



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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 11 OF 2005**

REPUBLIC .....PROSECUTOR

-VERSUS-

COSMAS MWANIKI MWAURA .....ACCUSED

**JUDGMENT**

The accused had been charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal Code (Cap. 63). The particulars of the charge were that on the 10<sup>th</sup> day of September, 2004 at Kayole Estate within the Nairobi Area, **Cosmas Mwaniki Mwaura** murdered one **Boniface Njuguna Ngugi**.

The plea in this case was taken on 15<sup>th</sup> February, 2005 when **Lady Justice Rawal** recorded a plea of “not guilty”. On 1<sup>st</sup> February, 2006 the following assessors were selected and duly appointed, in accordance with the terms of s.262 of the Criminal Procedure Code (Cap. 75): **Mr. Gilbert Eshikumu**, **Mr. David Angwenyi** and **Ms Judith Mutinda**.

P.W.1, **Jackson Njoroge Rose**, was sworn on 1<sup>st</sup> February, 2006 and gave his evidence in Kiswahili. He testified that he is 19 years old and lives at Kayole in Nairobi where he has lived for the last four years. His evidence was that he had been, on the night of **10<sup>th</sup> September, 2004** at about 9.00 p.m., in the company of his friend (the deceased), **Boniface Njuguna Ngugi**. The two of them, at about 5.00 p.m. on that day, left P.W.1’s home and went over to the home of the deceased, at Kioi in Kayole Estate. At 9.00 p.m. P.W.1 and the deceased left the Kioi home, with the intention of walking to a place called Jawaka Traveller, at Corner Mbaya in Kayole Estate. The mother of the deceased had given her approval to this departure in the night, which was for the purpose of attending a funeral gathering at Corner Mbaya. P.W.1 and the deceased then walked up to the neighbourhood of Jawaka Traveller (which is a pub); and they remained at the gathering until 2.00 a.m. in the small hours of the morning of **11<sup>th</sup> September, 2004**. The two then left, for the purpose of going to P.W.1’s home at Matopeni in Kayole, to sleep. Normally it would take some twenty minutes to walk from Jawaka Traveller to Matopeni, but this time P.W.1 and the deceased chose to take a short-cut; and this route took them towards the Social Hall, and while walking, they met a lady known to both of them, one **Hellen**.

**Hellen** was walking in the company of a man who, however, was not known to P.W.1. P.W.1 had known **Hellen** as a girlfriend of the deceased, and on that early morning of 11<sup>th</sup> September, 2004 the deceased had been upset by the fact that this lady was in the company of another man. The deceased insisted on stopping and talking to **Hellen**, though P.W.1 discouraged such action. The deceased shook hands with **Hellen** and held her hand, talking to her – to which acts the man accompanying **Hellen** strongly objected.

An altercation ensued, in the course of which a fight took place. In the words of P.W.1:

*“They pushed each other; I held the deceased, and asked him not to push the accused. He did not speak; they continued to push each other; I [then] stood aside, and they went on pushing each other. I saw the man bring out a pistol from the waist ... The accused retreated ... The deceased went and held the pistol... I heard gun-shot. I was shocked. I looked from side to side; I took off. I ran ... Deceased also ran off ... but did not follow the direction I took ...”*

It took P.W.1 ten minutes to get home, where he found his parents already asleep. He knocked on the door to his brother’s room which was on the outside of the parents’ unit. He did not tell his brother the whereabouts of the deceased, even though his brother inquired. P.W.1 responded that he had left the deceased at the funeral gathering – a story which he repeated to his mother later. Then on the following day [probably 12<sup>th</sup> September?] P.W.1 went to the home of the deceased – “to see if he was alive”. P.W.1 found the mother of the deceased: “I asked his mother if he had come home”; “she said he had not come back since the two of us had left home [recently] in the night”. P.W.1 did not tell the mother of the deceased about the night incident on 11<sup>th</sup> September, 2004; but on the **second day** he now convened a meeting in his mother’s house, attended by the mother of the deceased, his own mother, and himself; and he told them of the shooting of the deceased which had taken place on 11<sup>th</sup> September, 2004 in the small hours of the morning. The three, from this meeting, proceeded to Kayole Police Station and made statements which were recorded.

The Kayole Police personnel began investigations by detaining P.W.1; and it is the information he provided that led the police to **Hellen**, as a crucial lead in the **identification of the accused**. P.W.1 was kept in police custody for one month and one week, during which period he gave the name of a cousin of his who was most likely to know where **Hellen** was; and in the end **Hellen** was located and arrested.

P.W.1 testified that the Police had asked him if he knew the person who had shot the deceased. In his words, in the testimony:

*“I was asked if I knew the person who shot the accused. I said I did not know him, but I knew **Hellen**. They asked if I could identify the man who shot the deceased. I said I did not know him, and even if I saw him I could not identify him.”*

Did the state of **lighting** at the place where, and the time when the deceased was shot, prove at all helpful to P.W.1 who, as is not disputed, was **present** when the shooting took place? P.W.1, on this point, thus testified:

*“At the scene of the incident there was a standing light, not far; but I could not see very well.”*

This point was again taken up during cross-examination, and P.W.1 now averred:

*“Light was coming from a building – there was a light bulb in the eaves”*

And this man who shot the deceased, what did he look like? In the evidence-in-chief, P.W. 1 said:

*“He was taller than me – just a bit.”*

In the cross-examination P.W.1 testified:

*“The man [who shot deceased] had a black jacket. I cannot say whether he was light-skinned or dark-skinned. He was a larger man than myself.”*

Did P.W.1 truly see the shooting take place? Why did he not report the matter immediately? He testified in cross-examination:

*“I was shocked; and that night I was unable to report to relatives what had taken place in the night*

... I was very shocked. I did not report that day; I reported the following day.”

P.W.2, Police Constable No. 70317, **Peter Koros** of the General Service Unit Camp at Galana, Voi was sworn and gave his testimony on 2<sup>nd</sup> February, 2006. During 2004 he had been attached to the Kenya Broadcasting Corporation (K.B.C.) on Harry Thuku Road, Nairobi. His main duty was to escort Kenya Broadcasting Corporation staff doing shift-work at night. On **10<sup>th</sup> September, 2004** the witness commenced escort duties at 8.30 p.m., and he worked up to 6.30 a.m. the following day, **11<sup>th</sup> September, 2004**. On that day, just after midnight, P.W.2 and others dropped off Kenya Broadcasting Corporation staff at Kayole Estate. As his vehicle was driving towards Kayole, the passengers came across a boy lying by Kayole Road, and he was wailing, uttering the words: “Please help me, help me”. The vehicle crew thought the pleading young man was merely drunk, and they were not sure he was not a criminal employing tricks to stop them; so they drove on, dropping off retiring Kenya Broadcasting Corporation staff and taking on those commencing their shift. The vehicle later headed towards the City Centre, using the very same road; and now the crew found that the young man they had left lying by the road, had crawled right up to the centre of the road and was still pleading for help. In the words of the witness:

“This time we stopped. I alighted from the vehicle, and talked to the boy. I asked him what was wrong. He said he had been attacked by thieves. He showed me where he had been shot. The shooting was around the chest. It looked like gunshot. He told me the thieves wanted money from him. We decided to take him to the nearest Police Station – Buru Buru Police Station ... It was between 2.30 a.m. and 3.30 a.m. ...”

On cross-examination the witness testified that he had seen no bleeding on the “middle-aged boy” who appeared to have been shot; “but on the back side there was a small hole”. At the Buru Buru Police Station, the injured boy gave his name as **Njuguna**, and said he lived at Kayole.

P.W.3, Police Constable No. 78608, **Wesley Kiptoo Kiprotich** was sworn and gave his evidence on 2<sup>nd</sup> February, 2006. He testified that he was attached to the General Service Unit Headquarters on Thika Road, Nairobi and his current assignment was guard work, which he was doing throughout 2004, at the Kenya Broadcasting Corporation. On the night of 10<sup>th</sup> September, 2004 he was in the vehicle dropping off Kenya Broadcasting Corporation Staff who had completed their work-shift. At about 3.00 a.m. in the early morning of 11<sup>th</sup> September, 2004 they came across a young man lying by the road, pleading for help, in the Kayole area. The young man was injured on the right side of the ribs; he said he had been beaten by thugs, and he asked to be taken to hospital or to a Police Station. The witness saw an open wound, bleeding, on the front right of the ribs. The boy was left with the Buru Buru Police Station, and the General Service Unit crew proceeded with their errands. A week later **Sergeant Ndung’u** of the Kayole Police Station went to take statements from the General Service Unit crew at Kenya Broadcasting Corporation, regarding the incident of 11<sup>th</sup> September, 2004.

On cross-examination, P.W.3 testified that the boy they helped on 11<sup>th</sup> September, 2004 had much bleeding; he was a young man probably of the 18-25-year age range; he was able to walk from the vehicle to the reporting desk, at Buru Buru Police Station; he **did not say** specifically **who** had attacked him; he did not mention who was **present** during the attack.

P.W.4, Police Inspector No. 218186, **Moses Thuku Maina** was sworn and gave his testimony on 2<sup>nd</sup> February, 2006. He had been the Duty Officer at night, at Buru Buru Police Station on 10<sup>th</sup> September, 2004. At about 5.00 a.m. of the following day, after he had been away, he came to find an entry in Occurrence Book showing that an injured person had been brought in by General Service Unit personnel. The injured man had been kept in the Search Room; and the witness now made arrangements and took him to the Kenyatta National Hospital. The young man was conscious but in pain and was crying; he was saying he had been shot, but **did not name** the person who shot him. He was bleeding, from the right side of his chest. After the injured young man was admitted, P.W.4 returned to Buru Buru Police Station, and signalled the Kayole Police Station to conduct investigations into the shooting.

On cross-examination, P.W.4 testified that the young man when he was at Buru Buru Police Station, was

yelling in pain and was saying he had been shot, though without saying who shot him; and later on he had fallen unconscious.

P.W. 5, **Dr. Jane Wasike Simiyu** was sworn and gave her testimony on 2<sup>nd</sup> February, 2006. She testified that she is a pathologist with the National Public Health Laboratories and is deployed at the Nairobi City Mortuary. On **6<sup>th</sup> October, 2004** the witness had performed a **post mortem** examination on one **Boniface Njuguna Ngugi**. Her findings were as follows: (i) an African male of good physical and nutritional status; (ii) external examination showed a **laparotomy** surgical wound approximately 15 cm long; an entry wound in the right chest wall; drainage site on the right 4<sup>th</sup> intercostal space; (iii) internal examination showed: a perforated right lung; ruptured liver repaired; **haemoperitoneum** 0.5l. P.W.5 formed the opinion that the cause of death was chest and abdominal injury due to gun-shot. She concluded that the external and internal injuries occurred at the same time; and she presented her **post mortem** report (marked Exh. No. 1).

On cross-examination, P.W. 5 testified that she was unable to tell the age of the deceased; she had determined that the injury to the deceased had been occasioned by a bullet; the point of entry of the bullet was the right anterior chest wall. P.W.5 **did not know** who had shot the deceased.

P.W. 6, Police Constable No. 83580, **Ezekiel Nyachieng'a** was sworn and gave his evidence on 2<sup>nd</sup> February, 2006. He testified that he had, during 2004, been serving at the Kayole Police Station; and on 6<sup>th</sup> October, 2004 at 10.00 a.m. he was at the Nairobi City Mortuary, for the purpose of witnessing the **post mortem** examination on **Boniface Njuguna Ngugi**. The body of the deceased was on that occasion identified by the deceased's mother who was accompanied by two male adults (a Church leader and a relative); and the three together identified the body of the deceased. The examination was conducted in the presence of P.W.6 who thereafter recorded a brief statement of the mother of the deceased.

On cross-examination, P.W.6 testified that he did not know how Boniface Njuguna Ngugi met his death; he **did not know** the deceased; he did not know who shot the deceased.

P.W. 7, Police Constable No. 59374, **Daniel Mwendu**, was sworn and gave his testimony on 22<sup>nd</sup> February, 2006. He testified that he was currently attached to the Webuye Highway Patrol Base, but in 2004 he was serving at Kayole Police Station in Nairobi. On **30<sup>th</sup> September, 2004** the witness was on duty, in the company of one **Police Constable Hamisi Ali** and one **Police Constable David Kiplang'at**, when the three of them received instructions to make an arrest, in connection with the death of **Boniface Njuguna Ngugi** within Kayole Estate. Already **there was a suspect** who was in police custody who would lead P.W.7 and his team to the person to be arrested. This suspect was **Lucy Njeri**.

In the words of P.W.7:

“We proceeded to the house of the suspect. We knocked on the door; somebody answered; **Njeri** identified him as the suspect; we arrested him. The name of the person was **Mr. Nyongesa**, as we were told by **Lucy Njeri**. **Lucy** said the man who answered the door was **Mr. Nyongesa**. When we escorted him to the Police Station he gave us different names. He said he was **Cosmas Mwaniki Jumbe**. We searched him; he had then no identity card. He gave his names ... Reconciling names was left to pend investigations. **Lucy Njeri** directed us to the house without any difficulties. The accused said he was sharing the house with somebody else, but that person was not there. He did not say who that other person was.”

On cross-examination, it came to light that the key character in this case, **Lucy Njeri**, had also gone on police records by other names – **Hellen Lucy Njeri Maina**, and **Lucy Njeri Mwangi**.

P.W. 7 testified that the suspect who had led him and his Police team to the house of the accused, was **Lucy Njeri Mwangi**. He did not know whether there existed also **Hellen Lucy Njeri Maina**; he said: “I was only aware of **Lucy Njeri Mwangi**.”

P.W.7 testified that it was only a short distance from “*Njeri’s* place to *Nyongesa’s* place”; and at *Nyongesa’s* place when the police team arrived, “the opening of the door was prompt”. The police team then identified themselves; “the man was not shocked”; “he had nothing to say”; “he showed no surprise”, “he said it was okay if we wanted to arrest him. He said he did not know of the person said to have died”. The man told the police team he was ***Cosmas Mwaniki*** and not *Nyongesa*. P.W.7 went on to testify:

“*Lucy* said the one who answered the door was *Nyongesa*. I only know the person we arrested was *Nyongesa*. He was shown to us ... Nothing proves it; only *Lucy* said so, there were no documents [relating to] *Nyongesa* or *Mwaniki*. I believe I arrested *Nyongesa*.”

P.W.8, Sergeant No. 69329 ***Phares Ndung’u*** was sworn and gave his testimony on 6<sup>th</sup> March, 2006. He testified that in 2004 and even now, he has been an officer at the Kayole Police Station. On 11<sup>th</sup> September, 2004 a report was received at Kayole Police Station from Buru Buru Police Station, that there had been a shooting incident within the area of operations of the Kayole Police Station. The young man who had been shot, had been taken to the Buru Buru Police Station by General Service Unit Staff serving Kenya Broadcasting Corporation. The matter had been minuted to ***Inspector Grace Mwaura*** for investigation and she was to be assisted by P.W.8. P.W.8 testified that he and ***Inspector Grace Mwaura***, now retired, commenced investigations into the said shooting incident. On 17<sup>th</sup> September, 2004 P.W.8 recorded the statement of the deceased’s mother (who has since died). She attended at the police station in the company of ***Jackson Njoroge Rose*** (P.W.1). From interrogating P.W.1, P.W.8 had learnt that “the person who could know the culprit was one ***Hellen***”; and this ***Hellen***, P.W.8 testified, went by ***different names***, these being ***Hellen***, and ***Lucy Njeri Mwangi***; but her real name was ***Hellen Gathigia Gathumbi***.

P.W. 8 testified that ***Hellen*** was arrested by members of the public and escorted to Kayole Police Station for interrogation. She disclosed to P.W.8 that on the fateful night she had been in a drinking spree in Koma Rock Estate (next to Kayole), at Montana Bar, in the company of a man whom she referred to as *Nyongesa*. She later left with *Nyongesa* to find bed space at a lodging house. While on the way the two met the deceased, in the company of *Njoroge*, and at that time, which was about 3.00 a.m., an argument ensued between *Nyongesa* and the deceased. This led to a fight, in the course of which *Nyongesa* whipped out a pistol and shot the deceased. ***Hellen*** thereafter ran away and did not report the matter to anyone. ***Hellen***, when arrested and brought to Kayole Police Station, told P.W.8 that he knew *Nyongesa’s* residence and had known him for a long time. P.W.8, on 30<sup>th</sup> September, 2004 sent police officers with ***Hellen*** to *Nyongesa’s* house; and there a man identified as “*Nyongesa*” was found and taken to the Police Station even though he protested he was not *Nyogesa*. P.W.8 recorded a further statement from ***Hellen*** in which she maintained that the man arrested at *Nyongesa’s* house was *Nyongesa* himself even though that man insisted he was ***Cosmas Mwaniki***.

P.W.8 took further action by visiting the Kenya Broadcasting Corporation offices and recording statements from the General Service Unit personnel who had picked up the deceased on the night of 11<sup>th</sup> September, 2004 after he had been shot. He also recorded the statement of ***Inspector Moses Maina*** (P.W.4) of Buru Buru Police Station who had been the Duty Officer when the General Service Unit personnel brought the injured young man there on the material night.

P.W.8, testified that a search in *Nyongesa’s* house, on 30<sup>th</sup> September, 2004 revealed nothing of relevance to these proceedings.

On the facts as found by P.W.8, a file was opened and forwarded to the Attorney-General’s Chambers for advice; and the advice received was that a charge of murder be laid against the accused.

On cross-examination, P.W.8 further testified that the investigating team had found blood smears at the scene where the deceased had been shot. He and his team of police officers also found patches of blood along the road, where the deceased had crawled before he was found and taken away, on the material night.

P.W.8 testified that it is the members of the public who had received information that **Hellen** had information regarding the shooting of the deceased, who arrested her and presented her at Kayole Police Station, and the Police then re-arrested her. **Hellen** made several statements: in the first one she described herself as **Hellen Lucy Njeri Mwangi**; in the second one she described herself as **Hellen Gathigia Gathumbi**; and in the third one she described herself as **Hellen Lucy Njeri Maina**.

P.W.8 testified that he had questioned **Hellen** whether the several names she was using to describe herself were genuine; and the answer was: “these are names [by which] people call her in the streets and in [Kayole] Estate.” The witness then testified, in relation to **Hellen**, as follows:

“In her first statement she had named a boy called **Nyongesa** as the culprit. Then she said that in the second statement she **decided to tell the truth**. The truth being told was in identifying the house of the accused, and the accused himself. She stated that **Nyongesa** was in the company of other men who were drunk, in her first statement.”

P.W.8 testified that he did not accompany the team of police officers who went to arrest **Nyongesa**. He testified that **Hellen** was 17 years old when she was brought to the Police Station, but then said: “I did not check any documents to confirm her age. She told me she was seventeen years old.”

P.W.8 testified that the person arrested by the police as the suspect, who gave his name as **Cosmas Mwaniki**, was **Nyongesa** and, in this regard, the police were relying on the statements made by **Hellen**, who they regarded as a **key witness**.

The prosecution case being concluded with P.W.8’s testimony, learned counsel for the accused, **Mrs. Kinyori** sought adjournment before the making of submissions. On 16<sup>th</sup> March, 2006 learned counsel for the prosecution, **Ms. Mwanza** adopted the prosecution evidence as tendered, and submitted that a **prima facie** case had at this stage been established against the accused, who should now be put to his defence.

Learned counsel submitted that a **prima facie** case against the accused arose from the evidence that **the accused** was armed with a pistol on the material night, and used it to murder the deceased. Counsel submitted that the accused had been arrested “as a result of the **police being guided by the person who was with the accused when the crime was committed**”. **Ms. Mwanza**, while acknowledging that the burden of proof, in law, rested on the prosecution, urged that this had been discharged, and so the accused should “**explain what happened** on the fateful night”.

Learned counsel **Mrs. Kinyori** for the accused, by contrast, submitted that no basis in law had been laid connecting the accused to the criminal act in question, and so a finding of not guilty should be recorded at this stage, and a judgment of acquittal entered.

**Mrs. Kinyori** submitted that the charge that the accused, **Cosmas Mwaniki**, had murdered **Boniface Njuguna Ngugi** contrary to s.203 as read with s.204 of the Penal Code, did not meet the basic criteria upon which a murder charge could be sustained. She recalled the trite principles of criminal liability: (i) **actus reus** – the prohibited act having been committed by accused; (ii) **mens rea** – accused being actuated in his act by malice aforethought. Relating these principles to the evidence adduced by the Prosecution’s eight witnesses, learned counsel submitted: “No evidence has been adduced which shows that the accused acted or omitted to do any act; there is no evidence to show that the accused had the gun and shot the deceased”.

Learned counsel submitted that the prosecution had shown no intention to kill, no recklessness, no negligence on the part of the accused leading to the death of the deceased. Of P.W. 1, **Jackson Njoroge Rose**, counsel submitted that although he testified that he had permission to accompany the deceased on the material night, and that a fight ensued between somebody and the deceased, P.W.1 could not identify that **somebody**.

Learned counsel submitted that P.W.1 had on the whole been evasive during cross-examination, and his credibility was doubtful. Counsel also impugned the character of P.W.1: he witnessed the shooting of

the deceased but chose to take off and run to safety; he thereafter never endeavoured to find out what had happened at the *locus in quo*; when he got home he told no-one about the shooting of a close friend; he gave false information about the deceased who had been shot as he observed; in pretence, he went much later to the home of the deceased, claiming to be ascertaining his return home.

Of P.W.2 and P.W.3, these being Police Officers from the General Service Unit, learned counsel submitted that their evidence was contradictory in certain particulars – such as the time of the night; the state of lighting at the place where they found the deceased; the routes they took as they drove towards Kayole; the way the deceased appeared. This evidence, counsel urged, was not credible.

Of P.W.4, *Inspector Moses Thuku Maina, Mrs. Kinyori* submitted that he was not clear on the time when he found the deceased in the police cells; he was unsure as to the state of the deceased at that time; he could not say what conversation he had had with the deceased.

Of P.W.7, *Police Constable Daniel Mwendo*, learned counsel submitted that his evidence showed that the person who had been arrested and charged, had not been properly identified: was he *Nyongesa*? Or was he *Cosmas Mwaniki*? P.W. 7 did not even “attempt to verify who *Nyongesa* was, and who *Cosmas Mwaniki* was” – counsel submitted. So, “apart from arresting [*Cosmas Mwaniki*], nothing else *connects* the accused with the murder of the deceased” – counsel submitted.

Learned counsel submitted that although P.W.8, *Sergeant Phares Ndung’u* initiated prosecution against the accused, he had in his evidence shown *no nexus* between the accused and the act constituting the offence; he had testified that the prosecution’s potential key witness *Hellen Lucy Njeri Mwangi* alias *Hellen Gathigia Gathumbi* alias *Lucy Njeri Maina* had identified the accused to the prosecution team, yet this lady *Hellen* was *not called as a witness*. *Mrs. Kinyori* submitted that in the absence of *Hellen* the prosecution had adduced no evidence at all to warrant the accused being put to his defence. Such evidence as the prosecution had tendered, counsel submitted, lacked corroboration; there was no evidence showing that the accused had been identified as the man who shot the deceased; it had not been shown that the accused bore any malice against the deceased; the burden of proof lay on the prosecution, but no evidence had been adduced to justify the mounting of a defence by the accused; it was not a legal requirement that the accused proceed to defence, for the purpose of filling gaps in the prosecution’s case.

*Mrs. Kinyori* submitted that the accused did not commit the offence charged; the wrong person had been charged; the murder weapon was not produced in Court. Learned counsel urged the Court to record a finding of not guilty, and to acquit the accused.

To the submissions made for the accused, counsel for the prosecution chose not to respond.

The basic principle applicable in criminal trial is that, any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such *prima facie* justification, there is *no legal basis* for putting the accused through the trouble of having to defend himself. It is the responsibility of the Court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by *early judgment*, or to proceed to the motions of hearing both sides before pronouncing judgment. The logical inference is that whereas the prosecution must be heard in a criminal case, the accused *does not have to be heard*. The accused can only be heard if the Court determines that the weight of the evidence laid on the table is so implicative of the accused that considerations of justice demand he be accorded a chance to answer.

What is the nature of the evidence placed on the table, in the instant matter? The evidence may be summarised as follows:

1. Somebody shot *Boniface Njuguna Ngugi* in the small hours of the morning, at the Kayole Estate, on 11<sup>th</sup> September, 2004. This caused his death several hours later.
2. P.W.1, *Jackson Njoroge Rose* definitely witnessed the shooting; but he saw this happening in

poor lighting, in the night, and he was seeing the man who did the shooting for the first time. There is conclusive evidence that P.W.1 is not able to identify the culprit.

3. The prosecution recognises that there is one and only one witness, variously described as **Lucy Njeri Mwangi**, **Hellen Lucy Njeri Maina**, and **Hellen Gathigia Gathumbi** who not only knows the culprit, but also properly witnessed the shooting incident.

4. All the evidence of the eight prosecution witnesses, whether singly or collectively, has not disclosed any set of circumstances which, outside the framework of the evidence of the lady aforementioned, would point to the identity of the culprit.

5. Yet **Lucy Njeri Mwangi** alias **Hellen Lucy Njeri Maina** aka **Hellen Gathigia Gathumbi** has not been called as a Prosecution witness. The reason for not calling her has not been stated in Court. But from her three separate statements made to the police, and from the evidence of the investigating officer, **Sergeant Phares Ndung'u** (P.W.8) it is clear that she has taken contradictory positions on the circumstances surrounding the offence the subject of the prosecution case.

6. The upshot is that the Prosecution has brought a charge against a person who has not been identified as the one who shot the deceased; and no credible evidence has been adduced in Court linking the accused to the shooting incident of 11<sup>th</sup> September, 2004.

It is obvious that the task of investigating crime is in general, the preserve of the Police. Shortfalls in the performance of that task, however, are readily noticed in this Court, as it lays a premium on cogency of evidence – as the legal basis for subjecting an accused to the task of defence. From the evidence adduced in Court, there are shortfalls in the Prosecution case which, I believe, are occasioned by: (i) failure to determine if there is concerted enterprise between the accused, and the lady referred to as **Hellen**; (ii) failure to properly identify **Hellen** and to obtain truthful accounts from her; (iii) failure to get **Hellen** to testify before the Court; (iv) failure to establish personal details relating to the accused; (v) failure to identify the unnamed person said to be sharing the same house with the accused; (vi) failure to trace and locate the firearm which was used to shoot the deceased, on 11<sup>th</sup> September, 2004.

The foregoing state of the evidence provided the sole legal foundation upon which this Court is to act, in concluding this case. That legal foundation dictates, as I find and hold, that the accused is **not** to be called upon to defend; for the charge is not based on the required standard of evidence.

The Court's decision, in the light of the foregoing analysis of evidence, is taken within the terms of **s.306 (1)** of the **Criminal Procedure Code** (Cap. 75) which stipulates:

***“When the evidence of the witnesses for the prosecution has been concluded, the Court, if it considers that there is no evidence that the accused or anyone of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”***

In the instant case no credible evidence has been led identifying the accused as the man who shot the deceased on 11<sup>th</sup> September, 2004. It follows that no evidence has been placed before the Court that the accused committed the offence charged.

I find, at the close of the prosecution case, that there is no evidence against the accused. I thus enter a finding of not guilty, and direct that the accused be forthwith released unless he is otherwise lawfully held.

The assessors are, by virtue of this Judgment, now discharged and I thank them for serving in the trial process.

**DATED and DELIVERED at Nairobi this 3<sup>rd</sup> day of April, 2006.**

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Ndung'u**

**For the Prosecution: Ms. Mwanza**

**For the Accused: Mrs. Kinyori**