



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Case 32 of 2003

SIMON MWANGI.....1ST ACCUSED

STEPHEN MWANIKI.....2ND ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

RULING

The accused persons, Simon Mwangi (*1st accused*) and Stephen Mwaniki (*2nd accused*) were charged with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code**. The particulars of the offence were that on the 19th of December 2002 at Igure Farm, Koibatek District, the accused persons jointly murdered John Nganga (*hereinafter referred to as the deceased*). The accused persons plead not guilty to the charge when they were arraigned before this court. The prosecution called three witnesses after which they were unable to avail other witnesses. This court having granted the prosecution a last adjournment on the 31st of October 2005 and the prosecution having failed to avail witnesses on the 16th of November 2005, the prosecution were constrained to close their case. This court reserved its ruling on whether the witnesses who had testified has established a *prima facie* case against the accused persons to enable this court to put them to their defence.

PW1 John Mburu Mwaura, a brother-in-law of the deceased testified that on the 19th of December 2002 at about 10.00 pm he was given information by the wife of the deceased that the deceased had been found lying by the footpath near the house of one James Gathaka. PW1 went to the scene, and with the assistance of his wife (*PW1's*) and the deceased's wife they managed to carry him to his house. PW1 saw that the deceased had injuries on his mouth and face. The deceased was also drunk and appeared to be unconscious. On the following day, *i.e.* the 20th of December 2002, PW1 realised that the condition of the deceased had not improved. The deceased was not talking. A decision was made to take the deceased to hospital. He was taken to the Eldama Ravine District Hospital where he was admitted.

When he regained consciousness at the hospital, the deceased told PW1 that he had been beaten by a person who had "*once been shot on the leg*". The deceased told PW1 that he was beaten by two people. The deceased did not however name names or give the reasons why he was assaulted. PW1 testified that he knew only of one person who had been shot on the leg in the village and that was the 2nd accused.

PW1 testified that at the time the deceased gave him this information he was lucid and coherent in his speech. PW1 however admitted that a day prior to when he spoke to the deceased and a day after he had spoken to the deceased, the deceased was not able to speak coherently. He appeared disorientated. In fact PW1 testified that the deceased thought he was at Maji Mazuri Secondary School at the time although he was still at the hospital. On the 29th of December 2002 the deceased died while still undergoing treatment at the Eldama Ravine District Hospital. PW1 was categorical that the deceased did not mention the 1st accused in this case. After the death of the deceased, PW1 reported what he had been told by the deceased to Eldama Ravine Police Station. He was given a letter which he took to PW3 Administration Police Constable Moses Sitienei based at Maji Mazuri Chief's Camp who effected the arrest of the accused persons and took them to Eldama Ravine Police Station.

PW2 James Gataka Kariuki, a village elder and a resident of Ijure village, Maji Mazuri testified that on the 19th of December 2002 while he was at his house, one Maina Nyaga came and informed him that someone was lying on the footpath near his house. He went to the scene to investigate. He realised that the person lying on the ground was the deceased – a fellow villager who was known to him prior thereto. PW2 tried to speak to the deceased but he (*the deceased*) did not answer back. PW2 realised that the deceased was smelling of alcohol. He thought that the deceased had drunk too much alcohol and thereby become unconscious.

PW2 sent someone to inform the family of the deceased who later arrived and took the deceased to his house. Before the deceased was taken to his house, PW2 tried to revive him by giving him a glass of milk from a nearby kiosk. The deceased was however not able to drink the milk. PW2 testified that since 1990 when he became a village elder, he knew the accused persons as people of good behaviour. PW1 was not aware of any grudge or disagreement between the deceased and the accused persons. PW2 further testified that contrary to the accused persons good behaviour, the deceased had fought with two villagers within a period of six months prior to his death. When the dispute was referred to him (PW2), in each of the two instances he was able to resolve the issues in dispute. That is in essence the evidence that the prosecution was able to adduce against the accused persons.

Does this evidence establish a *prima facie* case so as to enable this court to put the accused persons on their defence? This court does not think so. No evidence was adduced by the witnesses which connected the 1st accused to the death of the deceased. Indeed this court was not put in the picture as to what caused the death of the deceased. The only evidence that in a roundabout way connects the death of the deceased to the 2nd accused is the evidence of PW1. He testified that the deceased, upon regaining consciousness in hospital told him that he (*the deceased*) had been assaulted by two people. The deceased did not give the names of the persons whom he alleged to have assaulted him. He however told PW1 that one of the persons who had attacked him had "*once been shot on the leg*". PW1 did not have any doubt in his mind as to who the deceased was referring to since there was only one person in the village who had been shot on the leg.

The circumstances under which the deceased is said to have made this "*dying declaration*" raises doubt as to the credibility of the information given to PW1 by the deceased. PW1 testified that the deceased was unconscious for two days after admission to the hospital. When the deceased regained consciousness on the third day he spoke to PW1. Although PW1 testified that the deceased appeared lucid at the time and in full control of his mental faculties, it is apparent from his evidence that PW1 was not in a state of mind to coherently and succinctly identify the people who attacked him. PW1 testified that the deceased appeared not to be aware of his surroundings. He thought he was at Maji Mazuri Secondary School, yet he was in hospital. The deceased was disoriented and soon thereafter spoke incoherently.

Even if this court were to be persuaded that indeed the deceased made what amounts in law to a dying declaration, the circumstances under which the deceased was "*attacked*" raises doubt that he was in a position to identify his assailants. It cannot also be said that the deceased realised that he was in imminent fear of death. According to PW2, when he found the deceased lying unconscious near his house, he thought that the deceased was drunk. Indeed he could smell alcohol emanating from the mouth of the deceased. PW1 likewise thought that the deceased had drunk too much alcohol to the extent that he

had become unconscious. It is apparent that the deceased was someone who used to consume alcohol excessively. Neither PW1 nor PW2 were surprised to find the deceased in the unconscious state. In the circumstances of this case, if the deceased was indeed assaulted by some people, in his intoxicated state he could not be in a position to positively identify them especially as it appears in this case that the alleged assault took place at night when issues of visibility came into play.

This court finds that the prosecution has failed to establish a prima facie case to enable this court put the accused persons to their defence. They are consequently acquitted. They are ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 1st day of February 2006.

L. KIMARU

JUDGE