



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPLICATION 7 OF 2005**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMOS NGALA MUTUA.....1<sup>ST</sup> ACCUSED**

**FRANCIS MUKWATI MUTUA.....2<sup>ND</sup> ACCUSED**

**RULING UNDER SECTION 306 CPC**

Amos Ngala Mutua and Francis Mukwati Mutua are both charged jointly with the offence of Murder of David Wambua Mbindiyo contrary to Section 203 of the Penal Code.

The prosecution evidence is that PW11 a farmer he was at Kitloloni market at about 5 p.m. He heard screams and he rushed to the source of screams on the side of Benson stores. There he found Ngala and Mukwati. The two were beating Paul Kimondee who was separating them from beating David Wambua. He did not talk to them and they did not talk to him. They looked angry. They beat him for about 10 minutes. David Wambua (deceased) walked towards. The PW1 said he knew both accused for about 10 years.

On cross examination he said he had seen the accused coming from the club. They were looking for David Wambua. He saw deceased being kicked and he fell down. He was informed by the people around that it was David Wambua (deceased) who was being beaten. However when his statement to police was read it was recorded "I did not see Wambua all this day". Further evidence was produced by PW2 she said the two accused persons were brothers of her husband. She also confirmed that she knew the deceased as he used to be their neighbour.

On 19.3.2001 she had gone to the market. She heard noises and then she saw deceased lying down outside Benson plot. He was dead. After 5 metres first accused Ngala he walked close to where deceased was lying. She went to her home with the accused in the morning they heard of the death of the deceased. It is to be noted that this witness did not witness any fighting or beating of the deceased. The mother of deceased gave evidence. On 19/3/2001 she was at her home. She saw her son come from Kitloloni market. He told her that he was beaten by Mukwati and Ngala the two accused. The deceased had blood from nose and mouth and was feeling pain on the back of the neck and waist. He was holding his abdomen. He asked her to take him to hospital. It was night and she did not get a vehicle to take him to hospital. She said that he died after midnight at about 1 a.m. On cross-examination she said that before he died she and Angelina talked to the deceased who told them that she was beaten by the accused person. Angelina also gave evidence. She knew both the accused. She also knew deceased. On 19/3/2001 at

about 5.30 p.m. she was at Kitloloni at a kiosk. There was noise. She went and saw deceased lying on the ground she saw both accused beating the deceased and boxing him with fists all over the body. The three were making noise and quarreling. Later the deceased look up and walked there. She also walked home but because she was a neighbour of deceased she went to his home to see what was going on. She found him crying and talking to his mother. She informed the mother that he was beaten by Mukwati and Ngala. Later she heard that David had died.

Paul Mbono Kimathi also gave evidence. He was also from Kitloloni. On 19/3/2001. He went to market at 2p.m. and found the accused taking tradition beer at the bar. He joined them. They talked about they had been beaten by Mwendwa and that David Mbindyo (deceased) was one of those who beat them. Then when they saw David they started a fight and there was a fight which he separated and deceased went home.

I have considered the evidence offered by prosecution there were eye witnesses who were able to give direct evidence of what happened. I apply provision of Section 306(2). Both the accused have a right to defend themselves and the right to give sworn evidence or to make unsworn statement and may call witnesses.

**J.N. KHAMINWA**

**JUDGE**

**Mr. Gitonga :** I ask for mention on 21/1/2008 to take instruction as to how the accused shall defend themselves.

**Court:** Further mention on 21/1/2008.

**J. N. KHAMINWA**

**JUDGE**

**6/12/2007**

**Khaminwa –Judge**

**Njue - Clerk**

**Mr. Omwega for state**

**Mr. Gitonga for accused**

**Mr. Gitonga HB for 1<sup>st</sup> accused for Kahiga.**

Ruling read in open court.

**J. N. KHAMINWA**

**JUDGE**