



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**CRIMINAL CASE NO. 28 OF 2002**

**REPUBLIC .....**  
**PLAINTIFF**

**VERSUS**

- 1. JOSEPH GIKUNDA M’KIARA )**
  - 2. JOSEPH GIKUNDA M’KIARA) .....**
- APPLICANTS**

**JUDGMENT**

The accused, **Joseph Gikunda Nkiara** and **George Kinoti Nganga** are charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the offence are that on the 19<sup>th</sup> day of December, 2001 at Kahurura Forest in Nyeri District of the Central Province jointly murdered **David Miriti Kigundu**.

**PW1 Ignanua Rigichu Kigundu**, Kigundu, was told on 23<sup>rd</sup> December, 2002 by his brother-in-law Kaige that his son had died in Laikipia District near Nanyuki. On 25<sup>th</sup> December, 2001 he got information that his son’s body was at Nanyuki mortuary. He went and identified the body on 22<sup>nd</sup> March 2002. Later he took the body for burial. Four months later the body was exhumed and post-mortem was done at the grave side by **Dr. Njue (PW4)**.

**PW2 Benson Koome Thurania**, Koome, recalled that on 18<sup>th</sup> December, 2001 at about 5.00 p.m. **Miriti, Gikunda, Sharack and Githire** consumed about four (4) litres of changaa at his den. Miriti, the deceased, alone had taken changaa valued at Shs40/=, Gikunda Shs.35, Shadrack Shs.30/= and Githire Shs.20/=.

In the process youth wingers namely, **Kinoti (A1) Gikunda (A2), Kirimi, Muthoni, Bundi, Gituma and Wahia** arrested Miriti (deceased). The rest of the group escaped.

Koome was tied with a rope. After a while the youth wingers came with Miriti (deceased) Shadrack and Gikunda. The Chairman of Kahurura Forest elicited a bribe from Koome to the tune of Shs.10,000/= to secure his release.

Koome bargained his freedom up to Shs.3, 000/= . Gikunda (A2) was sent by the Chairman to tell Koome’s wife to pay before he (Koome) could be released.

In the course of their incarceration Miriti quarreled with Kinoti (A1) who hit Miriti with a branch of a

tree. It was dark so Koome did not see clearly what part of the body was hit and the size of the tree. But he remembers that Miriti (deceased) fell down. That the second accused kicked Miriti with shoes on the neck. At that point in time the chairman authorized the release of Koome.

On 20<sup>th</sup> December, 2002 at 7.30 p.m. in the evening one **Mwenda** told Koome that Miriti had died. Koome confirmed the fact of death. Later Koome wrote a statement.

**PW3 Perisina Kira Kigundu**, Perisina, the mother of deceased recalled 12<sup>th</sup> January, 2002 when the body of her son was exhumed for post mortem. She identified the body to (PW4) after exhumation.

**PW4, Dr. Moses Njue Gachoki**, Njue, performed postmortem on the body of Miriti. He fixed the date of death as 20<sup>th</sup> December, 2002. Exhumation was done on 22<sup>nd</sup> March, 2002. That was 3 months after the burial with the mother Perisina (PW3) identifying the body.

Dr. Njue's finding was that the body was decomposing hence he could not establish bruises. However, he was categorical that there was a visible bruise on the left ear. When he opened the body he confirmed presence of a depressed structure of the skull beneath the bruised area. He formed the opinion that the cause of death was a depressed fracture of the skull on the left side. He opined that the fracture could be as a result of a blow or a fall. He produced the post-mortem report as exhibit 1. Cross-examined by the defence counsel, he confessed that he did not rule out that the deceased had died of excessive changaa consumption in isolation of the depressed fracture.

**PW5, Shadrack Bundi**, Bundi, was in company of the chairman of the forest and Musa on a routine check up of changaa drinkers and brewers. They came across Koome (PW2) a brewer. Bundi's evidence is similar in material particulars to that of Koome. He confirmed that there was a quarrel between Kinoti (A2) and Miriti. That Kinoti hit deceased with a branch of a tree.. He also confirmed the fact of bribery of Musa by Koome.

The following day **Gikunda (A1)** called on him to say that deceased was still at the same place they left him. In company of 1<sup>st</sup> accused they went to the scene and tried to wake up Miriti in vain. They called on Musa the chairman with the news of death of Miriti. Later they reported the matter to Nanyuki Police Station. He confirmed that he was one of the people arrested in connection with the offence and was released after three (3) days. Eight other people were released along with Bundi. He confirmed that Kinoti (A2) had beaten deceased with a stick but did not see any injury on the body of the deceased. He equally confirmed that he neither saw the size of the stick used nor the part of the body hit.

**PW6, Moses Maitima Ngera**, Maitima, stays at Kangaita in Central Meru and is committee chairman of the forest. He summoned youth wingers on receiving information of brewing and drinking of changaa. That Benson Koome (PW2) was selling changaa in a jerrican of 10 litres. Maitima confirmed having "fined" Koome Shs.2, 400/= which fine was distributed in the sum of Shs.150/= each to the youth-wingers. He then left . The following day he was told by Bundi (PW3) that Miriti died. In company of Bundi he went to the scene and confirmed the fact of death. He reported the matter to Nanyuki Police Station. The body was collected on 20<sup>th</sup> December, 2002. He was arrested on 21<sup>st</sup> December, 2002 and remanded in custody for two (2) days. On the 3<sup>rd</sup> day he recorded a statement with the police.

**PW7 Zakayo Mwangi Mathai**, Mathai, a labourer at Nanyuki General Hospital received the body, kept it and released it on request. He was told by the police named **PC Charles Mwai** who brought the body that it was not a police case. On that account he confirmed the release order from the **MOH** but forgot to ask the MOH about burial permit with the consequence that the body was buried without a burial permit. He confirmed that if it was a police case, post-mortem was a must. Though the body was brought on 20<sup>th</sup> January, he wrote in the O.B. 23<sup>rd</sup> January, 2001.

**PW8, No.55491, PC Charles Mwai**, Mwai received a report of a death at Kahurura Forest. He booked the report in the O.B. In company of **PC Wairago** and **PC Marangu** they went to the scene and retrieved the body of a male African they were told was Miriti. He led the investigation team and took statements

and arrested the two accused persons.

He confirmed having arrested 10 – 12 people but zeroed in on the two accused.

At the close of the prosecution's case neither the prosecution nor the defence submitted on whether or not there was a prima facie case to warrant the accused being put on their defences.

Having considered the evidence adduced by the prosecution I put the accused on their defence.

The first accused gave unsworn statement He admitted having gone to the forest in company of Musa (DW6) and arrested brewers and consumers of changaa. Among them was Miriti, since deceased. He equally confirmed the fact of bribery to enable Musa to forego taking the brewer to the Forester. That on being set free Miriti drunk 10 litres of changaa alone and collapsed. The following day he heard that Miriti had died. Following the incident thirteen (13) youth wingers were arrested but eleven were released after two days.

The second accused equally gave unsworn statement. According to him Moses Maitima (PW6) asked him to accompany him to arrest changaa brewers and consumers at Kahurura Forest. They were thirteen (13) youth wingers in total. He admitted having partaken of part of the bribery of Shs.2, 400/=. His position was that after Moses (PW6) released the consumers, Miriti drank 10 litres of changaa in a plastic container. The following day he heard that Miriti had died.

At the close of the defence case I summed up the case to the assessors who returned a verdict of not guilty.

I have carefully analysed the evidence for the prosecution and that of the defence. Having done so I take the view that there was a drinking spree at the Kahurura Forest. Musa (PW6) as the committee chairman of the forest gathered the youth wingers who arrested several people including the deceased. After the brewer, Koome (PW2) was bribed; the arrested persons were left to finish up their drink. It would appear that a quarrel developed between Miriti (A2) and the deceased which culminated in Kinoti (A2) hitting the deceased with a stick. There is conflicting evidence of whether it was a stick or a branch of a tree used by Kinoti. Be that as it may Miriti and others continued drinking and it would appear they drunk heavily until Kinoti collapsed and was later on found dead at the same spot the following day.

Investigations were carried out which culminated in the arrest of the accused persons and the release of eleven (11) other youth wingers who were part of the operation exercise.

Unfortunately a post-mortem was not performed on the body of the deceased before burial thereby necessitating an exhumation three months later when the body was already decomposed.

Decomposition notwithstanding, Dr. Njue made a finding that he could not establish bruises except for one on the left ear. However, when he (Dr Njue) opened up the body he formed the opinion that the cause of death was due to a depressed fracture of the skull on the left side. He opined that the fracture could be as a result of a blow or a fall. The post-mortem report was produced as an exhibit in these proceedings. Cross-examined by the defence counsel he confirmed that he could not rule out that the deceased had died of excessive changaa consumption.

I am alive to the law that accused person has no burden to prove his innocence. The burden of proof in a criminal case is throughout on the prosecution. I am equally alive to the law that if there is reasonable doubt the benefit of the same should be given to the accused.

On the evidence of Dr. Njue (PW4), it is clear to me that the body had decomposed at the time of the post-mortem and clinical analysis of things like stomach content was not possible. It is also settled law and forensic science that in coming to a finding of cause of death a doctor must rule out all the natural causes of death before making his findings.

By his own admission, Dr. Njue did not rule out all the natural causes of death before making his finding as to the cause. In addition Dr. Njue also confirmed that the fracture to the skull could have been as a result of a fall or a blow to the head.

There is enough evidence that the group comprising deceased were engaged in serious changaa drinking. There is evidence that deceased consumed 10 litres of changaa alone and collapsed.

Taking all this evidence into account it is possible that the collapsing of the deceased which is a fall, is consistent with the fracture of the skull and could have been as a result of a fall or a blow to the head.

The foregoing apart. It is of paramount importance also to note that the body was taken from the hospital without post-mortem being done. There is no evidence of how the body was handled from the hospital to the burial place. It is probable that the fracture could have been occasioned on the way or at the time of the burial. Anything could have happened to the body within the 3 months it was in the grave. The fracture could also have been occasioned at the time of the exhumation.

Accordingly I find that there is reasonable doubt which I resolve in favour of the accused person.

In the result, I acquit both accused of the offence of murder. The accused are set free forthwith under the provisions of section 306(2) of the Criminal Procedure Code unless lawfully held for some other lawful cause.

***DATED at NAIROBI this 17<sup>th</sup> day of JANUARY, 2005.***

**N. R. O. OMBIJA,**

**JUDGE.**