



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 132 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID MWAI GATIMU ..... RESPONDENT**

**JUDGMENT**

The Accused herein 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 of offence state that on 1<sup>st</sup> July, 2003 at Gituamba Village in Thika District, he murdered David Mwangi Gatimu.

It emerged from the record that the deceased and the accused were brothers and were living in the same homestead with their respective families.

The facts of this case, as evidenced by testimonies of seven witnesses from the prosecution are short.

PW.1 P.C. Julius Kivuva and PW.2 Cpl. John Kariuki from Gatundu Police Station went to the scene after report was received at Kajiarua Police Post. They found relatives who led them to their homestead. As per PW.2 they found the body of the deceased '**outside their house**' and as per PW.1 '**outside the home of the Accused**'.

They both stated that the body of the deceased had a deep cut on the left side of the neck and blood was oozing therefrom. They were told by the relatives that it was the Accused who killed the deceased. I may note here that they did not give much details as to whether they were told how he was killed and who was around at the time of the commission of the crime. I can definitely mention that they did not mention that the wife of the deceased had seen the act of murder. The accused was not around when they went to the scene but presented himself to CID, Thika Police Station on 16<sup>th</sup> July, 2003, where he was arrested.

PW.1 also stated that the accused was removed temporarily from the custody by the late Chief Inspector Akumu and P.C. Richard Tanui (PW.4). These two officers returned with a panga (Ex.1) and sample of blood stained soil (Ex.2).

PW.1 stated that they searched the house of the deceased when they visited the scene on the same evening for weapon but nothing was found and that they did not take samples of soil as well as that they saw blood stained soil at the scene.

Finally, I do observe that apart from the wife who is not mentioned by these witnesses, none of these relatives mentioned has been called as a witness.

The aforesaid exhibits, were taken to Government Chemist for comparison with the blood sample of the deceased, Stephen Matinde Joel (PW.6) produced the report which states that both these exhibits were stained with human blood of group “B” which corresponded with that of the deceased’s blood. The Post mortem report (Ex.5) mentions that the blood sample of the deceased was taken.

These facts corroborate the evidence of PW.1 and PW.2 that the body of the deceased with blood oozing was found at the homestead of the Accused and the deceased. It also confirms that the panga Ex.1 and soil Ex.2 had blood stains similar to the blood group of the deceased.

The Post mortem report produced, without any objection, by Cpl. Joshua (PW.7) also states similar injury on the body of the deceased as described, both, by PW.1 and PW.2 i.e. a cut on left side of the neck measuring 10 c.m. deep up to cervical vertebra. The cause of death was stated as hyponolemic shock due to cut on the neck.

P.C. Tanui (PW.4) accompanied the late Inspector Akumu to the Accused’s home on 19<sup>th</sup> July, 2003 after about 19 days from the date of the incident. He testified that they recovered “**a blood stained panga hidden under the bed**”. and collected the soil samples outside his house. He candidly agreed, however, that the scene was not preserved for all those days. He could not identify the panga (Ex.1) as the one recovered from the house of the Accused.

PW.3 checked the Accused on his age, mental capacity and any injury on his body. The Accused was found to be an adult and capable of standing the trial.

The crucial witness for this case is Susan Njambi (PW.5) the widow of the deceased. Her evidence before the court had to be deferred to a further date as, after her evidence as to how she saw the act of murder was committed, she was stood down to identify the panga (Ex.1) which was unavailable on the day of her first evidence. This move turned out to be unfortunate for the prosecution case, as she contradicted her earlier evidence in many relevant parts, on the later date.

On the first day of her testimony i.e. 29<sup>th</sup> November, 2005, she stated that around 7.00 p.m. the deceased came home drunk. He was called by the Accused who asked him to come to his house. According to her there was some disagreement between the deceased and wife of the Accused over theft of chicken and water.

The deceased asked her to join him lest something could happen to him. She was not very specific about this part of her evidence. She followed him and this is what she testified.

***“My husband was ahead of me and I had not reached the Accused’s house. At that time the Accused asked the deceased ‘Do you know that I could kill you?’ I just saw the Accused’s wife handing him a panga and he cut the deceased on the back of his neck”.***

The Accused asked her to remove the deceased or he would also kill her and according to her he did cut her on the leg. Once again she did not specify which leg was and how it was cut, and with what. She did not produce P3 form even though she said she was given one and got it filled in. None of the Police witnesses mentions the injury received by her as well as the issuance of a P3 form. I have earlier mentioned report of the Government Chemist as regards the blood stains on the panga (Ex.1). The report does not state any trace of blood of any other group. Lastly, the blood sample of this witness also has not been sent.

In her evidence on 21<sup>st</sup> February, 2006, she first said it was at 6.00 p.m. that the Accused cut the deceased on the material day. She then testified and I quote “**All of us were in the house of the Accused at the time of incident.**” Earlier she has stated that she had not reached the house of the Accused. On description of the panga used by the Accused, she said that it was a panga used to prune tea leaves and had a wooden handle. She identified Ex.1 by stating it is similar to what she said because the panga (Ex.1) had a handle wrapped in coloured thread. In her cross-examination she had this to state:

***“It was around 6.00 p.m. on 15<sup>th</sup> December, 2005 (emphasis mine) I said it was 7.00 p.m. Now I say that the quarrel started around 6.00 p.m., but the deceased was cut around 7.00 p.m.”***

I must note here that in her earlier evidence she has stated that the deceased came home at 7.00 p.m. drunk and was called by the Accused to his home and that she had not reached the house of the Accused and that she only heard him saying that he could kill the deceased. Even if she could have been not accurate about the time of the incident, she has not stated anything about the quarrel which lasted about an hour. Furthermore, the date also varied quite substantially as well as the evidence on where she was when the incident occurred.

I am aware that the Accused is not a stranger to her, but the prosecution has not put forth any evidence as to the condition of light around and in the Accused’s house. None of the police witnesses (PW.1 and PW.2) who went first to the scene, has also been asked about the condition of light, whether the wife of the Accused was present and how they searched the house for the murder weapon which was not found at the time of their search.

Nothing was said by either of them on the kind of soil the deceased was lying on and whether they had seen any soil which was stained with blood.

I ponder on and raise these questions because both the blood stained soil and panga were recovered by another team of police officers, after the lapse of about 19 days from the date of the commission and from the scene which was not preserved or marked. PW.4 has stated that the scene of crime was outside the home of the Accused from where the soil was recovered. That goes contrary to the evidence of PW.5 who said the deceased was cut inside the house by the Accused. The evidence that the blood stained panga was recovered hidden under the bed in his house also does not strengthen the case of the prosecution when it is undisputed that the Accused surrendered himself to the police voluntarily. My observation is fortified by the evidence of PW.1 and PW.2 that they searched for murder weapon in the house of the Accused and to look for it under the bed could have been the first thing any prudent officer would do.

I am fully aware of the principle of Criminal Law that although there is nothing prohibiting the court to rely on the evidence of a sole witness, the same has to be weighed with crucial scrutiny and special attention to all the surrounding circumstances and facts presented before the court.

For reasons given by me, I am hesitant to rely solely on the evidence of PW.5 to declare the Accused guilty of this crime. There are several, if not numerous ‘*ifs*’ and ‘*buts*’ present in her evidence, which have not only been contradicted by herself, but also have not been corroborated by any other witness though there were several people who went to the police station to report and had informed the officers that it was the Accused who committed this offence.

As against these observations, the defence of alibi by the Accused is not relevant as the prosecution by its evidence has not proved beyond reasonable doubt that the crime was committed by the Accused or could only have been committed by him.

With the above reasonings, observations and findings, I am unable to concur with the opinion of the Assessors who opined that the Accused was guilty of the charge of murder as alleged.

I thus enter a finding of not guilty in favour of the Accused person and acquit him of the charge of offence of murder as particularized in information dated 20<sup>th</sup> August, 2003.

I also direct that the Accused be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi this 19<sup>th</sup> June, 2006.

**K.H. RAWAL**

**JUDGE**

**19.6.069**