



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

**AT NAIROBI**

**CRIMINAL CASE 90 OF 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. SHEM MWANGI MUTUOTA.....ACCUSED**

**2. NKUNJA MWITARI MBIRITU**

**JUDGMENT**

The two Accused persons are charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63, Laws of Kenya). It is alleged that on 27th November, 2002 at Kariua 'C' Village they jointly murdered Mwangi Wakanyuki.

To prove the offence of murder the prosecution has to prove the death of the deceased and that the same has occurred due to voluntary act or omission of the Accused, as per the law.

Pw.1 Simon Njuguna Mukuha testified that he was a Chairman of Village Kariua since 2002. He claimed to know all the village residents but he stated since the village was destroyed, (he did not clarify when) they were scattered. To prove that the death has in fact occurred as stipulated in charge, the prosecution showed that PW.1 went to City Mortuary to identify the deceased's body before the Post Mortem. He stated that the deceased was running a hotel in the village. As per Post mortem report the deceased was found with multiple bruises of the scalp, neck, both upper limbs lateral aspect and both lower limbs and the posterior trunk.

The cause of death as per Dr. Jane Wasike (PW.6) was head injury, multiple bruises due to blunt weapon.

Pw.3, Charles Kitee testified that despite several efforts he could not trace any relative of the deceased and even after finger prints of the deceased were lifted, his whereabouts were not traced. That was the reason. PW.1 was asked to identify the body. Although another person, just identified as CD2 by this witness, also accompanied them to identify the body but was not called to give evidence, without any explanation.

Coming to the actual evidence as regards the commission of the offence, I can safely state that the prosecution based its case on circumstantial evidence. PW.1 Simon Njuguna reiterated severally that the incident occurred on 27th November, 2003 and that he had started knowing Maingi (1st Accused) since November 2002 or March 2003. The Charge sheet gives the date as 27th November, 2002. He similarly insisted that he went to other village on 26th November 2003 and not in 2002 and was informed of finding a body and arrests of two persons on 27th November 2003. He further stated that as the village

was destroyed eight persons who informed him about the arrests and recovery of a body had left. He did not name any and the Prosecution has not given any explanation as to their difficulty to call them as witnesses. I am also not told whether statements of any of those neighbours were recorded. Same is the case with the street boy who is mentioned by two officers (PW.2 and PW.4). PC. Charles Gacheru and PC. Justus Mutunga. In any event this witness could not shed any light because what he deponed was hearsay and cannot be relied by this court.

This leaves me with evidence of two police officers. PW.2 testified that he was on patrol duty along Ngara/Murang'a Road with one PC. Wachira. They were approached by a member of public (name not disclosed) who informed them that a street boy identified as Karui had told him that the two Accused persons before the court had beaten someone in the house of 1st Accused. He knew both the Accused persons as, according to him, he had arrested them for petty offences. They called the street boy who briefed them on the incident. On the same day, after 20 to 30 minutes, both Accused persons were arrested at the junction of Murang'a and Kolobot road. At the home of 1st Accused which was opened by 1st Accused, they found a body facing down on a sack and they recovered a broken piece of Masai rungu (Ex.1) from the scene. He conceded that they could have recovered two pieces of that rungu but there is no explanation as to absence of missing piece before the court. What he was told by the street boy, once again has not been corroborated.

PW.4 testified that at the material time he was with PW.2 and one PC. Wachira while PW.2 has not mentioned him being on patrol. He testified having been given information by a member of public as stated by PW.2 but did not state that they talked to the street boy which has been stated by PW.2. They just started chasing the two Accused persons who were spotted along Murang'a Road. He knew both Accuseds but only as residents of their patrol area. He did not state, unlike PW.2, that the police had arrested them previously. He described 1st Accused as vendor of cartons and 2nd Accused as a matatu tout along route 108. PW.1 and PW.2 had described the 2nd Accused as selling puppies along Murang'a road.

Without saying whether he knew where the house of 1st Accused was, he stated that they ordered him to open the door which was locked. They found a body lying down on the ground and after inquiry they concluded he was killed. After observing the body he did not see any visible injury. PW.2 did not mention anything on the injury.

PW.5 Peter Mwangi a Scene of Crime Officer took photographs of the scene and stated that the body had no physical injuries and that he did not see any weapon at the scene.

Contrary to what all those witnesses have said Dr. Wasike (PW.6) who performed autopsy saw multiple bruises of the scalp, neck, both upper limbs lateral aspect both lower limbs and the posterior trunk.

On internal examination she found bruised head and subdural haemorrhage. According to her the cause of death was head injury, multiple bruises due to blunt object as earlier mentioned.

PW.7 Cpl. Harrison Kingeru stated that he saw the head of the body swollen at the scene of crime. He categorically stated that as per his information both Accused persons lived in the same house. PW.1 on the contrary stated that 2nd Accused was living at a different village which was far from Kariua 'C' village where the offence was committed.

The Accused persons in their defence denied committing the offence and stated that they were arrested on 27th November 2002 along Murang'a Road while they were doing their work. They were then taken to a place whose door was opened. They found a body therein and later on they were charged.

The onus to prove the charge as leveled, beyond reasonable doubt, is on the Prosecution and does not shift to these two Accused persons.

In absence of any eye witness, the case of the Prosecution rests on the circumstantial evidence. Thus the prosecution has to show as laid down in the case of R -vs- Kipkering arap Koske and another, 16 EACA

(1949 135 i.e.:

“In order to prove the inference of guilt, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

In other words, the case of the prosecution should point an unwavering finger at the guilt of the Accused persons and the court should be unable to have any reasonable doubt as to the guilt of the Accused persons before it.

In my humble opinion from the evidence as led, the prosecution has been unable to prove, as per law\ without reasonable doubt, that the body was in fact removed from the house of the 1st Accused and that 1st Accused and 2nd Accused were in that house the previous night and inflicted injuries on the deceased which resulted in his death. The court also is not adequately satisfied with the identity of the deceased in view of absence of identity of the deceased as a person and also due to conflicting evidence as to the injuries seen by witnesses and by the pathologist.

In view of all the aforesaid, I do not find that the prosecution has proved its case as required by law against any of the accused persons. I thus enter finding of not guilty against both Accused persons and direct them to be set at liberty unless otherwise held as per law.

I thus concur with the opinion of the Assessors.

**Dated and signed at Nairobi this 9th June, 2005.**

**K.H. RAWAL**

**JUDGE**

**9.6.2005**