



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

**Criminal Case 53 of 2003**

REPUBLIC.....PROSECUTO

R

VS

1 GABRIEL CAPTAIN

2 MAURICE MUNYASIA

3 WANYONYI

LUNANI.....ACCUSED

**RULING**

Gabriel Captain, Maurice Munyasia and wanyonyi Lunani Masharubu are before this court on information of the Attorney General duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the nights of 16<sup>th</sup> and 17<sup>th</sup> July 2003 at Chwele Village, Chwele location in Bungoma District of Western Province, the trio jointly with others not before court murdered Slim Johnstone Walukano. The prosecution summoned the evidence of 7 witnesses before closing its case. At the close of the prosecution's case both learned counsels for the accused persons and the learned Principal State Counsel were invited to submit under section 306 of the Criminal Procedure Code.

Mary Nasambu (P.W2) told this court that the deceased visited her home to take chang'aa on 16<sup>th</sup> July 2003. she said the deceased arrived at her house at 3.00 p.m. and left at 5.00 p.m. James Lusweti Mugwe (P.W7) who is the deceased's brother in-law told this court that at about 7.30 pm on 16.7.2003 he found the deceased lying down next to Sanandiki Primary School. P.W7 said the deceased was unable to walk. He said he attempted to assist the deceased rise up in vain. P.W7 said he knew the duo being their councilor. On 17.7.2003, P.W7 received news of the deceased's death from Gabriel Kaptain while he was in company of a village elder.

James Musyimi (P.W5) the investigating officer told this court that he visited the scene of murder upon receiving a report of the murder from Chwele District Officer. P.W5 said he found the deceased's body was half nude with his private parts missing. P.W5 said members of the public mentioned the names of the 1<sup>st</sup> and 2<sup>nd</sup> accused and this prompted him to arrest them as the first suspects. P.W5 said he took them, to Bungoma Police Station where they were grilled by the D.C.I.O after which they were charged with the current offence. Unfortunately, the D.C.I.O was not called to testify.

Dr. John Ouma (P.W6) produced the post mortem report prepared by dr. Kubasu. In that post mortem the Doctor formed the opinion that the cause of death was haemorrhagic shock due to excisional wound at the genitalia.

The accused persons were represented by Mssr. Omollo and Wekesa. It is the submission of both learned counsels that the accused persons should be acquitted at this stage because prima facie case has not been established by the prosecution to enable this court place them on their defence. It is the contention of the defence that the investigating officer was not called to shed light at to how the accused persons were connected to this offence. It is further contended that malice aforethought has not been established.

On his part, the learned Principal State Counsel was of the view that the accused persons should be placed on their defence to explain how far they managed to assist the deceased upon the request of P.W7.

I have considered the evidence and the submissions. What emerges from this case is that the prosecution relies on circumstantial evidence. All the witnesses who testified did not mention the name or the role played by Wanyonyi Lunani Mashurubu in this case. I find him not guilty. He is acquitted of the offence.

The evidence of P.W7, tend to incriminate the 1<sup>st</sup> and 2<sup>nd</sup> accused with this offence. In short, they were the last people to be with the deceased before he was found dead. I have been urged by the prosecution to place the accused persons on their defence so as they could explain their role. The view I have is that the burden proof cannot shift in this matter. It is incumbent upon the prosecution to establish its case beyond reasonable doubt. It will be a great misdirection on the part of this court to call upon the accused persons to prove their innocence. This is another case where the investigative arm of the prosecution has failed to perform its duty. The key investigating officer was not called upon to shed light on how the accused persons are connected with the offence. I have already said that the prosecution rely on circumstantial evidence. Let me restate that in a case depending exclusively on circumstantial evidence, there must be exculpatory facts which are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. One must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference. In this case, it is evident that the deceased met his death along a public road or foot path. It is possible other people committed the heinous offence. There was no evidence discounting such a hypothesis.

My final decision in this matter is that I not satisfied that there is sufficient evidence capable of sustaining a conviction of murder. Hence there is no need to place the accused persons in their defence. They are hereby acquitted of the offence of murder. They are hereby set free immediately unless lawfully held.

Dated and delivered this 14th day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Omollo and wekesa for the accused.

COURT: The assessors are hereby discharged but may be selected to serve in other cases. They should however be paid for today.