage I had ruled that the prosecution had established a *prima facie* case against the accused. Thereafter the Court had the opportunity to hear the accused in his own defence, in the course of which he was led in his evidence by learned counsel **Mr. Mutisya**, and was cross-examined by learned prosecution counsel **Mrs. Ouya**. The question before the Court now is, after taking into account all the evidence, after hearing the submissions of counsel, and after hearing the detailed opinion of the assessors, is it to be concluded that the prosecution case has been established? The classical statement of the law on burden of proof, in such circumstances, resting upon the *prosecution*, is found in the following passage (*per Viscount Sankey, L.C.*) in the English House of Lords decision in **Woolmington v. the Director of Public Prosecutions** [1935] A.C. 462, at p.481:

“Throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to...the defence of insanity and subject also to any statutory exception. If, at the end of the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to

whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

Has that standard of proof been achieved in the instant case?

It is for certain, that no witness observed the delivery of the fatal stroke that caused the death of the deceased; but there is evidence of a *series of strokes* which were served upon the deceased, for a rather continuous period of time, beginning some moments after 8.00 a.m. on the material day. The chain of battery upon the deceased went on, *inside the house of the accused*, intermittently up to about 10.00 a.m., when *the accused* and others now lifted the deceased, alive or dead, and dumped him in a disused house in the compound of PW2, in which the accused also lived. *The many instances of battery* delivered upon the deceased that morning, I would hold, constitute *one transaction*; they qualify as *res gestae*, what, for this purpose, is defined in ***An Outline of the Law of Evidence*** by **Sir Rupert Cross** and **Nancy Wilkins** (4th ed., **London, Butterworths**, 1975) (p.156) as: “*facts forming part of the transaction under investigation.*”

The chain of beatings dealt upon the deceased, on the material date, if seen as a *res-gestae* chain, did indeed have eye witnesses, and so there was *direct evidence*; these were PW1 and PW2. Upon that chain of beatings, death was *instantaneous*, according to PW6, the Government Pathologist. I would hold, therefore, that the fact that one single stroke, on the material morning, may have caused the death of the deceased, is immaterial; and so, proof of the prosecution’s case is to be judged from *both* direct, and circumstantial evidence.

From the details of evidence, and from the demeanour of witnesses, I have to conclude that it is true *the accused had felt aggrieved* about the deceased – in connexion with an alleged stealing of a jacket and money belonging to the accused, on the early morning of the material date. It is *untrue*, that the accused had never met the deceased whose death was being attributed to his conduct on the material date. It is *inside the accused’s house*, on the material date, that the deceased was battered between 8.30 a.m. and 10.00 a.m., in the presence of *the accused* and his accomplices. Death, most probably, had taken place by 10.00 a.m. when the deceased ceased to scream in pain, and when the accused and his accomplices dumped his body in a disused house. The Court believes the testimony of PW1, that by about 12.30 p.m. on the material date, she had entertained doubts as to whether the deceased was alive; and she had then spoken about it to the accused, who responded by sheer cock-and-bull stories which ought to be taken to mean that he, the accused, *did know* at that time, that the deceased was dead (indeed, he would probably have known that at 10.00 a.m. already).

From the evidence, it is clear to the Court, the accused was well aware of the death of the deceased, during the whole period of day-time, on the material date. Though, however, during daytime his attitude on the fate of the deceased was somewhat brash, reality began to dawn on him as evening approached; there was the question of disposing of the body; and responsibility might come to be apportioned. Hardly surprising is it that, at 8.00 p.m. the deceased’s body was secretly being carted away; and at that moment PW1 peered at those removing the body through the gate, and among them was *the accused*, the lot of them talking in *hushed tones*.

About an hour since the carting away of the deceased, an *anxious* accused visited his landlord’s house, bearing great burdens on his face. He took his landlord out in the rain – and again they took just about *one hour* out there. This Court believes PW2’s testimony, that during that one hour of absence, the accused had gone to show him where the body of the deceased had been dumped.

Now that the accused had brought his special secret to the attention of his landlord, great fear of consequences set in; the accused cautioned his landlord about *secrecy*; the landlord feared that caution might be enforced through secret-society (Mungiki) initiatives. The accused became extremely irritable and issued threats of undefined consequences against his landlord; and later, after 11.00 p.m. on the material night, the accused thought it better to lodge *false allegations* at the Dandora Police Post, against PW2; but his malicious report to the Police happens to carry the signal that he had all along known that ***Francis Kamanja Ndubai*** was no longer alive. Indeed, the accused, clearly, would already have known

that, by about 10.00 a.m. on the material day!

The accused claimed in his defence that he had returned home, since he had gone to his place of work in the morning of the material day, at 7.30 p.m., and found his landlord (PW2) and others battering the deceased. The accused said he had then (at 7.30 p.m.) gone to Dandora Police Post to report the incident; but this could not be a true account, as there is the more credible evidence of PW4, Police Force No. 67955 **Police Constable Muyekho Wamela**, that the accused had visited Dandora Police Post after 11.00 p.m., when he sought to implicate his landlord in the death of the deceased. This Court finds as a fact, on the basis of reliable evidence, *that the deceased was not alive at 7.30 p.m.*, and could not have been being battered at that time by the landlord (PW2) and others. There is no credible evidence that, between 7.30 p.m. and 11.00 p.m. the accused was just lolling at Dandora Police Post; he was not there; there is credible evidence that, soon after 7.30 p.m. on the material day, the accused was busy carting away the body of the deceased to the Dandora dump-site, and between 9.00 p.m. and 11.00 p.m. he was in the company of his landlord (PW2), showing PW2 the place where the body had been dumped, talking to PW2, threatening PW2 with undisclosed consequences, and cringing in fear of possible consequences of the killing of the deceased.

This analysis interlocks with the meritorious assessment contained in the *opinion of the assessors*, to ascertain that the prosecution case against the accused is an overwhelming one. There can be no doubt that the accused, driven by grudges and malice, on the material date consorted with his accomplices to bludgeon **Francis Kamanja Ndubai** to death. The manner in which the deceased was killed is clear from the testimony of the Government pathologist (PW6, **Dr. Peter Muriuki Ndegwa**); the deceased was hit with blunt objects, causing *instant death*; the body of the deceased had bruises everywhere; the body had sub-cutaneous haematomae; the death was occasioned by loss of blood. This is consistent with the testimony of PW1, that an iron bar had been used in the commission of the crime.

The **intention** to kill is to be inferred from the evidence set out in the foregoing paragraph – quite apart from the fact that the Court received credible evidence that the accused harboured *grudges* against the deceased.

It is, therefore, a case of **murder**, in a proper sense; and it has been established by evidence that the accused was the culprit. I hold it to have been proved beyond reasonable doubt, that the accused caused the death of the deceased, as charged. No evidence has been adduced by the accused which makes any dent at all on the prosecution evidence.

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

It is so ordered.

DATED and DELIVERED at Nairobi this 18th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Defence: Mr. Mutisya

For the Prosecution: Mrs. Ouya