



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
Criminal Case 16 of 2002**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHARLES MUNGAI NDUNGU.....ACCUSED**

**J U D G M E N T**

The accused, Charles Mungai Ndungu, is charged with the offence of Murder.

The charge is that on the 18th day of July, 2001 at Githunguri Trading Centre in Maragua District of the Central Province, he murdered one Stephen Mwaura Machia. The Prosecution was led by Mrs. Murungi, State Counsel, WHO called eight witnesses.

The facts of the case from the evidence on the record, can be summarized from the witnesses who included Pw4, Peter Muiruri Gachema, Pw5, Harun Waweru, Pw6, David Kiarie Githinji, Pw7, Phillip Maina Wachira and Pw8, No.51065, P.C. Maina.

Evidence also came from Pw1, Stephen Wanyoike Mbuthia, Pw2, Lucy Wambui Njenga and Pw3, Dr. George Waiganjo.

Pw4, Peter Muiruri Gachema testified that on 18th July, 1991 he and the accused Charles Mungai Ndungu and a third person known as Kigege, had been taking chang'aa at home before they decided to go to Githunguri Trading Centre at 6.00 p.m. They arrived at Kanyua Bar while drunk. At the bar they found Pw2, Lucy Wambui Njenga serving customers and they noisily demanded to be served as well. Pw2, noting that the three were drunk, noisy and disorderly, decided not to serve them in that condition. As they continued to disturb other customers, they were advised to leave the bar. In that bar was the deceased person, Stephen Mwaura Machia, nicknamed "mrefu". The deceased had apparently been drinking at that bar since morning of that day. He had left the bar at about 11.a.m. but returned at about 2.00 p.m. when he stayed on until Pw4 and his colleagues found him there at 6.00 p.m. He was himself quite drunk at 6.00 p.m. It was Pw4's testimony that when they were refused service at Kanyua Bar, and were ordered out of the bar by one Kigege and another, the deceased exchanged a few abusive or quarrelsome words with Pw4, Peter Muiruri Gachema. Pw4, also testified that at that bar he saw the accused person carrying a knife at his waist. He also testified that he saw the knife being recovered from the house of the accused later the same night when the police took him to the accused's house. He identified the knife as exhibit 1 in this case. It was his further evidence that when they were chased out of Kanyua Bar they entered another bar called Mkathe Bar in the same Market. There they were served with more Changaa which they drunk before they decided to leave for home. Their route home was by the gate of Githunguri Girls Secondary School. The school was said to be about 300 metres from the Githunguri Trading Centre. Pw4, the accused and a third person, walked to the school gate where they stopped. They were apparently unhappy that they had not been properly treated at Kanyua Bar and they blamed Pw2, Lucy Wambui Njenga, Pw5, Harun Waweru and the deceased, Stephen Mwaura for it. They stopped at

the school to wait for those who refused to serve them with beer. They were aware that the people would be passing along the same route as they walked home the same evening. It was Pw4 further testimony, that at about 8.30 p.m., Kigege, Mrefu and a third person, probably Pw5, Waweru came along as expected. The night according to Pw4, was dark. As soon as the three came by a fight started between the deceased's group of three on the one hand and the accused's group of two on the other. Pw4 stated that he fought with the deceased and the accused fought with a third person whom he did not identify. Kigege who was present in the deceased's company did not fight with anybody. Pw4 testified also that as he fought with the deceased Stephen Mwaura, also nicknamed "Mrefu", the latter fell down and when he stood up and picked a stone, the witness ran away. It was as he ran away that he heard someone cry from the other side of the school gate stating that he had been stabbed. Pw4 did not recognize whose voice it was. He denied fighting or injuring the deceased although he admitted that he fought with "Mrefu". Pw4 concluded his evidence by saying that after the fight he went home but apparently through the house of the accused where he met the accused. He asked the accused how the accused escaped from the fight and accused told him that he had stabbed the person he was fighting using a knife. He further stated that he had then left for his own house after which the accused followed him there before the accused went back to his own house. Later Pw7, Assistant Chief Phillip Wachira in company of a police officer, woke Pw4 up and ordered him to escort them to the accused person's house. Pw4 escorted them there but remained in the police Land Rover as the Assistant Chief and the Police Officer entered the accused's house. Soon afterwards he saw them come out with a knife, exhibit 1, as well as the accused. He further testified that when the accused went to Pw4's house earlier, he was not carrying the knife but he identified the knife, when he saw it with the police officer the same night, as the knife he had seen being carried by the accused at Kanyua Bar earlier the same evening. Pw4 was categorical that he did not see the accused fight with the deceased nor did he see the person who stabbed the deceased.

More evidence came from Pw5, Harun Waweru. That evening he was helping Pw2 Lucy Wambui at Kanyua Bar. He confirmed that among the people who visited the bar was Charles Mungai the accused, Peter Muiruri Gachema Pw4, Kiarie Githenji Pw6, and the deceased, Stephen Mwaura. He noticed the accused arrive, accompanied by Peter Muiruri Gachema. He noticed also that they were drunk as they demanded to be served with beer and because they were unruly, he supported Wambui's decision that they should not be served. He helped persuade them to leave the bar and when the accused and Peter Muiruri had left, Kiarie Githenji Pw6 and the deceased were left in the bar. When Wambui soon after realized that they were also drunk he stopped serving them and they were forced to leave for their homes. They left the bar following the route passing by Githunguri Girls School which was the route earlier followed by the accused and Muiruri.

At the Githunguri Girls School they were being awaited by the accused, Muiruri and a third person not identified. When the two groups met, Waweru testified, they started fighting over the issue that the accused's group had been denied service by the deceased's group at Kanyua Bar. According to Harun Waweru, Muiruri hit Kiarie Githenji with a stick which brought Kiarie to the ground. He then ran away followed by the accused towards the other side of the school gate. The deceased who had been fighting with Muiruri is then said to have chased after Muiruri and the accused. It was Waweru's further evidence that within only a short time he heard someone scream out that he had been stabbed. The scream came from the direction to which the accused and Muiruri had ran followed by the deceased. He could however identify that the person who had screamed was the deceased "Mrefu". He however did not immediately go to the spot where "Mrefu" had screamed from but proceeded to help Kiarie who was still on the ground where he had fallen. He assisted him to the bar at the market where he reported that they had been attacked and Kiarie had been injured while Stephen Mwaura the deceased had also been stabbed. Waweru also further testified that it was then he returned to where the deceased lay. He observed that the deceased was bleeding from the chest. There were many people at the spot at that moment. He could see these things despite that it was a dark night. He used some poor lighting from the Githunguri Girls School. Stephen Mwaura was apparently dead by then. As they were still at the spot the police came, took the body of the deceased and also took him to lead them to the house of Peter Muiruri at the area called the Scheme. The police took him because the police gathered information at the scene of crime that he Waweru, had been in company of the accused and Peter Muiruri. The police traveled to the Scheme in the police Landrover.

At the Scheme he was left in the Landrover as the police collected Peter Muiruri and the accused Charles Mungai. He confirmed that when the police collected the two to the landrover, he saw the police carrying the knife, exhibit 1 which the police claimed they had recovered in the house of the accused. At first Waweru claimed that he had seen the accused have and carry the knife as they were in Kanyua Bar but on cross-examination he changed his version and denied seeing the knife before the time when he saw the police claim that they had picked it in the accused's house. He admitted that he and all the others at the bar including the accused, Waweru and Muiruri, were indeed fairly drunk during that evening.

David Kiarie Githinji, Pw6 was in Kanyua Bar the fateful evening. He witnessed the accused, Charles Mungai and Peter Muiruru being refused service because they came while already drunk. He noticed that the deceased Stephen Mwaura, and Pw5 Harun Waweru were present in Kanyua Bar and he witnessed accused and Muiruri leave the bar. Sometime later, Kiarie in company of Waweru and the deceased, left Kanyua Bar for their home. They followed the road passing by Githunguri Girls school towards Kabati. Near the School gate, they met with the accused and Muiruri. It was Kiarie's testimony that accused attacked him by hitting him with a stick which fell him to the ground. When Waweru was trying to help him, he heard a scream from the direction of Githunguri Girls School shortly after the deceased had tried to chase after the accused and Muiruri. When later Kiarie stood up and went to the spot where the scream had come from, he found that it was the deceased Stephen Mwaura who had been stabbed. There were many people there already. He stayed at the spot until the Assistant Chief, Phillip Maina, Pw7 came and later he was joined by the police. Kiarie and Waweru were taken by the police in the police Landrover to a place called Scheme where he was left in the Landrover as the police and Assistant Chief went into the houses of Peter Muiruri and the accused. When the police and Assistant Chief came back to the Landrover, they had arrested Muiruri and the accused. Kiarie denied seeing the police come with the knife, exh.1 to the vehicle, thus differing in this aspect with other prosecution witnesses.

Phillip Maina, Pw7's testimony was to the effect that he was in a Matatu traveling home that fateful evening when he saw a group of people at the Githunguri Girls School. As the Assistant Chief of the area, he decided to find out what the problem was. He alighted from the matatu. That is when he saw the body of the deceased who he knew well Lying on his back. He noticed a stab wound on the left chest which had profusely bled. He soon called the Kabati Police. In the meantime he collected information to the effect that the deceased was earlier in the company of Muiruri, Charles Mungai, Waweru and David Kiarie. The last two were at the scene of crime when the police arrived. The police and the Assistant Chief decided to take Waweru and Kiarie to lead them to the homes of Muiruri and Charles Mungai who had from the information gathered there, become the suspects of deceased's death. It was Assistant Chief Maina's further evidence that he and the police, led by Kiarie and Waweru to the house of Muiruri, at Matutoini Scheme and arrested Waweru who led them to the house of Charles Mungai. They searched the house of Charles Mungai and found the knife exhibit 1 in a carton box under his bed. The knife had a wet bloodstain when they got it. They arrested him and the police put him in their custody as suspect to deceased's death.

The next evidence to be considered is that of No.51065, Police Constable Maina who at the material time was attached to Kabati Police Station. On 18.7.2001 at about 9.00 p.m. he was on duty when he got a report on telephone from Pw7, Assistant Chief Phillip Maina about a death that occurred at Githunguri Girls School. He joined Inspector Kiplangat and P.C. Mulwa in a police Landrover to Githunguri Girls School where they found and collected the body of the deceased, Stephen Mwaura Machia. They gathered information on the scene of crime as a result of which they took one Kiarie and Waweru into their custody. These two led the police to Matutoini Scheme Village where they pointed out the house of the accused Charles Mungai. It was Pc Maina's further evidence that when they searched the said Charles Mungai's house, they discovered a knife in a paper carton under Mungai's bed. The knife had a wet bloodstain at its head's tip. They as a result arrested him and took him to Kabati Police Station.

They also arrested Pw4 Muiruri and put the two in police cells. The body of the deceased was in the same night escorted to Muranga District Hospital. On 26th July, 2001 Pc Maina received a blood sample from the body of the deceased, during a post mortem carried out later for the purpose of having some tests done on it. He also received the deceased's blood stained shirt and accused's trouser, for similar tests. Pc Maina then filled an exhibits memo form in respect to the above exhibits on 27.7.2001 and escorted the

said exhibits and the knife exhibit 1 to the Government Chemist for tests. After a while, Pc Maina received the Government Chemist Report back and kept it in his own custody. He produced the report in evidence as exhibit 3. He was allowed to read the report to the court since the defence did not object to it. The effect of the Chemist Report was that the DNA profiles generated from the bloodstains on the knife, exhibit 'B' and those from the deceased's shirt exhibit 'C' matched those of the deceased's blood.

Other evidence came from Pw1 Stephen Wanyoike Mbuthia who was the brother of the deceased. He got information on 8.7.2001 evening that his brother the deceased had been stabbed to death near Githungri Girls School. He went there and was there when the Assistant Chief Pw7, called the police and when the police came and carried away the body of the deceased. On 26.7.2001 he went to Muranga District Hospital where he identified the body of Stephen Mwaura Machie to Dr. Waigancho before the latter performed a postmortem on the body.

Lucy Wambui Njenga who was the person selling beer in Wakanyua Bar on the relevant night confirmed the evidence given by Pw4 & Pw5 that she refused the accused and Pw4, Muiruri, service because they were drunk and unruly. She confirmed further that they left her bar immediately but could not say where they went. Later the deceased, Kiarie and Waweru also left the bar for home but all she got to know is that the latter group were going to follow the same road followed by the accused and Muiruri.

Dr. George Waiganjo, Pw3 performed the post mortem on the body of the deceased Stephen Mwaura Machie. On a request to do so from Kabati Police Station. He found the clothes worn to be bloodstained. There was only one stab wound in the fourth intercostals space, which had penetrated into the right ventricles of the heart. He noticed much external bleeding. He made an opinion that the cause of death was haemorrhage secondary to the penetrating stab wound in the right ventricle. He produced in evidence the postmortem report which he had filled. He remembered that the body had been identified to him by Stephen Wanyoike Mbuthia and another. The Doctor was a Government Pathologist and had performed many postmortems. He recalled that he had taken out blood sample from the deceased's body for more tests and handed them to the investigating officer for further tests.

The above was the evidence upon which the accused was put on his defence. He gave sworn evidence stating that on 18.7.2001 he worked at the shamba in company of Peter Muiruri, Pw4, until 2.00 p.m. when they left for a meal before he and Muiruri went to Githunguri Market at about 6.00 p.m. They had started drinking a local brew called "karobo" after eating lunch meal and by the time they went to the market they were already drunk. When he and Muiruri arrived at Kanyua Bar where Wambui Pw2 was the bar tender, she refused to serve them because they were drunk. Wambui, Stephen Mwaura otherwise nicknamed "Mrefu" and another called "Kigege" are the people who chased them out of the bar. They went to the next bar called Mkathe where they were served and drunk more "Karobo" beer. At about 7.30 p.m. accused, Muiruri and a third person left Mkathe Bar for home past Githunguri Girls School where they stopped and decided to wait for those who had refused to serve them at Kanyua Bar and who had also chased them out of the bar. It was as they waited there that the deceased arrived there and held Muiruri by the collar in a fight. At that moment a third person hit the accused from behind and when the accused turned, he began fighting and struggling with the third person. It was the accused's further testimony that he was hit with a stick and felled down before he picked the same stick and hit his attacker who also fell down. That is when the accused ran away. They had fought at a dark spot and he had no opportunity to recognize the person he had fought with. Muiruri called his name as accused was running away ahead of Githunguri Girls School. When he stopped running, Muiruri told him that he, Muiruri, had managed to run away from the deceased with whom he was fighting after hitting and felling Muiruri to the ground. Accused claimed however that as Muiruri and the deceased were fighting, he had heard someone scream that he had been stabbed and that the scream came from where Muiruri and deceased were fighting. After exchanging the above information, it was the accused's further testimony that they went home at the Scheme Village where each of them went to his own house to sleep. The accused's house was about a kilometre away from Muiruri's . At about 11.00 p.m. people claiming to be the police went to his house but he refused to open the door to them until they had to bring the accused's father. The accused further testified that when he finally opened up, the police and the Assistant Chief began harassing him telling him to produce the knife he had used to stab someone but he denied stabbing anyone and further denied that he had any knife. They then made a thorough search of his house but

found no knife. They tied him and took him out where he saw Muiruri and his brother tied together in the police landrover. Inside the landrover he saw "Mrefu's" dead body. That by the time Muiruri and his brother were later released at that place, the knife exhibit 2 did not appear or feature anywhere. He was finally driven to the police station where he was later charged with this offence. The accused was categorical that Muiruri who was his friend, lied about seeing the knife in court with the accused that evening at the bar.

He also said that the Assistant Chief and Pc Maina lied about the said knife being found in accused's house. He denied ever seeing the said knife before seeing it in court. He also recalled that he did not fight with deceased that night, nor did he stab him as claimed. What he remembers well is that he and those others were drunk that night. He cannot understand why Muiruri lied against him and yet he was his friend who also was the person who started the fight between the two groups that night. He was certain that the knife exhibit 1 was not recovered in his house when he was arrested.

It was submitted by State that the accused did not deny being at the scene of crime at the material time but admitted having a fight between the accused's group and that of the deceased. The State also stressed the fact that the knife believed to have been used to stab the deceased was recovered from the house of the accused by the Pw7 and Pw8 after a thorough search. They reminded the court that the knife belonged to the accused and Pw4 had noticed it early in the relevant evening on the accused's waist. Later, asserted the State, the blood on the knife was proved to be of the same group as that of the deceased, proving that the knife had been used to stab the deceased.

On the other hand Mr. Marube for the accused submitted that the accused did not stab the deceased. Why? Because he was not seen by any of the witnesses doing so.

That the accused on the evidence in the record, did not, that night, fight with the deceased. That the knife produced in court as exhibit and claimed to belong to the accused did not belong to the accused and was not recovered in accused's house as claimed by the Assistant Chief and Pc Maina, who therefore really lied against the accused about it. Mr. Marube therefore asserted that Assistant Chief and Pc Maina framed the accused in relation to the knife exhibit 2 and should not be believed. For these reasons, the prosecution, he submitted, failed to prove the case against the accused beyond a reasonable doubt and accused should be given the benefit of the doubt. The three assessors each concluded that the accused is the person who stabbed the deceased to death but the killing amounted not to murder but manslaughter due to the fact the accused like all the others, was drunk and the killing took place during a fight.

I have carefully considered the prosecution evidence in the face of the accused's defence. There is evidence, that he and Muiruri went to Kanyua Bar that evening and were denied service by the barmaid Wambui. The reason for refusal of service is conceded by all sides, including the accused, to be the fact that they were already drunk.

The witnesses and the accused also agree that he and Muiruri awaited for the deceased, Kiarie and Waweru, at or near the Githunguri Girls School gate. It was also common ground that the deceased, Kiarie, and Waweru on the one side fought with the accused and Muiruri on the other side. There is further evidence admitted by the accused as well that towards the end of the fight when the accused and Muiruri were running away, someone was heard screaming that he had been stabbed and this person was soon after identified as the deceased. It is also unanimous that nobody saw the person who stabbed the deceased. It could have been Pw4, Peter Muiruri because there is evidence that he was the one who actually fought with deceased that night. It could on the other hand have been the accused or again Muiruri because both ran away along the road from the school toward Matutoini and the deceased was seen chasing them along soon after they took off. The evidence that is most crucial in this case however, is the evidence of the recovery of the knife, exhibit 1. Pw7 and Pw8 who are the Assistant Chief and the Investigating Police Officer each testified that when they were led to the accused's house by Muiruri, that night. They made a thorough search of the house and ended up finding a knife, exhibit 1, in a paper carton under the accused's bed. They each said that on looking at the knife they noticed that it contained wet bloodstains on its tip, which raised their suspicion that it may have been used to stab the deceased. They collected the knife and later Pw8 sent it to the Government Chemist together with the deceased's and

accused's blood samples for analysis. It was the finding of the Government Chemist as contained in his Report, exhibit 3, that the DNA profiles generated from the blood stains on the knife exhibit 1 and those from the deceased's shirt, (which also had been sent to him), matched those from the deceased blood. The DNA profiles from the bloodstains from the accused's T-shirt matched the blood of the accused. This means that the bloodstains found on the knife were those of the deceased. By that conclusion the prosecution argued that circumstantially the prosecution evidence produced before the court, should imperatively convince it to find that it was the accused and no one else that stabbed the deceased to death. The question then is whether that should be so?

The court has carefully considered the prosecution evidence. It has also considered the accused's version of the story. The accused admits that he took part in the fight near Githunguri Girls School gate before he ran away. He admits the evidence that as he ran away he heard somebody scream that he had been stabbed. He denied identifying the person who screamed. He also categorically denied that he was the person who stabbed the one who screamed. Accused testimony however shows that thereafter he and Muiruri went to their village in Matutoini Scheme Village before they parted, each to his house to sleep. The story could have ended there if Pw7 and Pw8 did not follow the two to their village and recover a knife, exhibit 1 in the house of the accused as earlier stated. Pw7 Assistant Chief Phillip Maina Wachira testified that he and Pw8, P.C. Maina searched accused's house that evening. They recovered a knife in a paper carton under the accused's bed and noticed that it was somewhat wet with blood at the tip of it. They suspected that it may have been used to stab the deceased and P.C. Maina sent it to the Government Chemist for tests and analysis. The accused of course denied categorically that the knife exhibit 1, was found in his house as testified by P.C. Maina and Assistant Chief Maina.

I have considered this piece of evidence. I have taken into account the fact that the accused was at the scene where the deceased was stabbed that evening. There is no doubt that the accused had a motive to injure the deceased. There had been bad blood between accused's group and deceased's group the whole evening. The deceased was seen chasing or running after the accused and Muiruri immediately the two started to run away from the scene of the fight. It is probable that deceased caught up with the accused and the accused stabbed him in continuation of the fight.

I have come to the above conclusion because of the fact that Muiruri who was accused's friend categorically testified that when he ran away from the scene of the fight he met accused at the accused's house and accused revealed that he had escaped by stabbing someone with a knife. The accused in his defence explained this meeting differently. He stated that as he ran away from the scene of the fight he was called by Muiruri who then asked accused what had happened and he had explained that he had hit the person he had been fighting with. I believe the evidence of Muiruri that the accused had told him that he had escaped from the fight by stabbing someone. I have also considered the evidence of P.C. Maina and Assistant Chief Maina about the recovery of the knife, exhibit 1 and this is in spite of the accused's denial that the knife was not recovered inside his house. I find no reason why the two would concoct a frame-up against the accused. If P.C. Maina was not friendly with the accused as the accused claimed, the Assistant Chief had no grudge against the accused that would make him frame-up the accused. There is also the evidence of Muiruri that he had earlier seen the accused carrying the knife exhibit 1 which the witness identified by a clear description in his evidence. Further more I do not believe the accused's testimony about the recovery of knife because, apart from Muiruri who had seen the accused carrying the knife at Kanyua Bar, he again later saw P.C. Maina carrying it at the house of the accused when he and Assistant Chief Maina claimed that they had recovered it at the accused's house.

It can also be recalled that the accused in his defence claimed that he refused to open his door to P.C. Maina and Assistant Chief Maina until accused's father had to be called to intervene. While the accused was not obliged to call his father to testify in his support, it could help his defence to call him to support him on his stand that the knife was not recovered from accused's house that night when accused himself was arrested. All these pieces of evidence in my finding add up to one main conclusion: that the knife which later turned out to be stained with the blood of the deceased was found in a paper carton under the accused's bed. It must have been taken there from the scene where it was used to stab the accused by someone who was at the scene of the fight. All evidence place the accused and Muiruri at that scene, among other people. There is no evidence that, apart from the accused, anyone else who was at the scene

of fighting entered accused's house that evening. Not even Muiruri who walked home together with the accused is said to have entered accused. Had Muiruri done so, a doubt would arise as to whether he could have deliberately planted the knife where it was found. This leaves the court with only one probable conclusion: that it was the accused person who carried the knife from the scene of crime and hid it in a carton under his own bed in his own house where PC Maina and Assistant Chief Maina recovered it from. It will be observed, as earlier pointed out, that no one saw the accused stab the deceased. The evidence that has led me to come to the conclusion that it was the accused who stabbed the deceased to death arises from purely circumstantial evidence. Such is evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact or facts in issue. Such circumstances must of necessity be of a conclusive nature and tendency and should be such as exclude every other hypothesis except the one proposed to be proved. In this case the hypothesis would be that the accused, Charles Mungai Ndungu on the night in question at about 8.30 p.m. or thereabouts, stabbed to death the deceased Stephen Mwaura Machie nicknamed "Mrefu".

If the chain of events would lead to any other reasonable conclusion consistent with the innocence of the accused person, then such is not watertight and such other reasonable conclusion would give the accused person the benefit of the doubt available to the accused in criminal cases. The circumstantial evidence that convicts the accused, is one that shows that within human probability no one else other than the accused person committed the acts that are charged.

In this case the accused is charged with the act of stabbing the deceased and inflicting on him the injury that caused his death. There is undisputed evidence that he was at or near the scene of crime at the material time. He had, a short time before, been seen carrying a knife which was later recovered from a carton under his bed with wet blood stains and immediately identified to be the knife accused was carrying on his waist, earlier, in the same evening. There was no evidence led that accused lived with anyone else in the said house. There was no evidence either that anybody else who may have been at the scene of crime visited accused's house and had an opportunity to plant the knife there. There is evidence that the DNA profiles generated from the blood stains found on the knife matched with those generated from the blood of the deceased, leading to the reasonable and probable conclusion that it was the said knife that was used to stab the deceased to death. The above pieces of circumstantial evidence in my finding, lead me to the only probable and irresistible conclusion that it was the accused person, and no one else, that stabbed the deceased to death on the night of 18.7.2001 and who transported the knife used to his own house where he hid it. I accordingly find the accused responsible for the death of the deceased.

The only other issue which this court must resolve is whether or not the charge of murder has been proved against the accused beyond a reasonable doubt?

The assessors believed and declared that the accused had no malice aforethought as defined under section 203 of the penal code. They therefore expressed the opinion that the accused should be convicted of the lesser charge of manslaughter. I have considered this issue. It is my finding that there is more than sufficient evidence on the record that the accused had been drinking a local strong brew called "Karobo" immediately he left working at the shamba at about 2.00 p.m. He drunk it, accompanied by Muiruri Pw4, until 6.00 p.m. when they went to Githunguri market. Although they were refused service at Kanyua Bar, they were served with the same brew at Mkathe Bar until 8.00 p.m. or thereabouts when they started going home. By the time they started to fight near Githunguri Girls School, the accused and the deceased and the others, are shown to still have been under severe influence of drink. Their conduct all together from the evidence before the court, shows that all of them, including the accused, were incapable of forming the malice aforethought as defined under Section 203 of the Penal Code. In fact there was unchallenged evidence from the accused himself that he did not recognize the person he first engaged in a fight. There is evidence on the record also that the accused and Pw4 Muiruri decided to wait for the deceased and the others who they claimed refused to serve them. But at this moment in time and taking into account of the events of that day, it can be safely concluded that they were still under the influence of drink. Furthermore there is the evidence that the accused did not know the deceased before that day. No grudge or bad blood can be said to have existed between him and the deceased to give the accused grounds to plan to hurt the deceased. Even at the scene where the fight took place near Githunguri Girls School, even the prosecution witnesses testified that the accused did not personally fight with the

deceased who fought with Muiruri. Also, little is known as to how exactly the accused stabbed the deceased. All there is in evidence is that the deceased chased the accused and Muiruri. What happened when he caught up with accused? Who restarted the fight? Did accused only respond to the deceased's possible provocation, if any there was? All these need answers to enable the court to read or find malice aforethought from the accused. No such answers are available. For these reasons and for the reason that the accused was incapable of forming the necessary malice aforethought, this court has no alternative but find that his act amounts only to manslaughter. I so find.

**Dated and delivered at Nairobi this 12th day of May, 2005**

**D. A.ONYANCHA**

**J U D G E**