



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

**AT MERU**

**CRIMINAL CASE 55 OF 2001**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID NJERU MUKURU ..... ACCUSED**

**JUDGMENT OF THE COURT**

David Njeru Mukuru, the accused herein faces one count of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of the offence being that on the night of 6.4.2001 at Mubukuro Village, Mugwe Location of Meru south District of the Eastern Province murdered Francis Mukuru Rubas. The accused was originally charged with one Mugambi Mukuru now deceased. The accused has denied the charge against him. From the facts, both the accused his co-accused who is since deceased are sons to the deceased, from the same father and same mother.

The prosecution called six (6) witnesses. PWI, Halima Nasir alias Halima Rajab alias Ciambaka testified that she was the 2nd wife of the deceased Francis Mukuru Rubas. That the deceased had another wife by the name Jane Mukuru and that the said Jane Mukuru was the mother of the accused among other children. PWI testified that on 6.4.2001 at about 8.00pm, she was in her house in the company of the deceased and that the two of them were threshing maize. Then the accused, whom the witness knew well both by voice and physical appearance went to the house. The accused stood at the door without entering the house and informed the deceased that his (the deceased's) mother known as Felice was sick and needed assistance go to the hospital. PWI testified further that on hearing the information, the deceased asked the accused to go and call his older brother Gitari (PW2) so that together with the deceased, they could go and take Felice to hospital. The accused then went away as requested by the deceased.

A while later, according to PWI, the accused returned, accompanied by somebody else. The accused and the other person did not enter the house but PWI testified that she heard the voice of a female asking the deceased why he had not gone to take his mother to hospital. The deceased and PWI left the house at that juncture and on reaching outside they met somebody who was covered from head to toe in lessos. The person then led the way followed by PWI and then the deceased. Before reaching Felice's place, and just as the three got near the river the accused met them and cut the deceased with a panga. That before the accused cut the deceased with a panga, the accused removed the lessos from around his body, thereby enabling PWI to recognize him as the deceased's assailant. PWI testified further that there was bright moonlight that enabled her to see and recognize the accused that night. PWI went on to testify that after the accused cut the deceased, the deceased fell down while making some noises. That at that time, one Mugambi with whom the accused was originally jointly charged also came to the scene and joined the accused in cutting the deceased. PWI said she could identify Mugambi because of the bright moonlight and that it was also easy to recognize Mugambi because she knew him before as one of the sons of the

deceased.

On seeing what was happening PWI went and hid herself in a nearby tea bush and it took her one hour from the time the deceased was first hit to the time she went away to hide in the tea bushes. PWI stated that during that one hour, the accused and his brother Mugambi remained at the scene of the attack. Then suddenly, she saw the accused and Mugambi running towards where she was hiding. She therefore pushed herself deeper into the tea bushes and crawled towards her neighbour's house, one Gitonga PW3. At the home of Gitonga, PWI asked him to escort her to Gitari's house (PW2) so that she could inform Gitari about the attack on the deceased by the accused and Mugambi. Gitonga obliged and escorted PWI to Gitari's home and together they went to the scene where they found the deceased lying down. At the scene, they found the deceased had been so badly cut across the mouth that he could hardly talk. PWI testified that the deceased was [www.kenyalaw.org](http://www.kenyalaw.org) Republic v David Njeru Mukuru [2005] eKLR 3 also found to have been cut all over the body. Eventually the deceased was taken home as they made arrangements to take him to hospital and to make a report to the police. The deceased was taken to hospital but they first of all passed through Chuka Police Station to make a report and to ask for a P3 form. The deceased died at Embu provincial General Hospital while undergoing treatment. Mr. Ondieki for the accused cross-examined PWI at length. From that cross examination, PWI gave the following additional evidence. That when they went to the police station on the night of the attack, she gave the names of the deceased's attackers to the police. That on that night of the attack, none of her own children was in the house with them. PWI stated that she identified the voice that called out to the deceased as that of David Njeru, the accused and that the person she saw dressed in lessos when she and the deceased went out to start their journey to Felice's home was actually the deceased. That as they walked along, no one was talking to the other and that before they started walking and before the attack, PWI did not see the face of the person who was leading them. That just before the attack, they found some logs lying across the path and that when the accused cut the deceased he also asked him to now curse him (accused). That when PWI recorded her statement with the police, she was too distraught to remember everything, although she told the police that the accused had used a panga to cut the deceased. She further stated that when she saw Mugambi coming towards her she had to run for her life. On further cross-examination, PWI denied that she had told the police she could not identify the voice of the person who called her and the deceased, and stated that the omission of that fact from her statement to the police was the work of the police who had even tried to influence her to change her statement so that they could give their own version of the statement. PWI also told the court that out of the deceased's six sons, it was only Gitari (PW2) who was in good terms with him due to misunderstandings over land. That the accused was constantly in contention with the deceased and PWI over the land to the extent that he (accused) even once chased PWI away from the home. PWI also testified that before the attack on the deceased and his subsequent death the deceased had shared out his land but that there was still great enmity between the deceased and his sons. PWI also testified that because she had known the accused for about 18 years, she was able to recognize his voice. She stated that on the fateful night there was moonlight (though not very bright) which enabled her to recognize the accused. PWI denied a suggestion by defence counsel that she was implicating the accused because of the family disagreements over land as she reiterated her evidence in chief that it is the accused and his brother Mugambi who killed the deceased.

PW2, Gitari Mukuru testified that on the evening of 6.4.2001 at about 9.00pm, while he was in his house, Gitonga (PW3) went to him and informed him that the accused and Mugambi had killed the deceased. PW3 was together with PWI. PW2 accompanied PWI and PW3 to the scene and on arrival, he saw that the deceased was badly injured on the head. He made arrangements to take the deceased to hospital and that on that same night the accused was arrested in connection with the murder of the deceased. PW2 also identified the deceased's body for the post-mortem examination. During cross-examination PW2 told the court that he was woken up at about 9.30 pm by Gitonga, PW3 and together with many other people they went to the scene of crime. That the accused was not among the people who went to the scene that night after the deceased had been attacked.

PW2 also testified that before the attack, there were many quarrels between the accused and PWI over land. He also stated that there was full moonlight on that night although he could not say how bright the moonlight was at 8.00pm because that was the time he went to sleep.

PW3 was Gitonga Ruiga. He told the court that on 6.4.2001 at about 9.00pm, he was at his house when PW1 went to him and informed him that the accused and another of the deceased's sons called Mukuru had cut the deceased. He accompanied PW1 to Gitari's home and later to the scene of crime. According to PW3, the deceased had been cut on the face, mouth and shoulders.

In cross-examination, PW3 told the court that they left for the scene of crime from Gitari's house at about 10.00pm, accompanied by other neighbours who had been called by PW1. That when PW1 went to call him for help PW1 told him she did not know the person who had called her and the deceased that night and that she only recognized the person, meaning accused when the accused was cutting the deceased. On the intensity of the moonlight on that fateful night PW3 testified that it was bright enough to enable someone see 100 metres away. The witness denied a suggestion by defence counsel that he had been coached by PW1 on the evidence that he gave before the court.

PW4, Bernard Nthiri told the court that he received news of the deceased's death on the morning of 7.4.2001 at about 8.00am. He stated further that when he arrived at the deceased's home, he learnt that the deceased had indeed died the previous night from panga cuts, but he was also informed that the attackers were not known. That is when he called a meeting of the deceased's family where all the sons and the deceased's first wife Jane were present, including the accused and his brother Mugambi. PW4 testified that he convened the meeting in his capacity as brother of the deceased. PW1 was not at that meeting as she had taken the deceased to hospital. Later when the whole family was gathered at the police station, PW1 informed PW4 that it was the accused and Mugambi who had killed the deceased. The accused and Mugambi were arrested there and then. In cross-examination, PW4 told the court that Gitari (PW2) was not present at the family meeting he convened before going to the police station. He also testified that none of those who were present at the meeting said they knew who had killed the deceased. PW5 Police Constable James Mbeva testified that on 7.4.2001, while he was in the crime office, PW4 and others went to the station and gave him names of the suspects in the killing of the deceased. That PW4 and PW1 gave him the names of the accused and Mugambi Mukuru. The two were arrested since they were together with the group that went to the police station. PW5 also attended the post-mortem examination on the body of the deceased and identified the body of the deceased to the doctor on 17.4.2001. PW4 also stated that he visited the scene and found blood all over the place.

When PW5 was cross-examined by Mr. Ondieki, he testified that he was not the one who received the initial report and that he was not the one who investigated the case. He admitted that no photographs of the scene of crime were taken. PW6 was Dr. Stephen Kiluva Musomba who produced the post-mortem report on the body of the deceased. The report was prepared by a Dr. G.N. Njiru who had since left Chuka District Hospital. According to PW6, the post-mortem examination was done on 9.4.2001. The report was produced as P exhibit 1. From the report, the deceased suffered deep multiple cuts on the head and the cause of death was given as cardiopulmonary arrest due to haemorrhage as a result of multiple cuts on the head. At the end of the prosecutions case, Mr. Ondieki chose not to make any submissions on a no-case to answer. The court then proceeded to rule that on the evidence before it, the accused had a case to answer and accordingly put him on his defence.

The accused gave unsworn evidence and called no witnesses. The accused told the court that on 6.4.2001, he was at home together with his wife all day long, sorting out their maize. He stated that by evening he was tired. He took his supper early and the whole family retired to bed early. That sometime in the night, at about 11.00pm, he woke up and heard the sound of a motor vehicle which passed by his gate and went and stopped at his father's gate. He then heard people talking. He went out of the house to see what was happening. He saw many people. He went back into the house and informed his wife about the goings on outside and also told her that he needed to go and see what was happening. That is when he went towards the group of people and just then, the vehicle he had heard passing by his gate drove off. The accused then enquired from one of his sisters-in-law as to what was happening. That is when he was told that his father had been attacked at the river. He sought to know who had cut his father but his sister-in-law told him she did not know. He went back to sleep until the following morning when his uncle, PW4 convened the family meeting after which they all went to Chuka Police Station where he was arrested and subsequently charged. He denied any knowledge of the allegations against him.

Mr. Ondieki made lengthy submissions urging this court to acquit the accused of the offence of murder, contending that the prosecution had not established its case beyond any reasonable doubt. Mr. Ondieki submitted that recognition of the deceased's assailant was in doubt as PW1 did not and could not identify the assailants, especially, according to him PW1 was not sure who was leading her and the deceased that night from their house on their way to Felice's house. Mr. Ondieki contended further that PW1 could not have identified the assailant because according to her own evidence the person was covered in lessos from head to toe. Mr. Ondieki also urged the court to treat the evidence of PW1 with suspicion especially when she alleged that she was able to identify the accused at the scene of crime when in the same breath she told the court that she was shocked when the accused and another person, whom PW1 identified as Mugambi started cutting the deceased. That further PW1's evidence that she stood at the scene for one hour watching the accused and Mugambi cutting the deceased should not be believed, as common sense would have forced PW1 to run away for her dear life. Also that PW1's evidence that the deceased's assailants turned to attack her after the said one hour cannot be believed for indeed if the deceased's assailants wanted to kill her, she would have had little chance of escape. Mr. Ondieki also submitted that if PW1's testimony were to be believed that the deceased's assailants cut her for one hour, then the deceased's body would have been in pieces by the end of that one hour. The prosecution's case was also attacked for lack of investigations as the only police witness, PW5 simply arrested the accused whose name he said was given to the police by PW1 and PW4. Defence counsel expressed surprise that no police officer visited the scene of crime. No officer even visited the house of the accused and that no effort was made to look for and find the alleged murder weapon or to find any other independent evidence that would tie or connect the accused to the offence with which accused is charged.

Mr. Ondieki also pointed to some apparent contradictions in the prosecution's evidence, especially to contradictions in the evidence of PW1 and that of PW3 as to who between the two of them woke up PW2. He also urged the court to dismiss as untrue PW3's evidence that PW1 left PW2 and PW3 in PW2's house while PW1 went out to seek the help of other neighbours especially, Mr. Ondieki argued, when there was already evidence on record showing that PW1 was seized with fear. It was also contended on behalf of the accused that because of the disagreements between PW1 and the accused on the one hand and PW1 and the accused's mother, then there was every likelihood that the case against the accused was a frame-up by PW1. Mr. Ondieki urged the court to so find. Regarding recognition of the deceased's attackers, it was contended for the accused that the prevailing conditions that night for recognition were far from ideal and Mr. Ondieki submitted that even if PW1 knew the accused before, it was not easy for PW1 to positively recognize the accused. That the situation was worsened by the suddenness of the attack. Mr. Ondieki cited to me the case of Charles O. Maitanyi V. R. Criminal Appeal No. 6 of 1996 in support of his arguments. Further that though PW1 named the deceased's attackers, that naming was shaky mainly because all the prosecution witnesses, save for PW6 were drafted into the case by PW1. That even the intensity of the moonlight which PW1 alleged helped her to recognize the deceased's attackers was in doubt. He also submitted that contrary to the prosecution's allegations, the accused's conduct after the crime was committed did not suggest that the accused participated in the crime.

Mr. Oluoch, learned state counsel submitted that the prosecution had established its case beyond any reasonable doubt. He contended that the accused who was armed with a panga lured the deceased and PW1 to leave the house on the pretext that the deceased's mother was sick, only to turn upon the deceased and savagely attack him. That PW1 was able to recognize the accused when the lessos with which the accused had covered himself fell off in the course of the accused cutting the deceased. On conditions for recognition, Mr. Oluoch submitted that the evidence of PW1 and PW3 was to the effect that there was full moonlight and further that PW1 had enough time to recognize the accused during the one hour that PW1 was at the scene when the accused and Mugambi were cutting the deceased. He submitted that there was no possibility of error or mistake because this was a case of recognition as opposed to identification. That the attack took a long time during which PW1 was at the scene, seeing the accused cutting the deceased. That there was bright moonlight and that the accused was not disguised at the time when he started cutting the deceased, and that for these reasons, the court should find that the accused was clearly recognized by PW1. The learned state counsel also submitted that PW1 was consistent in naming the accused and his deceased brother as the deceased's attackers, and further that PW1's demeanor during the rigorous cross-examination was testimony to the fact that her evidence was true.

Mr. Oluoch also submitted on the issue raised by defence counsel that the accused could have had no motive for killing the deceased since disagreements over land, if any, were between the accused and PW1 and not between the accused and the deceased. Mr. Oluoch asked the court to dismiss the suggestion for being baseless and without merit and to find that the evidence adduced before court established beyond any reasonable doubt that it was the accused and no one else who killed the deceased that night, and that the medical evidence given by PW6 was consistent with the evidence of not only PW1 but also that of PW2 and PW3.

On the testimony of the accused, the learned state counsel dismissed the same as being a mere corrupted version of what transpired on the fateful night. He also submitted that the accused's conduct on the material night was consistent with guilt. That the accused's failure to go to the scene even after he had been informed that the deceased had been assaulted, and his failure to accompany those who were taking the deceased to hospital was conduct inconsistent with an innocent person. Further, Mr. Oluoch contended that the allegation that there was a grudge between the accused and PW1 was only raised during defence counsel's submission whereas the accused in his unsworn testimony raised the defence of alibi, and even then, the learned state counsel contended that the accused never called his wife as a witness to tell the court that indeed at the material time, the accused was asleep in his house. Mr. Oluoch cited the following authorities in support of his case:- (i) Joseph Ngumbao Nzaro V. R. (1991) 2 KAR 212. (ii) David Musembi Mue V. R. Criminal Appeal No. 36 of 2000 (unreported). (iii) Joseph Shikuku and another V. R. Criminal Appeal No. 160 of 1987. (iv) Wang'ombe V. R. (1980) KLR 149. After the close of the submissions, the court summed up the case for the assessors. The assessors returned a unanimous verdict of not guilty. The assessors verdict was read by Edwin Murungi.

The points for the determination by the court are whether the case against the accused person has been proved beyond any reasonable doubt by the testimony of the single witness being PW1 and whether the conditions prevailing on the material night were sufficient for the positive identification of the accused as one of the two attackers of the deceased person. Thirdly, I will say something about the defence of alibi raised by the accused in his unsworn testimony and whether the same is reasonable in the circumstances of this case and whether the prosecution adduced sufficient evidence to dislodge that defence.

I have carefully considered the whole evidence adduced before this court and the submissions made by both counsels. What is not in dispute is that the deceased succumbed to death from serious deep multiple cuts inflicted upon his head by somebody. It is also not in dispute that PW1 was in the company of the deceased when the deceased was set upon by his attackers. PW1 was the only eye witness. PW1 is the one who reported the attack first to PW3 and then to PW2 and finally the information got to PW4. The testimony of PW1 was that at about 8.00pm on 6.4.2001, a person whom PW1 said was the accused went to the house and informed her and the deceased that that Felice was sick, but that the said person did not enter the house. PW1 said she was able to tell it was the accused because of the voice. The second time the person returned, the person was in the company of somebody else whom PW1 could not identify and whom PW1 did not see. The people then spoke to the deceased and PW1, again while standing outside and the voice that spoke was a female voice. When PW1 and the deceased went out, PW1 saw somebody who had covered the body in lesos and that person is the one who led the pair as they left for Felice's place. PW1 does not say anything more about the second person. PW1 admitted that she did not know who the person was that was leading them along although later she stated that the person was the accused because when they reached the river, he uncovered his face before he started cutting the deceased. I have carefully considered this piece of evidence by PW1. My finding is that PW1 did not know that it was the accused who was wrapped up in lesos at the time when they were leaving the house. PW1 does not even say why she and the deceased did not talk to the person to establish why Gitari had not been called as requested by the deceased. When PW1 was cross-examined she told the court that when she went out of the house the second time the person returned, she saw that it was David (accused) dressed like a woman, and that the woman's voice she heard was the accused's voice. She also stated while under cross-examination that the accused then led them on the way. In answer to another question, PW1 said:- "I did not see his face, but I saw him clearly when he removed the leso and started cutting his father." [www.kenyalaw.org](http://www.kenyalaw.org) Republic v David Njeru Mukuru [2005] eKLR 11 From this evidence, it is clear to me that as at the time of leaving the house on their way to Felice's, PW1 did not know the person who was leading them. They also walked in silence because this is what she said in answer to another question:- "David led the way, followed by

me and the deceased. We were walking very closely together. None of us was talking.” What comes out from the above evidence is that after the voice had asked the deceased why he had not yet left for Felice’s place, PWI did not hear the accused’s voice. And in any event she said that the voice speaking on this second occasion was that of a woman. I therefore have doubts in my mind that as they set off, PWI was sure that the person who was leading them and who was covered in lessos was actually the accused. In one breath she says it was the accused and in the other breath she says she did not know who the person was. In one breath she says the voice was that of a woman and in the same breath, she says the voice was that of the accused. What made her think or believe that the female voice belonged to the accused? PWI’s testimony is not convincing as to the identity of the person with whom they walked towards the river on that night. No evidence was led to show that PWI had on other occasions in the past heard the accused speak in a female voice so as to positively testify to the accused’s manner of speech when speaking in a female voice. It might be that the accused is the one who had wrapped himself in lessos that night. It might also be true that he is the one who led PWI and the deceased towards the river that night, but the evidence on record falls short of establishing this fact by pointing to the accused only as having been that person and to nobody else. This point is of particularly importance because in her evidence in chief, PWI testified that the accused came back with somebody else. Where did that somebody else go? Was he/she the attacker? That now leads me to the scene of crime. PWI testified that as they approached the river, she noticed that the path was blocked by some kind of logs, which the deceased removed by using his walking stick. That the accused did not stop at that point but just passed over the obstruction, then turned back, passed PWI and started cutting the deceased. In her evidence in chief, PWI said that when they reached the river, the accused uncovered himself and she was able to see his face clearly because there was bright moonlight. In answer to questions put to her during cross-examination, PWI testified as follows:-

“I knew the accused and his siblings very well for a very long time. For that reason, I could identify accused and his brothers even in the night. The time was 8.00pm. There was moonlight though it was not very bright. Yes, one had to be close to another to identify him and when David removed the leso I was able to identify him.”

Two points come out clearly from this evidence. The first point is that the moonlight was not so bright as to make one person easily identify or recognize another. Secondly, it does not appear clear whether the accused removed the lessos before or after he started attacking the deceased. Mr. Oluoch submitted that PWI was able to clearly recognize the accused whom he knew well because of the bright moonlight and also because of the fact that the whole episode took one hour during which PWI was able to clearly see and recognize the accused as one of the deceased’s two attackers. Was the appellants properly identified?

In the English decision in *R. V. Turnbull* (1976) 3 ALL ER 549 a decision that was applied by the Court of Appeal in *David Musembi Mue V. R.* (above), the following directions were given in dealing with the issue of identification by recognition: - “First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken provided this is done in clear terms the judge need not use any particular words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.”

The above general guidelines have been applied by our courts. One such case is which these principles

were applied is Joseph Ngumbao Nzaro V. R. (above) cited to this court by the learned state counsel. In the instant case, PW1 said that she had one hour to observe the accused cutting the deceased. She also testified that no sooner had the accused started cutting the deceased than Mugambi also appeared with a panga and joined the accused in cutting the deceased. If that piece of evidence is true, then this court finds it difficult to believe that PW1 would have stood by watching the accused and Mugambi cutting the deceased for one whole hour without the fear of being out herself. Even the timing does not appear convincing. PW1 testified that the accused first went to the house at 8.00pm to tell PW1 and the deceased about Felice's sickness. Then the deceased sent the accused to call Gitari. Although it was not clear from the evidence how long the accused took, it seemed that PW1 and the deceased had to wait for sometime. When the accused allegedly returned the trio walked for some time before the attack and by 9.00pm, PW1 was already at the house of Gitonga, PW3 reporting the incident. The inference I have reached here is that there was no much time from the moment the deceased was first attacked and the time when PW1 arrived at PW3's house. And in between she had to hide herself in the tea bushes for fear of being cut. Reluctantly, I have to find that PW1 did not have sufficient time to so carefully observe the deceased's attackers as to positively say it was the accused. This was worsened by the fact that the moonlight was not so bright for an error free identification of the deceased's attackers.

PW1 also testified that she made some noises when the deceased was attacked, but it would seem to me that nobody heard these noises made by PW1. Until PW1 reached PW3 and PW2, nobody else seemed aware of the events of that evening. If there had been some other independent evidence to lend credence to the evidence by PW1, perhaps my conclusions would have been different. I am aware however that there is no specific number of witnesses required for the proof of any case against an accused person. See Joseph Shikuku and another V. R. (above). Yet in reaching the conclusions I have reached in this case, I am also reminded of the decision in Abdallah Bin Wendo and another V. R. (1953) 20 EACA 166 on the issue of identification. That decision was applied in Roria V. R. (1967) EA 583 where the Court of Appeal restated the principles thus:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDNER L.C. said recently in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten it is a question of identity.” That danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction should not be upheld it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification.” I have carefully considered the evidence of PW1 right from the time she stepped out of the house to the time she made reports to PW3 and to the police, and my view is that it would be unsafe to convict on that evidence. Even her evidence on the length of time allegedly taken by the accused and Mugambi to cut the deceased is hardly believable, and as contended by Mr. Ondieki for the accused if that evidence were true then the deceased would not have been found when he was still in our piece. If that had indeed had been the case, it would not have been possible for the deceased to PW1 still be able to make an effort to run away when he (deceased) saw PW1, PW2 and PW3 approaching the scene.

I therefore find that though PW1 knew the accused well before the incident, the conditions prevailing on the material night were such that identification of the accused by recognition could not have been free from error or mistake. I now turn briefly to the accused's defence. The accused raised the defence of alibi in his unsworn statement. That was the very first time that the same came up, for throughout the prosecution's case, no questions were ever put to the witnesses and especially to PW1, to suggest that the accused was asleep in his house at the time when he was said to have attacked the deceased. In my view and finding that line of defence was an afterthought. The only reason I have to deal with the issue is because of the submissions made by the learned state counsel to the effect that the accused did not even call his wife to support his claims. In Wang'ombe V. Republic (1980) KLR 149, the Court of Appeal quoting the dictum of Udo Udoma CJ in Ssentale V. Uganda (1968) EA 365 stated that when accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden

of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution ought to test the alibi wherever possible, but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.

As I have stated earlier, I have weighed that alibi against the whole of the evidence adduced by the prosecution. My conclusion is that that defence is an after thought. What the accused told the court leaves many questions unanswered. After getting to know that his father had been attacked the accused simply went back to his house to sleep. He made no effort whatsoever to look up any of his brothers or even his mother Jane to find out what the matter could have been. As Mr. Oluoch rightly submitted the conduct by the accused was not consistent with a man who was innocent. Yet, in the absence of sufficient evidence by the prosecution to pointedly connect the accused to the offence this court is unable to infer guilt just from that conduct of the accused. The whole evidence must be taken together. I have taken the evidence together. That evidence creates considerable doubt in my mind as regards identification of the accused as the deceased's attacker.

Before I conclude this judgment, I must make some comments on the investigation of this case. What has emerged from the entire evidence is that there were no investigations whatsoever in this case. Once the report was made to the police by PW1 and PW4 and the report booked, no other investigation was carried out in the matter. The only police witness, PW5, Police Constable James Mbeva testified that his only part in the case was to book the report of the attack and to identify the body of the deceased to Dr. Musomba, PW6, for the post mortem examination. Although this witness testified that he went to the scene, he could not remember when that was. He confirmed however that no photographs were taken at the scene. There was no evidence that accused's house was ever searched. I have sympathized with the learned state counsel who believes that the accused was the deceased's likely attacker, yet his hands were tied behind his back because of the shoddy job done by the police. Whether there was a cover up or not, is something that would need looking it. Perhaps this is one reason why the police wanted PW1 to change her statement implicating the accused. The police need to stand up to the task that is theirs. That task is to investigate cases and to investigate them properly without fear or favour and enable the prosecution of such cases to be done with the prospect of success.

In the result, this court finds that the prosecution has not established its case against the accused person beyond any reasonable doubt. Because of lack of adequate investigations the available evidence falls short of linking the accused to the death of the deceased. For these reasons, I dismiss the charge of murder against the accused David Njeru Mukuru. He is accordingly set free unless otherwise lawfully held in prison. It is so ordered.

**RUTH N. SITATI**

**JUDGE**

**30.6.2005**