



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

**Criminal Case 38 Of 2004**

**FRANCIS MAINA GACHARA.....ACCUSED**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**RULING**

The accused, Francis Maina Gachara was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. Particulars of the charge were that on the 26<sup>th</sup> of February 2004 at Menengai Crater Bahati in Nakuru District, the accused murdered Landres Lekraiya (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge. The prosecution called seven witnesses to establish its case against the accused. Mr Koech Learned State Counsel prosecuted the case while Mr Mogeru appeared for the accused.

The reconstruction of the events that took place on the material day, as narrated by the prosecution witnesses is as follows: On the 26<sup>th</sup> of February 2004 at around 4.00 pm PW1 Monicah Njeri was at her hotel in Bahati Shopping Centre. She heard screams emanating from outside her hotel. She went to investigate. She met with one Kimani (PW2), Nyambura (PW3) and one Jackson outside her hotel. Present also was one Eddy and the deceased whom PW1 did not know as he was a visitor to the area. PW1 saw PW2 and PW3 trying to intervene in a fight between Jackson, Eddy and the deceased on one hand and the deceased on the other. She then saw the deceased bleeding from a wound in his abdomen. She saw the deceased go under a tree and lie down. She then saw Eddy run towards his house at Satellite which was nearby and run while armed with a panga and rungu. Eddy wanted to attack the accused. He was however tackled to the ground by Jackson and disarmed. When the accused saw Eddy coming while armed, he sought safety by running away from the scene.

While the accused was fighting with the deceased, Jackson and Eddy, PW1 heard the accused ask Jackson what he was doing with his wife in his house. PW1 saw the accused holding a knife. She however did not see the accused stab the deceased. Thereafter PW1 saw the deceased being taken to hospital by one Francis Maina who had a motor vehicle. She later learnt that the deceased had died in hospital while undergoing treatment for his stab wounds. PW1 testified that she knew Jackson to be a person who liked approaching women for sexual favours especially when he had money. PW1 testified that the wife of the accused called Nyambura had told her that Jackson had visited her house with a cabbage on the material day. While at her house, Jackson held her while telling her that he loved her. PW1 testified that Jackson was fond of saying the following words to any woman that he met “*Mimi nakupenda sana hata Mungu*

*akiwa mbinguni anajua*” (I love you so much that even God in heaven knows). It is while Jackson was holding the accused’s wife that the accused found them in the house.

The accused fought with Jackson and managed to chase him from the house. Jackson however went and got reinforcement from Eddy and the deceased. It is at the point when the three of them were assaulting the accused, that the deceased was stabbed by the accused. PW2 Simon Kimani Macharia corroborates the testimony of PW1. He testified that he saw the accused and Jackson quarrelling outside the house of the accused. After a while, he saw Jackson and the accused fight. Two other men who included the deceased, joined the fight and started assaulting the accused. It is at that point that PW2 heard a woman scream that someone had been stabbed. PW2 later saw Eddy run towards his house and come back while armed with a rungu and panga. PW2 advised the accused to run away because he realized that Jackson and Eddy intended to physically harm him.

The evidence of PW1 and PW2 was further corroborated by the evidence of PW3 Lucy Nyambura who testified that she had witnessed the accused and the deceased fight with fists over the accused’s wife. PW3 heard the accused tell Jackson to explain to him what he was doing with his wife. According to PW3, when the two were separated by members of the public, Jackson was still not satisfied. He wanted to continue with the fight. He went and sought reinforcement from his fellow tribesmen *i.e.* Eddy and the deceased. The three of them came back and fought with the accused. It is at that juncture that PW3 saw the deceased come out from the fight while bleeding from his abdomen. PW3 later saw the deceased being ferried to the hospital. She later learnt that the deceased had succumbed to his injuries and died. PW3 similarly related how Jackson had approached her seeking sexual favours. She testified that Jackson was very persistent when it came to seeking sexual favours. According to PW3, Jackson did not discriminate between married and single women. He (*Jackson*) used to say to any woman that he loved her even God in heaven would know.

PW4 Police Constable Andrew Mbaru testified that he was at Bahati Police Station on the 27<sup>th</sup> of February 2004 at about 2 a.m. when the accused was brought to the police station by the Area Chief who informed him that the accused had stabbed the deceased causing him to sustain fatal injuries. PW4 re-arrested the accused and retained him at the police station. In the morning of the following day he went to Nakuru Provincial General Hospital Mortuary where he was able to see the body of the deceased. He saw that the deceased had sustained a single stab wound in the abdomen. PW4 went to the scene to try and trace the weapon that was used to stab the deceased. He was however not able to get the knife.

PW5 Dr Maina Kimani performed the post-mortem on the body of the deceased. He saw that there was a stab wound on the left side of the deceased’s abdomen below the rib measuring 5 cm in size. There was a lot of blood in the abdomen with a cut wound on the spleen. PW5 formed the opinion that the deceased died as a result of internal haemorrhage secondary to a stab injury. The post-mortem report was produced as *prosecution exhibit No. 1*. PW5 also produced the P3 form which was filled by Dr Kogutu who examined the accused and found him to be mentally fit to stand trial. PW6 Michael Mathai Nderitu investigated the case. He testified that after investigating the case he was of the opinion that the accused should be charged with murder. He testified that he did not believe the story which the accused had told him that he had stabbed the deceased when he (the accused) was attacked while defending his wife’s honour.

PW7 Daniel Njau Muchendu the Assistant Chief of Bahati Location testified that he was informed that the accused had stabbed someone at the local shopping centre. PW7 knew the accused. Upon receiving the information he went to house of the accused and was able to interview him. The accused told him that he had found Jackson in his house molesting his wife. A fight ensued. Thereafter Jackson sought reinforcement from his kinsmen and came back to the accused house and the three of them assaulted him. It was while defending himself that he stabbed the deceased. When PW7 learnt that the deceased had passed away, he advised the accused to surrender himself to Bahati Police Station. According to PW7 the accused followed the advice and accompanied him to Bahati Police Station where the accused was arrested and detained by the police.

This is the evidence in a nutshell that was offered by the prosecution. The issue for determination by this

court is whether this evidence establishes a prima facie case that would enable this court put the accused on his defence. The facts of this case are not in dispute. The accused found one Jackson molesting his wife in his house. The accused found Jackson holding his wife in his house in a manner that was suggestive that he intended to romantically embrace her. The accused was incensed. He was provoked. He asked Jackson what he was doing in his house. A quarrel ensued. Jackson and the accused fought. The accused managed to overpower Jackson. Jackson went and sought reinforcement from his kinsmen who included the deceased. From the evidence of PW1, PW2 and PW3 it is clear that it was Jackson and his two colleagues who were the aggressors. The fight was taking place in the compound of the house of the accused. There is evidence that the three aggressors were assaulting the accused with a view of physically harming him.

When the accused stabbed the deceased he was doing so in self defence. The background of the quarrel cannot be overlooked by this court. It is Jackson who provoked the accused by going to his house to seduce the wife of the accused. This is inspite of the fact that the wife of the accused did not encourage such advances by Jackson. PW1 and PW3 narrated how Jackson was fond of approaching women for sexual favours especially when he had money. Jackson was not bothered by the fact that the women he was approaching were single or married. According to PW1 and PW3 Jackson was fond of telling any woman that he met that he loved them that even God in heaven would know. In the circumstances of this case, it is clear that the accused was provoked and secondly he was attacked by the three able bodied men who intended to physically harm him.

PW2 narrated how after the deceased was stabbed, a colleague of Jackson ran to his house and came while armed with a rungu and a panga. He intended to grievously harm the accused. If the accused had not been advised by PW2 to disappear from the scene maybe we would be talking of two deaths and not one. The evidence adduced by the prosecution does not therefore disclose any malice aforethought on the part of the accused. Neither does it disclose that the accused unlawfully killed the deceased without having the requisite *mens rea*. What the evidence discloses is that the accused having been provoked managed to chase away an intruder who wanted to harass his wife in his house. As the saying goes a man's house is his castle he has a right to enjoy all the comfort of his house without interference from any quarters. This includes enjoying the company of his family without interference from an outsider. In the present case it is clear that the accused did what was required of him by chasing away the uninvited guest who had gone to his house to harass his wife.

Further, the accused was attacked by three men who intended to harm him. The act of stabbing the deceased was out of desperation. He used force that in the circumstances was justified. It was self defence. The accused has got no case to answer. He is acquitted of the charge of murder. He is set at liberty and ordered released from prison unless otherwise lawfully held. The three assessors who assisted this court in the hearing of this murder charge are hereby discharged. It is so ordered.

**DATED at NAKURU this 1<sup>st</sup> day of February 2006.**

**L. KIMARU**

**JUDGE**