



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 86 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SAMUEL NGUGI GITONGA ..... ACCUSED**

**JUDGMENT**

The accused Samuel Ngugi Gitonga is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63 Laws of Kenya).

The particulars in the information dated 7<sup>th</sup> March, 2002 state that on 29<sup>th</sup> March, 2002 at Kiawarega village in Kiambu District within Central Province, the accused murdered Bunsen Asiema Afundi.

The accused was arrested by members of public along with some of the prosecution witnesses who are the relatives of the accused.

It has been shown beyond reasonable doubt that the deceased died at the scene after receiving stab wound chest injury, and developing lungs haemothorax. The injury was confirmed to have been sustained from a sharp object as per post mortem report (Ex. 2). The same was produced by CPL Kennedy Apindi (P.W.7) after a successful application made by the learned state counsel under section 77 and sec.33 of the Evidence Act.

As per the prosecution case, Benjamin Openji (P.W.7), who was later described as Daniel Openji after explaining the discrepancy, George Avungu (P.W. 2) and Benjamin Kademi (PW.3) were with the accused. The three witnesses are relatives to the deceased who were walking together to go back to the house of P.W.1 who was the deceased's son.

P.W.1 at around 6.00 p.m. on the material day went to call the deceased from the nearby house of deceased's brother P.W.2. He also found P.W.3 with them. They all started walking towards his (P.W.1) house. On the way he saw the accused (whom he did not know) coming from the opposite direction holding a panga in his hand and shouting that he was going to kill someone.

Himself and P.W.3 dodged the panga but the same hit the deceased who fell down. There were passersby on the road and they held the accused who was later on taken to the police post. The deceased died before the vehicle arrived. He also confirmed that the accused looked as if he was drunk. He also agreed to the suggestions that P.W.3, his uncle accosted the accused by asking what was he doing and he (P.W.3) avoided the panga aimed at him which hit the deceased.

P.W.2 described the accused as a person who had tied his shirt around his waist and was holding a panga and it seemed to him that the person holding it would use it. He said he ducked the attack aimed at him but the deceased became victim thereof. This witness denied that the accused was saying anything before he attacked them, but stated, which I quote:

**“I heard Benjamin asking the accused why was he using abusive language. None of us challenged him to fight. It is not true that because we asked him to fight, he did retaliate.”**

With this specific deposition, I would consider his earlier evidence to the effect that the accused did not say anything before he attacked as not material. I would consider that what he meant was that he did not say anything in particular before the actual commission of the act. He has thus corroborated the evidence of P.W.1 and P.W.3 as regards use of abusive language by the accused.

This witness also denied suggestions of any confrontation with the accused when he stated and I quote: **“it is not true that we all confronted the accused and challenged him to fight and then he retaliated.”**

P.W.3 almost repeated the testimony of P.W.1. He however clarified that when the deceased fell down after he was attacked. He left others chasing the accused and went to look for a vehicle. He also stated that before the police vehicle arrived, the deceased had already died. The next witness was given the panga (Ex.1) the murder weapon, according to the prosecution case and he took the same to the police station. As per the Government Chemist’s report this panga was slightly stained with human blood of group ‘A’ which was the blood group of the deceased. The accused’s trousers were also found to be with blood stains of human blood of group ‘O’ which was the group of the accused. The accused seemingly was beaten by the members of public before his arrest and before he was taken to the police.

In view of the absence of anything shown contrary, I can safely find that the deceased met his death due to a stab wound from the panga produced before the court.

The two police witnesses AP CPL. Bernard Gichanga and CPL Kennedy Apindi visited the scene and were informed of the incident by witnesses present at the scene.

The accused testified under oath and in short stated in his defence that, after taking permission to travel home on the material date from tea company, he went to drink with his friends and had four beers. He then came back to his rented place, paid rent in advance to his landlord one Kamau and then went to Mama Kamau’s kiosk where he drank chang’aa. In the kiosk he saw an elderly man who drunk chang’aa but did not pay. One Kogia held the old man by his shirt collar and demanded money. At this juncture, the accused stopped Kogia from harassing the old man and paid for his drink. At that time the said Kogia kicked him on lower jaws and he started bleeding. He went to his house to clean blood from his face. When he came out of his house, he saw a crowd gathered outside his house and was held by them and taken to police station.

I may pause here to note that I was unable to accept the testimony of the accused as probable when he stated that Kogia hit him even after he paid the money he was demanding from the old man. I also note that after the prosecution stated that it was not calling Kogia as its witness, the learned defendant counsel specifically asked for summons to be served on him so that he could be called as defendant’s witness. The prosecution made efforts to trace Kogia and, on the day of defence hearing, Kogia was present in court. However, the defendant refused to call him as its witness. I cannot accept the explanation by the defence counsel in his submissions that the defendant requested for summons to be served on the said Kogia to show that although he was available the prosecution did not call him as its witness, and I should take adverse inference against the Prosecution. I was and still unable to understand the submissions. The law is very trite viz when the prosecution is not calling a witness, it has simply to offer the witness not called to the defence. This is what in reality had happened. The defendant cannot be heard to raise any adverse inference against the prosecution in that event.

Moreover I also notice that despite the fact that the learned defendant counsel was at pains to ask all the prosecution witnesses (PW.1, PW.2 and PW.3) that the accused retaliated after he was provoked,

instigated or challenged, the accused did not even hint at that fact in his defence. On the contrary in his defence, he simply raised the defence that he was not present when the incident occurred, if it did occur.

I have carefully evaluated evidence of P.W.1, P.W.2 and P.W.3 and have arrived at an opinion that the same was consistent and creditworthy. I would not raise any doubt in their respective evidence only because they were relatives of the deceased and because no other independent witnesses were called. I state so despite the fact that there were passersby on the road and after the incident they assisted in arresting the accused, as I am unable to raise any reasonable doubt in their testimonies which are absolutely water tight and unquestionable. I have also heard those witnesses giving their testimonies and seen their demeanours and I accept their evidence without any reservation. I also reiterate that the aforesaid Kogia was one of the independent witnesses who was donated to the defence and despite its request to call him, refused to do so when Kogia was made available to the defence.

The prosecution has given me evidence of three witnesses who had been with the deceased and had seen the commission of the act.

Thus I do not have any doubt that it was the accused who caused the death of the deceased on the material day as particularized in the information filed in this case.

The only question which remains to be answered is whether the accused caused the death with malice afterthought. There is ample evidence that the Accused was not behaving normally. I say so after admitting totally the testimonies of the three aforesaid Prosecution witnesses. I cannot separate their evidence when they indicated that the Accused seemed drunk or was acting abnormally. The Accused himself also has stated in his defence that he was drinking from the morning. In the premises a small provocation which was offered to him by pw.3 stirred the Accused and he committed this unlawful act. The deceased was hit after PW.1 and PW.2 evaded his onslaught.

Considering this aspect of the case, I shall be inclined to find, which I hereby do, that the Accused did not commit the act of killing the deceased with malice.

Once I have so found, I therefore do not enter finding of guilty against the Accused as charged but instead find that he is guilty of offence of manslaughter and do thus convict of the offence of manslaughter when he killed the deceased under Section 20 of the Penal Code.

Dated and signed at Nairobi this 22nd day of February 2006.

**K. H. RAWAL**

**JUDGE**

**22.2.2006**