



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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.32 OF 2002**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MOSES KINYORO WAIRIMU ..... ACCUSED**

**SUMMING-UP**

The Accused before us is alleged to have murdered David Mukono Mwaura on 26th December, 2000 at Kangemi Village within Nairobi.

In law a person is said to have murdered when he, with malice aforethought, unlawfully kills another person.

The burden to prove beyond reasonable doubt that this accused committed this offence, squarely lies on the shoulders of the Prosecution. It does not shift to the accused person. There are some defences which need to be proved by the Accused on balance of probability. But this case does not involve this issue.

I may also explain briefly to you what constitutes malice aforethought. So far as the facts of this case are concerned, it shall suffice if I tell you that it is an intention to cause death or grievous harm and the knowledge that the injury inflicted could result in death of a person.

With this background I shall now summarize facts of this case. The prosecution called six witnesses to discharge the burden to prove this case against the Accused.

PW.1, Stephen Njuguna Njenga a cousin to the deceased only told the court, that on 26th December 2000 at about 10 p.m., his brother George Mugo came to his home and informed him that the deceased (who was staying with him) was beaten. He went to the place shown and found the deceased's head had been cut and an axe was on his right hand. The deceased died at the hospital after three days.

The matter was then reported. He also identified body of the deceased before Post Mortem was performed.

PW.2, Dr. Njue was permitted by the court to give evidence on and produce the Post Mortem Report conducted by Dr. Maundu.

As per the Post Mortem report prepared, and signed on 12th January, 2001 the cause of death was found to be head injury with associated brain haemorrhage. It was also opined that the cause of injury was a blunt weapon.

PW.3, George Mugo is key witness to the prosecution and his evidence should be carefully considered.

He recalled that on 26th December 2000 at around 9 p.m. he, David Mukono (deceased) and one Robert Njenga were going to the shopping centre they approached home of the Accused, he with other two persons (not identified) came out from the gate of his house and asked to identify themselves. This witness called the Accused by his name but they just started harassing them. He did not specify how they were harassed but stated that they hit the deceased with an axe and the deceased fell down. They all ran away in darkness. After shouts from them, neighbours gathered and the deceased was assisted to be taken to Kenyatta National Hospital where he was admitted in ICU. He said he could identify the accused in moonlight and the gate nearby had lights and that he knew the accused since childhood. Even after he called the Accused by name they continued harassing them. According to him the axe was on the deceased's head and he was sure that the Accused was the one who hit the deceased.

In cross-examination he stated that they were defending themselves and that they went to drink at the Shopping Centre. He reiterated it was the Accused who had the axe and that he saw it on him when he ran away. The fight according to him was on the road and it took less than one minute before the deceased was hit and that they did not talk (utter) anything while in fight.

Please note discrepancies in his own testimony as well as those with evidence of PW.4.

He also testified that when he took the police to the house of the Accused, he was not found and Accused's mother informed that she was not aware where he had gone.

PW.4, PC Alex Sako testified as to how the Accused was arrested on 20th July, 2001 at Kirwara Market on information received. The Accused then was collected by officers from Kabete Police Station on 25th July, 2001.

PW.5, Laban Mwaura was father to the deceased and identified his body before Post Mortem.

PW.6, Sgt. Philip Muia testified that on 28th December 2000 he received report from one Robert Njenga with an axe. He kept that axe as an exhibit and later passed it on to the investigating officer. He neither named him nor was the axe produced before the court.

You may also note this absence of this axe against testimony of PW.3 that he saw the Accused running away with the axe.

The said Robert Njenga was not brought before the court and the Learned State Counsel had stated that he was not traced by Police despite efforts having been made. The Prosecution thus closed its case.

The Accused gave sworn statement. He agreed that at about 9 p.m. he escorted his two friends out of the house who had been at his home since 5 p.m. According to him at a distance of about 8 meters from his gate they met three strong young persons who asked them to stop and sit down. Then they started beating them. In efforts to defend himself he tried to push one of them who fell down. He ran away and went home. Next day at 11 a.m. he went to his rural home and stayed there upto 20th July, 2001. On that he was arrested from his grandmother's shop.

In cross-examination he agreed he had stayed at Kangemi since childhood. He insisted they were attacked first by the other group which was acting as if they were Police Officers. When he screamed some neighbours came and one of them was Stephen (PW.1). He reiterated that he did not know anyone from those who attacked him. He also said that when he went back home his mother and two sisters were there. Of course none of them has been called as his witness. He also stated that he neither reported this incident of attack on him to the police nor to his family. He denied knowing PW.3 at all despite agreeing he has lived in Kangemi since he was a child.

You have heard submissions made by both counsel.

In short I shall state that the law as to identification is trite. If the prosecution case is mainly or substantially based on identification of one witness, I shall have to warn you to look into all the circumstances surrounding identification. There is also defence testimony. What you have to warn yourself is whether there was any chance of error in identifying. Here you shall have to also consider defence where the Accused had admitted to be at the place and that one person also fell down, while he was defending himself.

We do not have the axe which is the alleged murder weapon without any explanation from the prosecution. Once more at the end, I do remind you that the burden to prove the charge is on the prosecution.

The Accused has raised a defence known as self-defence. This defence needs to be shown on balance of probability by the Accused to be necessary and reasonable. That is the law. You shall have to consider whether the Accused in his sworn testimony, has shown that, and has created a doubt as to its probability in your mind.

With the above, I shall leave you to retire to arrive at your opinion which could be unanimous or otherwise.

**K.H. RAWAL**

**JUDGE**