



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 3 OF 2005

REPUBLICPROSECUTOR

VERSUS

KAMIRO CHEGE.....ACCUSED

JUDGEMENT

The information laid against the accused herein reads: “**Kamiro Chege**: on the night of 7th and 8th September, 2004 at Kaguku ‘C’ Village, Kaguku Sub-location, Ithanga Location in Thika District within Central Province, murdered **Simon Ngaruiya Michong’o**.”

The accused pleaded not guilty before **Rawal, J** on 17th January, 2005. On 10th May, 2006 I selected as the three assessors **Ben Joel Oyieko, Philip Ndonye Nzuve** and **Williams Okoth Arony**, and immediately began hearing the testimonies.

PW1, **Paulina Njoki Ngaruiya** was sworn and her testimony in the Kikuyu language was interpreted throughout. She testified that she lives at Ithanga, Makuyu, in Murang’a District. She is a farmer, and the widow of the deceased, **Simon Ngaruiya Michong’o**.

The witness testified that her husband had been killed on 7th September, 2004. On that day, the accused came to fetch her husband from their home, at about mid-day; but she told the accused that her husband was not at home; he had gone to Kaguku Shopping Centre, only some 300 metres from the homestead. The accused decided to go to the shopping centre, to meet the deceased there. It turned out that over the whole day and the night following, the deceased did not return home. PW1 waited for him until she gave up about mid-night, and went to sleep. On the following day PW1’s grand-daughter came to ask the witness to get out of her residence, as she had just received word that **Simon Ngaruiya Michong’o** had been killed. PW1 did just that, and went upto the Chief’s Camp, from where the Government officers stationed there, took her to the *locus in quo*; and she identified the body of her husband. She went upto the Police Station at Kaguku, and recorded her statement. Police Officers later took photographs of the *locus in quo* and of the body of the deceased, before transferring it to a mortuary in Nairobi.

Of the accused, PW1 testified that for some six months prior to the incident which is the subject of this case, he had repeatedly been fetching the deceased from home, so they may go out on a drinking spree. PW1 knew the accused well, and identified him in the dock. She knew that the accused had two homes: one of these was in some place in Murang’a District unknown to her; but sometimes he would come and live on his mother’s farm, close to Kaguku Shopping Centre. Of the relationship between the accused and the deceased, PW1 averred: “I don’t know whether there was friendly relations between the two.”

On cross-examination by learned counsel **Mrs. Rashid**, PW1 testified:

“My husband was killed at night. I was not there.”

Although she perceived no action that linked the accused’s hand to the killing of her husband, PW1 had a belief: “I know the accused killed my husband, and even God knows. I was not present, but I know the accused is the one who killed him.” Although from her evidence, the accused had two homes, PW1 believed that following the death of her husband the accused had stayed away from Kaguku, for a period of three-and-a-half weeks. She had spent her time searching for the accused; and on 5th October, 2004 when she saw him in a Law Court at Thika Town, she gave the information to the Police who then arrested him. PW1 was in the company of the Police and of the accused when they asked him about the deceased. In the words of the witness:

“He said to the Police he knew me. When he was taken to the Police Station, he was asked about the deceased. He answered that they had been drinking together, but he left the deceased drinking.”

PW1 testified that she did not believe the accused had gone to his second home when, for three weeks and a half he was not at Kaguku, following the death of her husband. It was within PW1’s knowledge that there was a dispute regarding land at Kaguku which the accused’s mother had sold to two persons – one **Mama Jimmy** and one **Baba Mwangi**. Although **Baba Mwangi** was not related to PW1’s family, he used to employ the deceased at one time as a casual worker; and **Baba Mwangi** also used to employ the accused. The land dispute involved **Baba Mwangi** and the accused; and so far as PW1 knew, the deceased would have been a witness not for **Baba Mwangi**, but for the accused. The deceased had witnessed the sale of two acres of the said suit land.

While in the evidence-in-chief PW1 had averred: “I don’t know whether there was friendly relations between the two,” on cross-examination she testified:

“The accused and the deceased were very good friends..The accused needed the deceased as a witness.”

It is clear to me that the averment made by the witness in the examination-in-chief is somewhat guarded; whereas that made in the cross-examination is more open and more forthright. This is unsurprising, as questions in cross-examination obtrude upon the witness without a warning; whereas questions in examination-in-chief are formally designed, and bear elements of pre-arrangement. I would adopt and apply the principle that the Court generally gets more assistance towards veracity through questions in cross-examination, than through evidence led through examination-in-chief. I have to conclude, therefore, that in the land dispute at Kaguku which pitted the accused against his own mother, he would have depended on the deceased as a witness. I must also draw the conclusion that the deceased and the accused were *good friends*.

PW2, **Muroki Ngaruiya**, was affirmed and gave his testimony in the Kikuyu language, being interpreted by the Court Clerk, **Mr. Ndungu**. He testified that he is a casual labourer working at Githanga, and that the deceased was his father.

On 7th September, 2004 PW2 had left the deceased and PW1 at home in the morning, taking tea. When he returned from his vocation at 4.00 p.m. he was informed by his mother that a friend of the deceased had come for him earlier in the day. He urged his mother “not to bother, for *the two were friends*.” PW2 later went to bed, and on the following day went to work for a **Mr Gaceha**; he had a break for lunch at 1.00 p.m., and continued to work until 3.00 pm. He returned home only to find that his house had been broken into. In his inquires with neighbours, the remarkable account that he received was about his father, said to have been killed on the far side of Kaguku. As he walked in the direction of the supposed *locus in quo*, PW2 met his mother who informed him the body of the deceased had been transferred to the mortuary. The two returned home. PW2, like his mother, had a *belief*; in his words:

“I know the person who was with my father is the one who killed him; the person who used to come for him is only **Chege** [the accused].”

On cross-examination by learned counsel **Mrs. Rashid**, PW2 averred:

“I don’t know who was with him when he was killed; so I don’t know who killed him.”

PW2 corroborated PW1’s testimony given during cross-examination, regarding the friendship between the accused and the deceased:

“The two ...were great friends. He used to come for my father many times, in my presence.”

Could the deceased have fallen into the bad hands of some others not in Court? PW2 averred: “I wouldn’t know if the deceased met any others.”

PW3, **Samuel Waiguru**, was affirmed and gave testimony in the Kikuyu language, being interpreted by the Court Clerk. He testified that he lives in Gatanga Division, Thika District, and the deceased was his brother, living far away at Ithanga. On 10th September, 2004 PW3 received, through a messenger specially sent from Ithanga, information regarding the death of the deceased herein. The information came from PW1, who was seeking to have burial arrangements made. PW3 acted by going to Ithanga on the following day, 11th September, 2004 and what he came to learn was that **Simon Ngaruiya Michong’o** had been killed. The witness was present when a post-mortem examination was carried out at the City Mortuary, Nairobi on 17th September, 2004. He and his sons had gone to the City Mortuary in the company of Policemen from Gituamba Police Station, for the purpose of identifying the deceased’s body for post-mortem examination, and for the purpose of taking possession of the body for burial. The body of the deceased was handed over to PW3 and his sons after the post-mortem examination. The witness concluded his evidence with the testimony: “I do not know who killed my brother”; following which learned counsel **Mrs. Rashid** expressed her preference not to cross-examine.

PW4, **Martin Mwangi Ngaruiya** could not be examined at the scheduled hearing of 10th May, 2006 as, for no apparent cause, he declined to be sworn or affirmed, leading to a ruling by the Court as follows:

“The foundation of true testimony in Court, is the oath or affirmation. But the witness declines to undergo either of these processes.

“I now step him down. He should re-examine his conscience. If he understands these foundations of testimony in Court, then he can in future be taken on as a witness.”

On the following day PW4 stepped into the witness-box and agreed to be affirmed in the Kiswahili language. He testified that he lived in Nairobi, conducting a green-grocery business at Mathare North. The deceased was his father. He had, on 9th September, 2004 been informed by his mother who visited him in Nairobi, that his father had died. He travelled home (Ithanga) on the following day; he describes the events of 10th September, 2004 thus:

“After understanding what had taken place, we went to Githanga Police Station to write our statements. The deceased’s body was then at the City Mortuary.”

PW4 joined his uncle and relatives as they travelled to the City Mortuary on 17th September, 2004 for the purpose of collecting the body of the deceased for burial. He concluded his testimony by stating: “I don’t know the person who killed the deceased”; and learned counsel **Mrs. Rashid** chose not to cross-examine.

PW5, **Ngugi Kanyari** was sworn and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He testified that he was a farmer, living at Ithanga in Thika District. He testified that he had been at his home on 7th September, 2004 at 5.30 p.m., feeding his pigs when, along a nearby road, he saw the deceased walking along, ahead of the accused; they were together as they walked along; and this was a matter that cleared out of PW5’s mind as soon as the two had passed. PW5 testified that the accused and the deceased were walking in the direction of Kaguku, several kilometres away; and although in his perception they were together, he did not hear either of them talk to the other. The witness did not know

where the deceased and the accused were coming from, or where they were going.

PW5 did not know how the Police identified him as a possible witness regarding the death of **Simon Ngaruiya Michong'o**; but the Police came to his home on 9th September, 2004 at 10.00 a.m. and asked him to make a statement. It was on that day after PW5 saw the accused and the deceased walking in the direction of Kaguku, that he came to learn that **Ngaruiya** had died; and he concluded his evidence-in-chief with the words: "I don't know who killed the deceased."

On cross-examination by learned counsel **Mrs. Rashid**, PW5 averred that he was not able to assess how close the deceased was from the accused, when he had seen them walk towards Kaguku on 7th September, 2004. He was at the time preoccupied with his pigs, though he saw that **Ngaruiya** (deceased) was walking ahead, while the accused was behind. The witness testified that the footpath leading in the direction of Kaguku was a public thoroughfare, and many people do use it. He had noticed that there were school-children who also walked along the same footpath, soon after he had seen the deceased and the accused go by. The witness did not know whether anyone else had followed the footpath in the Kaguku direction, before the deceased and the accused came along.

PW6, **Pastor Onesmus Kamau**, was sworn and gave his testimony in Kiswahili. He averred that he was a pastor of the Kenya Mission of Hope, based at Ithanga, in Kaguku Division. He testified that at about 7.00 p.m. on 7th September, 2004 he had been walking from a local shop, and called in at the home of a fellow clergyman, **Pastor Kilonzo**; and as the time approached 8.00 pm., and some 200 – 300 yards from **Pastor Kilonzo's** house he met two men, one of them being "very drunk", so drunk that he could not walk and was only able to move on his knees. The other man was standing, and brandishing a stick; he was saying to the other in the Kikuyu language: "Stand up, we go," but the other was unable. PW6 asked the man who was on his knees: why are you so drunk? The other man is the one who responded, denying being drunk, and attributing drunkenness only to the man who was kneeling down. Of his intentions, the man who was standing said: "I will beat him and kill him. I will not stay overnight here with him." PW6 testified that the man on his knees went on all fours upto some 10 – 15 metres, and found his way into the bush. PW6 testified: "it was getting dark...I left them. I went home." On the following morning (7.30 a.m. – 8.00 a.m.) when he walked along the same footpath he had used the previous evening, PW6 ran into a crowd, and wondered just what was happening. Somebody in that crowd told him: "a man has committed suicide." PW6 saw the body, and he heard it said that the person in question had died in the night.

On the following day (9th September, 2004) the Police asked PW6 to make a statement regarding the death which had taken place. The body had been found some 300 – 400 yards from the place where PW6 had spoken to two men in the night of 7th September, 2004.

Had PW6 properly seen and recognised the two men he saw along the footpath, on 7th September, 2004 between 7.00 p.m. and 8.00 p.m.? Was he able, of his own perception, to identify one of the two men with the one now in the dock? PW6's own words of testimony are pertinent:

"The person I spoke to, who was with the deceased – I only got to know him when this case started. The person I saw was his brother."

He further testified:

"On that occasion it was dark, and I could not see very well. The accused whom I am seeing in the dock – I could only identify him if I were to hear his voice."

On cross-examination, PW6 restated the situation as regards *visibility*; in his words: "it was dark, on the night when I met the two men...I saw the accused for the first time in Court."

PW7, **Peter Nyoike Njuguna** was sworn and gave his testimony in Kiswahili. He averred that he is a farmer, living in Ithanga Location, Kaguku Division, Thika District. He averred that he was walking

towards the home of one **Mama Wanjiku Mbugua** on 7th September, 2004 at about 4.00 p.m., when he saw the deceased, in the company of somebody he did not know. As he walked on, PW7 noticed that the deceased and the man accompanying him were involved in some kind of altercation; he passed them without talking to them. Then later, after visiting **Mama Wanjiku Mbugua**, he started walking back, alone. At about 5.30 p.m., as he walked back in the same direction from which he had come earlier, he came by a group of school-children standing in a circle, apparently around something or some event in progress. When PW7 got closer he noticed the deceased, **Ngaruiya**, who was seated; and the accused was pulling him up, saying “stand, I won’t leave you here”; and surrounding these two were the school-children. Both the deceased and the accused, in PW7’s perception, looked drunk. He did not talk to them, and he passed and walked on.

On the following day, 8th September, 2004 PW7’s brother, **Joseph Kamaru**, told him that somebody had been killed by the road. Then **Mama Wanjiku Mbugua** came to PW7’s home, and together they set out for Thika where they had an engagement; and as they walked together they passed by the body of the deceased. They heard one of the school-children say: “this is my grandfather,” and he left the scene crying. PW7 and **Mama Wanjiku Mbugua** went up to Thika and later returned, finding the body of the deceased still by the road-side. Police officers later came to the scene and took photographs. The body was lying about a quarter of a kilometre from the place where, on the previous day, **Ngaruiya** had been found sitting, and surrounded by school-children.

PW7 restated that he had seen the deceased, **Ngaruiya**, alive but drunk on 7th September, 2004 at about 5.30 p.m., and that the man who had been in his company was the one in the dock; he had not seen this man in the dock before that occasion on 7th September, 2004. Of the accused, PW7 testified: “I am certain he is the one.”

On cross-examination by **Mrs. Rashid**, PW7 said he believed he had first seen the deceased and the accused along the road at about 3.00 pm.; and then he saw them again at about 5.30 p.m., and he affirmed that he was seeing the two men during daylight. Of the accused as he appeared in Court, PW7 testified:

“The man I saw then [in the company of the deceased] and the one I am seeing in Court, is the same man.”

The witness had not known the name of the accused, and he averred:

“If I had not come to Court, I would not have known him.”

PW8, **Onesmus Ndicho Kamau** was sworn and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He testified that he is a farmer and village elder living at Kaguku in Ithanga, Thika District. On the morning of 8th September, 2004 as he worked in his farm, the secretary to the Village Elders came to see him, to report that a dead person had been found by the road. The two of them went to the scene, and found the body on the side of the road, on a parcel of land belonging to one **Kisembe** (now deceased). PW8 and his colleague could not identify the body, and so they went to the local Police Station, where **Pauline Njoki Ngaruiya** (PW1) came and found them. PW8 and his colleague, the Police officers, and PW1 went up to the scene, and PW1 identified the body as that of her husband. PW8 was left at the scene of death; and later a Police vehicle came and took the body to the City Mortuary in Nairobi.

PW9, personnel No. 38747 **Sergeant Francis Waithaka** was sworn on 10th July, 2006 and testified that he is attached to Ruaraka Police Station, and previously he had served at the Githanga Police Patrol Base within Kaguku. On 8th September, 2004 the witness was at the Patrol Base when members of the public reported, at about 8.30 a.m, an incident of the death of a person. PW9 booked the report in the Occurrence Book, and then proceeded to the scene with two police officers – **A.P.C. Orony** and **P.C. Malecho**. He took action to preserve the scene, and then communicated to his superior officer, the OCS at Gituamba Police Station, asking for a vehicle for the collection of the body. The body had bruises, and appeared to have been dragged on the ground. The body was identified as that of **Simon Ngaruiya Michongo**. Apart

from the bruises, there were slight injuries on the back hip-bone area, and on the head. The scene-of-crime personnel were called, and they came and took photographs of the scene.

PW9 conducted investigations, and took statements from witnesses. Information from those who gave statements indicated that on the previous day, the accused had been seen with the deceased; and the manner in which the two departed from each other, raised suspicions – and so the accused was arrested and charged.

PW9 testified that the accused had, on 27th October, 2004 been escorted to Thika District Hospital for mental examination; and **Dr. Siagany** who did the examination made a report which was handed to PW9.

Learned counsel for the Prosecution, **Mr. Bifwoli** applied under ss.77 and 33 of the Evidence Act (Cap.80), that the witness be allowed to produce the medical report, as it was not possible to avail the doctor without undue delay. As counsel for the accused raised no objection, PW9 produced the report as Exhibit 1. The report stated that the accused was over 60 years of age, and was in a fine mental condition.

Counsel for the Prosecution also applied for PW9 to produce the post-mortem report signed by **Dr. Njue Moses** and dated 17th September, 2004. PW9 averred that he had not himself witnessed the autopsy, but his colleague **P.C. Adrian Kinoti** had; and the report was later handed in to PW9 as the investigating officer. Learned counsel **Mr. Bifwoli** urged that the report be produced by PW9, since the cause of death was not in issue; and learned counsel **Mrs. Rashid** stated that she would raise no objection to the production of the report by PW9. The report stated cause of death as **asphyxia**. Counsel urged that the report be produced under s.77 of the Evidence Act, as it would not be possible to call **Dr. Njue Moses** without undue delay. The post-mortem report was then admitted as Exhibit No.2.

On cross-examination, PW9 testified that he arrested the accused because he was alleged to have been in the company of the deceased on the day the deceased died; and a witness had found the two of them together. The son of the deceased, too, had been arrested for interrogation – because a few days earlier he had had a dispute with the deceased. But this son of the deceased later became a witness in this matter.

With PW9, the Prosecution closed its case; and learned counsel **Mrs. Rashid** at that moment indicated that she wished to make submissions that no case to answer exists, and the accused should be acquitted at this early stage.

Counsel for the accused made her submissions on 17th October, 2006, and the milestones in her submissions were as follows:

- (i) that the Prosecution has not made out a *prima facie* case, and if the accused elected to remain silent, then no proof would exist on the basis of which the accused could be convicted;
- (ii) that the Prosecution has not discharged its burden of proof, and the accused was not to be expected to fill gaps in the Prosecution case;
- (iii) that PW1 had testified that the deceased was a great friend of the accused, and the accused needed him as a witness in a land dispute which would have to be resolved by litigation;
- (iv) that PW2 had testified that the accused and the deceased were great friends;
- (v) that PW5 had testified that while he had seen the accused and the deceased walk together past his home on the material day, he did not know who had killed the deceased;
- (vi) that PW5 himself had been arrested and interrogated in connection with the offence, before being later released;
- (vii) that PW6 only saw two people (presumably including the deceased) in the dark; and so he could not identify the accused as the second of the two; and that no identification parade had been

mounted for him to identify the accused by way of voice-recognition;

(viii) that PW7, though he says he saw the deceased in the company of the accused earlier on the material evening, did not know the accused until he had seen him in Court; and besides, PW7 had himself been interrogated in connection with the offence;

(ix) that PW8's testimony that some of the witnesses had been interrogated in connection with the offence shows them to be accomplices whose evidence cannot stand up.

On the foregoing foundations, learned counsel **Mrs. Rashid** submitted that the prosecution has done incomplete investigations, and consequently has placed before the Court no *prima facie* case that dictates that the accused be put to his defence.

In response, learned Prosecution counsel **Mr. Bifwoli** urged that the onus of making out a *prima facie* case has been fully discharged. He based this contention on the following milestones:

(i) PW1 gave evidence that when on the material day, at midday, the accused sought the deceased from the deceased's home and found him gone to the shops, the accused wended thither to find him;

(ii) then later that day, PW5 saw the accused and the deceased walking together, past PW5's home, at about 5.00 p.m.

(iii) then some two-three hours later, at about 8.00 p.m. PW6 met deceased and accused near the *locus in quo*, and the deceased was so drunk he was disabled, and the accused held him by his shirt, while wielding a stick;

(iv) that there was strong circumstantial evidence indicating that the accused was the last person to be seen with the deceased; and the accused had the opportunity and the means to cause the death of the deceased; and that the circumstantial evidence irresistibly pointed to the accused as the culprit;

(v) that even those witnesses who had been interrogated were still competent witnesses, and their evidence is good evidence, and indeed their testimonies remained unshaken; and in any case such witnesses cannot be treated as accomplices.

Witnesses Who During Investigations were Arrested and Interrogated by the Police - Are they Accomplices?

I was not in agreement with counsel for the defence that some of the witnesses were accomplices. **Osborne's Concise Law Dictionary**, 6th ed. (London: Sweet & Maxwell, 1976) thus defines the word "accomplice" (pp.6 – 7):

"Any person who, either as a principal or as an accessory, has been associated with another person in the commission of any offence. The evidence of an accomplice is admissible, but the judge must warn the jury of the danger of convicting on such evidence, unless corroborated, and if this warning is omitted a conviction may be quashed."

It had not been the prosecution case – and it did not emerge from the evidence – that any of the witnesses acted in cahoots with whoever may have killed the deceased.

Putting the Accused to His Defence

In view of the evidence of the nine witnesses, but particularly the evidence of those who saw the deceased in the company of the deceased, in one case at several different times, in the later part of the material day, I delivered a **ruling** on 25th October, 2006 putting the accused to his defence.

The accused elected to make an *unsworn statement*, and on 31st October, 2006 he stated that he had, at about 4.30 p.m. on 7th September, 2004 been walking from Giraria market towards Maguguni, on a market-day when there were many people moving along the same footpath. On the way, he had caught up with the deceased, who was in the company of others, including school children. The accused and the deceased were going in the same direction, towards Kaguku, and each was on his own. The two were not involved in any altercation; they walked on until they reached Kaguku, at about 7.30 p.m., and then parted ways, each going in his own direction. Some five kilometres separated the home of the accused from that of the deceased. The accused said he went to his home after parting with the deceased, and he knew nothing about the cause of the death of the deceased. He said he was shocked to learn of **Ngaruiya's** death.

Defence Submissions

Counsel for the Prosecution chose to rely on the evidence without final submissions; and thereupon, learned counsel **Mrs. Rashid** for the accused, submitted that *malice aforethought* had not been shown to have existed which could land the accused with liability for murder. In the words of counsel: "There is no evidence on record that the accused had malice aforethought, nor the intention to harm the deceased. There is only evidence that both the accused and the deceased were great friends. There would have been no cause why the accused would wish to harm the deceased."

Mrs. Rashid submitted that the evidence shows that the road along which the deceased and the accused had been seen by witnesses, was a public road; it was a market day; there were many passers-by, and any one of them ? not the accused ? could have had an opportunity to harm the deceased. The fact of the two having been seen together by several witnesses, counsel urged, would not point to the accused *as the one who* caused the death of the deceased. The circumstantial evidence in these circumstances, counsel urged, was "not watertight and leaving no room for the singular conclusion that it was the accused who, of the people who were on that road, caused the death of the deceased."

Adopting her earlier submissions at the no-case-to-answer stage, counsel re-emphasised that PW6 who may have seen the deceased with somebody else near Kaguku at about 8.00 p.m. on the material night, had not known the accused until he came to Court as a witness; and PW7 too, testified that although he had seen the accused walk along with the deceased on the material day, he had then not known the accused; and besides, PW7 had testified that he could only have identified the accused if he had had a chance – which he did not have – to hear him talk. Consequently, counsel urged that PW7's evidence that he had seen the accused on the evening of 7th September, 2004 should be ignored.

Mrs. Rashid submitted, correctly, with respect, that nobody had seen the accused cause any harm to the deceased; and that the circumstantial evidence on record was too flimsy to connect the accused with the offence. Learned counsel urged that the prosecution had not discharged the burden of proof beyond any reasonable doubt, and consequently the accused should be acquitted.

Summing-up to the Assessors

On 9th November, 2006, I summed up the case to the assessors as follows:

“I. WHAT IS EXPECTED OF ASSESSORS?”

- (1) Trial on a charge of murder, such as this one, is required by law to be conducted by a Judge with the assistance of assessors.
- (2) The task of the assessors is to assist the Judge in deciding on ***guilt*** or ***lack of guilt***.
- (3) Whether the accused is ***guilty*** or ***not guilty*** depends firstly on the *evidence given in Court*; and secondly, on the *applicable law*.

“II. WHAT IS THE CASE NOW BEFORE THE COURT?”

(1) The State’s case which has been heard in this Court is that:

“**Kamiro Chege**, on the night of 7th and 8th September, 2004 at Kaguku ‘C’ Village, Kaguku Sub-Location, Ithanga Location in Thika District within Central Province, murdered **Simon Ngaruiya Michong’o**.”

(2) Your role as assessors is to take a *lay person’s common-sense position*, looking with clear sights at the evidence which has been placed before the Court – and then tell the Court whether you believe **Kamiro Chege** the accused, is, or is not the person who caused the death of **Simon Ngaruiya Michong’o** on the night of 7th – 8th September, 2004.

“III. WHAT ARE THE POINTS OF LAW TO GUIDE THE ASSESSORS?”

(1) The points of law which I am about to state are **enough** to guide you; and there will be no need for you to seek out any further legal material. The focus of your contribution will rest on the *factual evidence* which has been placed before the Court in the form of *witness testimonies*.

(2) You recall that the charge brought against the accused is **murder**. Please note that causing the death of a person sometimes amounts to **murder**, but at other times it amounts to **manslaughter**. Now “manslaughter” is a lesser offence than “murder” and the punishment prescribed for it is lighter. But murder is a most serious offence, for which there is only one punishment, namely, **death**.

(3) Under the law, a person cannot be held to be guilty of murder unless he has **intentionally** caused death; or he has caused death out of malice; or he was so reckless he never cared about the deceased’s right to life, and in that blameworthy state of mind, caused the death of the deceased.

(4) Proof that a person killed another intentionally and he, thus, committed murder, can be done by *direct* evidence, i.e. the testimony of one who perceived the killing with one of his or her five senses – such as **hearing, seeing, or feeling**. But, proof of murder can also be quite properly done by way of **indirect, or circumstantial** evidence; and in such a case there is no person who has seen, heard or felt the killing of the deceased take place. Such indirect proof is achieved when witness testimony shows a set of different acts or omissions which, when joined together, clearly *point towards the hands of the accused, in the carrying out of the killing*.

(5) Whether proof of intentional killing of a person is done through *direct* or **circumstantial** evidence, it is the singular task of the State, i.e. the **Prosecution** to discharge it; the accused does not have to prove anything and may, indeed, even choose to remain silent; the **State** must prove **guilt**, leaving no doubts at all in your minds, that nobody other than the **accused**, has caused the death of the deceased. If there remains in your mind even a single doubt, as to who killed the deceased, then you must find the accused **Not Guilty**.

“IV. CONSIDERING THE TESTIMONIES OF WITNESSES GIVEN IN THIS COURT

(1) You have heard all the nine witnesses testify in Court. Now: do you believe these witnesses to have said the truth? Did any of them give untrue accounts?

(2) Which ones of the witnesses are the most crucial, in terms of getting to know who killed **Simon Ngaruiya Michong’o**? What did such important witnesses say, and does their evidence leave no doubts at all in your minds, that **Kamiro Chege** is the one who killed the deceased? If **yes**, then you must return a finding of **Guilty**; but if **no**, then you must return a finding of **Not Guilty**.

(3) Consider the following details in the testimonies of the several witnesses –

(i) PW1 **Paulina Njoki Ngaruiya** testified that the accused went to her home at 12.00 noon on 7th

September, 2004 seeking her husband who was that night found to have been killed;

(ii) PW5, **Ngugi Kanyari** testified that on the day the deceased died, the deceased and the accused had passed by his home at about 5.00 pm. while he was feeding his pigs; they were walking in the direction of Kaguku;

(iii) PW6, **Pastor Onesmus Kamau** testified that he had not known the accused until he came to Court and saw him in the dock, but that, at about 8.00 p.m. on 7th September, 2004 at Kaguku, he had met the deceased who was very drunk, in the company of the person who has been brought before the Court as the accused;

(iv) PW7, **Peter Nyoike Njuguna** testified that on 7th September, 2004 on the road leading to Kaguku, he had met the deceased twice, first at 3.00 p.m. – 4.00 p.m. and then again at 5.30 p.m., on each occasion in the company of the man now charged in Court as the accused; when PW7 saw the two at 5.30 p.m. the deceased appeared drunk and was unable to move; then on the following day, 8th September, 2004 PW7 learned that the deceased had been found dead on the road-side, in the neighbourhood of Kaguku;

(4) It is for certain, that none of the nine witnesses *personally* witnessed the killing of the deceased. And so, the assessors must give their verdict on the basis of **circumstantial evidence**;

(5) To the assessors I will put **one question**: Do the circumstances brought out in the testimonies of the nine witnesses, point clearly and unambiguously to *the accused* as the one who killed the deceased, on the night of 7th – 8th September, 2004?

“V. HOW ARE THE ASSESSORS TO EXPRESS THEIR VERDICT?”

It is required that each assessor shall render his or her *separate verdict* orally in Court. If, however, the three assessors all find themselves in agreement, then their verdict may be presented in Court by one of their number; but in that case, each of the other assessors must personally express his or her agreement with the common verdict.”

Assessors’ Verdict

The assessors sought adjournment for one hour to enable them to make their finding, in the light of the summing-up; and they returned with a *common verdict* which was read out by one assessor, **Ben Joel Oyioko** and concurred in by the other assessors. The decision of the assessors is as follows:

1. the deceased and the accused were friends, and so it was entirely normal that the accused should have visited the home of the deceased on the material day, looking for him.
2. Since the accused was looking to rely on the deceased as a witness in a land dispute, he needed the deceased, and could not have had the intention of taking his life.
3. No single witness testified to having perceived the accused killing the deceased.
4. PW6, **Pastor Onesmus Kamau** had not known the accused until he came to Court and saw him there; and when he claims to have seen the deceased in the company of the accused, it had been dark, and thus PW6 could easily have confused someone else for the accused.
5. PW6 when he says he saw the deceased in the company of the accused on the material night, had not sensed any danger to the life or safety of the deceased, for otherwise he could have helped, or even raised alarm.
6. The fact that PW7, **Peter Nyoike Njuguna** saw the deceased twice on the material day, on each

occasion in the company of the deceased, does not by and of itself prove that it is the accused who killed the deceased; for both were using a public thoroughfare which was rather heavily used by others on that day, and any one of those others could have killed the deceased.

The assessors have returned a unanimous verdict of ***not guilty***.

The Court's Verdict

I have myself carefully considered the evidence brought by the Prosecution, and I feel certain that no ***proof beyond reasonable doubt***, against the accused, has been achieved. I am in agreement with the assessors in their unanimous decision, and I have found their reasoning to be of definite merit.

Accordingly I hereby find the accused not guilty and acquit him of the charge laid against him. He shall forthwith be set at liberty, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of November, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndungu

For the Prosecution: Mr. Bifwoli

For the Defence: Mrs. Rashid