



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

**Criminal Case 121 of 2003**

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

**Criminal Case 121 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**LAWI OLOO OGILA AND 9 OTHERS..... ACCUSED**

**RULING OF THE COURT**

All the 10 Accused persons before the court faces 12 counts of offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 Laws of Kenya).

In all counts it is alleged that these 10 Accused persons with others not before the court jointly murdered the named 12 deceased persons on 3rd June, 2003 at Mathare North Area II in Nairobi.

It is prerequisite in an offence of murder that the Prosecution proves death of the named deceased person. We have 12 such named deceased persons. In my view the evidence of PW.14 Nancy Wanjiku, PW.15 Peter Chege, PW.16 Kimani Muchani, PW.17 Daniel Njoroge, PW.18 Karanja Ndirangu, PW. 19 Peter Ngacha, PW.20 Michael Njoroge, PW.23 Daniel Ndashi, PW.27 Njuguna Wanyoike, PW.28 Geoffrey Goro PW.35, Njiri Thiongo showed that they identified to the pathologists bodies of their respective deceased relatives before Post Mortems on the bodies of the deceaseds were performed at the City Mortuary.

PW.13 Dr. Jane Wasike gave evidence on and produced Post Mortem conducted by herself and those conducted by Dr. Maundu who has since retired, after the application made under Section 77 as read with Section 33 of the Evidence Act was made, not objected to, considered and allowed by me. The causes of death of all the deceased persons were mainly head injuries due to either sharp objects or blunt object or blunt trauma (Exhibits 6 to 16). Considering the aforesaid evidence, I do find that the prosecution has satisfactorily proved that the deaths of the 12 deceased persons named in 12 counts of murder had occurred on 3rd June, 2003.

The background leading to the death is clear.

PW.1 Solomon Njuguna is the Landlord of the building situated at Mathare North Area II, Nairobi where the incident on hand occurred. The building had about 54 rooms which were rented and he did not have good relation with half of the tenants. Although he did not mention as such, the other witnesses stated that between 80 and 100 persons were hired by PW.1 to remove old doors and replace the same with new doors. As per PW.1 he was going to meet some of the tenants who were ready to pay but he was warned by his agent as well as the watchman that there could be trouble and he should go with as many people as possible. He went with eighty people who had iron hammers and crowbars. When they entered the building people started gathering and mayhem ensued. All the witnesses have stated their versions but the centre theme was that the fight ensued and some people wielding pangas started cutting the people who had entered the building. Although other witnesses have not given number of people gathered, but PW.25 PC. Francis Wanyoike, stated that the crowd was '**swelling up to 1000 people**'. The people who had entered the building started running to all directions to save their lives. It is not difficult to visualize the chaos which would have resulted at the scene which left 12 people dead.

It is also not in record that the coming of these 80 to 100 persons was notified. The crowd started gathering spontaneously when the occupants of the premises started screaming and the riot erupted. It is also very apparent that the Accused persons belong to Luo tribes while all the deceased persons were from Kikuyu tribes.

The Prosecution could not bring forth any witnesses who were tenants in the building because as per PW.36 Inspector Benson Omondi the Investigation Officer, the tenants had all left the premises. Thus the Prosecution only called witnesses who were amongst the group who went to the premises at around 7.00 a.m. and hired by PW.1 on that frightful day. They all are also charged with many counts of creating disturbances in Cr. Case No.1432/2003 which case is still pending and all of them have pleaded not guilty to the charges faced by them.

Under the aforesaid chaotic background the Prosecution led evidence which again, in my opinion, is not less chaotic.

I shall summarize their respective evidence to support my observation.

PW.1 is Solomon Njuguna Wanjohi who is the landlord of the building where the unfortunate incident took place. He had problems with his tenants as I have already observed hereinbefore.

Although according to him he had a meeting with some of the tenants on that fated morning, he went with about eighty people as advised. Meeting did not take place but instead they were welcomed by stones throwing. His people informed him of worsening situation. He asked his people to disburse and go out of the building when he saw many people gathering from the balcony of the building. He himself while going out saw one person Wango being cut with a panga. Even though he said he knew both the attacker and the victim he did not identify either of them. He tried to call police officers while retreating back to the building. He was with some of his people on the first floor. The people were demanding to produce him and his people started pushing him towards the attackers but he locked himself inside a room with another person. Once again he did not specify who that person was.

The door of the room he was hiding in was opened by axes and panga. That is what he said while he also stated that he was under the bed. The five people demanded money which he gave and they left him. From the witness box he identified 10th Accused as one of them after saying he knew some of them. Once more he neither said nor was asked how he knew the 10th Accused or how he could identify him. Once more some two or three persons entered the room and were given his mobile and some money the other person had. He did not know those persons but still identified 2nd Accused as one of them.

The police then arrived and 4th Accused (just pointed out at him from the witness box) came with his group and hit him on his left ear with a panga and asked for money. He gave 4th Accused named by him as Onyango his wrist watch. GSU personnel entered the room when 4th Accused was about to attack him. Surprisingly according to him even though he informed GSU personnel that those were attackers, they simply told them to leave the room.

I pause here to mention that none of the police witnesses has told the court that GSU personnel were called. It has also not been testified that he attended any Identification Parade.

Lastly, he also said that he saw dead bodies lying **“outside”** the building.

In cross-examination he stated that 4th Accused **“slapped him”** with a panga and he did not sustain any injuries. Although he stated that he knew 4th Accused he said he did not know that he was either a Landlord or a secretary of Landlord’s Association. He is charged with an offence of inciting violence in Cr.C.1432/03. PW.2 James Mungai Waweru is one of many who was hired allegedly to change doors in a building at Mathare North, Nairobi. They were ferried in a Mitsubishi Canter Registration No.KAQ 972 J. The people gathered and he started to go upstairs up to 2nd floor. Then he saw a ‘young man’ holding a panga. He was told to lie down. Then, although he did not tell me how but stated that he entered a room. Incredibility of his evidence can be perceived if I quote some of it:

***“I was with another Youngman. A young man came and told us to find our employer so that he could give something small to them (sic). I had Shs.982/- and another young man had Shs.200/- and then we paid the money to that young man. The young man told us to wait there till police arrived. I opened the door slightly to give money, (emphasis mine)”***

Then he identified 4th Accused. I notice with interest when he described earlier the 4th Accused as a **‘young man’** when he asked him to lie down. With no standard of description 4th Accused could be described as a young man.

He also agreed that he had a hammer with steel head.

PW.3 John Katiba Maina was one amongst 80 to 100 persons hired by PW.1. He had a crow bar to do the job. They were shouted at as **‘Mungikis’** when they entered the building. He went to 2nd floor and saw many people with pangas and axes. The people who came to 2nd floor told them to find PW.1 so that they could talk to him. He in return was sent by PW.1 to talk to them and was dragged down to the ground floor. He was hit by a panga on his forehead and lost consciousness and fell down. When he woke up he saw one person with an iron bar ready to hit him. He ran upstairs and hid in a room. He identified 6th Accused as per his testimony when he attended an Identification Parade. PW.4 Peter Njue Munga was one of those persons hired by PW.1 and was given a hammer to remove the doors.

He removed two and when he was going to remove third one, they were informed that one of them had been slashed to death. He still continued to work when PW.1 asked him to continue working as police would come. He was so oblivious to the situation that he had to ask people who were getting into houses why they were doing so and he was told that they were doing so to avoid being killed. He did not join them but looked around and saw CID officers and he ran downstairs. Then at the fague end of his examination in chief he said that

***“I saw them slashing one of us. He was Solomon Mokora Mwaura (deceased in count 6). I can identify them. I see them (3rd and 6th Accused persons pointed out)”***

After saying that he added and I quote:

***“I recall I went to Ruaraka Police Post on 6th June, 2003 to attend an Identification Parade. I identified two persons. They are in court (3rd and 7th Accused persons) He also testified that he identified 3rd and 7th Accused persons because they jointly slashed Solomon (deceased in count 6)”***

I just pause here, and observe that earlier he identified 3rd and 6th Accused persons as attackers of the said deceased.

Then he testified that he identified 4th Accused in another Identification parade because he saw him beat one of us, Joseph Kuria Njuguna (not identified) with an iron bar. I have to note here that other witnesses

have stated that 4th Accused had a panga in his hand.

In cross-examination he agreed that in his police statement he did not mention who were slashed by which of the Accused persons.

It also came out during his cross examination that he was not with Joseph Kuria Njuguna when he was hit by 4th Accused. (Now he said that it was 4th Accused). He was at the 1st floor and the said Njuguna was hit at the entrance of the building. He could identify even if they both were in that position i.e. at different levels of the building. At one point he also stated that when he was hit by an iron bar, he sat down.

Then in response to the court questions he said he identified only two suspects. He said he identified 2nd but did not identify 7th Accused although he had mentioned him severally. He did not give names of those he could identify as he did not know them. He said that he identified 4th Accused.

PW.5 is Samuel Mwithukia Wanjohi one of the group hired by PW.1. He stated that about three doors were removed. He identified 2nd Accused as the person who hit him with a panga on his back. He was also hit by an iron bar on his head. He did not state which one was the first. He did not state that he attended any Identification Parade. PW.6 Anthony Muchegu Karanja was one of the group who went to the building to remove doors. According to him six of them were removed. He also stated that sixty members of group had hammers or crowbars.

PW.7 Bernard Kinuthia Waithera was also one of the group by PW.1. Tenants started shouting '**robbers, robbers!**' when they entered the building. Neighbours came and started throwing stones at them. He panicked and saw people lying down who were beaten. Then he saw some 'other' people coming to 2nd floor with pangas. He hid behind the door as they were cutting people. But then he said he came out in a corridor. Why? Because he knew they would come to him!! And then he was cut with a panga at the back of his head. He went out (do not know where) with others and due to his injury fell down. He identified 4th Accused as one of the persons who were cutting member of his group. He gave the reason of his identification which is "**I saw him from the door slashing people**". Earlier he said, he hid behind the door. He also said he identified 4th Accused in an Identification Parade.

In his cross-examination he said and I quote:

***"I did not hide in any room. I was standing in a corridor. I was pulled from window (sic) where I was and asked to come out. I was on the ground floor. I was in (sic) the door of the corridor which leads to staircase. I was in the middle of the door and stairs. I was hit when I was standing near the door and then I went in the corridor where people were pushed down. I stood there for less than two minutes. I did not observe much."***

In cross-examination he stated he was on the ground floor when as per his testimony in examination-in-chief he was supposed to be at the 2nd floor. PW.31 Chief Inspector Said Mohamed has stated that this witness did identify 4th Accused in an Identification Parade conducted by him.

I do however note the circumstances of his identification as observed by me. PW.8 is Samuel Kamau Mwithaka. He was earlier a tenant in the building and was forced to evict his room after he became a caretaker thereof. He accompanied the others to the building. He did not look at people attacking with pangas and iron bars at the ground floor. He hid in a room with PW.1 and like him repeated how people took money from them. He however identified 4th Accused, 1st Accused, 3rd Accused and 10th Accused during his testimony.

During cross-examination he stated that he identified 4th Accused with a bandage and clean shave and then he stated in Identification Parade he did not have the bandage and had short hairs. He said 4th Accused could also be in custody while he was in custody for two weeks. He also stated that 5th Accused helped him hide in the room. PW.9 Erastus Ngotho Kaniu was one of the group and stated that they were supplied with hammers and crowbars and saw people come and cut two persons in the room he was but did not identify anyone. He did not state that he attended an Identification Parade. PW.10 Michael

Wanyoike is also one of the group and when people started attacking he jumped from 2nd floor and was met by the police. PW.11 Joseph Githinji Gathabu recalled two persons who attacked other persons when he was in a room but could not give any evidence on identification as his statement was neither dated nor signed.

PW.24 Henry Muiruri was one of the group members and testified that five doors were removed and then people started screaming saying they were 'Mungikis' which screams were coming from inside and outside the building. He hid in a room on 3rd floor and one named '**Joffy**' was cut. He neither identified him further nor was asked to do so. He identified 4th Accused as the one who pulled and cut Joffy. He said he attended many identification parades and identified other four who are not before the court. He then said he attended an Identification Parade but could not recall whether he identified any one. There is no evidence before this court that he attended many Identification Parades either. This in short is evidence of some of the persons who were at the scene in the group of 80 to 100 people who were armed with metal hammer and crowbars to enable them remove not more than eight doors in total. None of them were carpenters by profession. Although they stated they were to remove doors and replace them, none of them stated that they carried any door to be replaced. They did not explain how a hammer or a crowbar could be used to remove a door. They were aware why they were hired. It is not hard to find that the purpose for which they said they were hired is almost impossible to be believed. I do not think I need to give reasons for such observation. It is evident they went there for reasons which I shall refrain to state in view of a pending criminal case against all these witnesses.

The evidence on identification of some of the Accused persons clearly is not without doubt. I have detailed it in their relevant parts and I cannot find that it is without any possibility of error or mistake. I shall be further fortified by evidence of police witnesses who conducted Identification Parades in respect of some of the Accused persons and also from the evidence of other police witnesses. PW.2 Inspector of Police John Wainaina conducted an Identification Parade at Ruaraka Police Post on 7th June 2003 in respect of 5th Accused. According to him, four witnesses identified the 5th Accused.

One Ndirangu Kamau Musa was one of them but he is not before the court. PW.8 also identified the 5th Accused. However in his own evidence PW.8 has testified that he could identify 1st, 3rd, 4th and 10th Accused persons. He did refer to 5th Accused as the one who helped him to hide from the attackers. PW.4 was also one of the witnesses who identified 5th Accused in the Parade. But in his evidence he only talked of 4th Accused and identified 3rd and 7th Accused persons. The last witness to identify 5th Accused was PW.3 but in his evidence he did not give any evidence of attending an identification parade. He also did not otherwise mention 5th Accused in his evidence.

Then on 8th June, 2003 PW.2 conducted another Identification parade at Pangani Police Station in respect of 6th Accused. Once again one Ndirangu Kamau who is not before the court identified him. PW.8 once again identified him but in his evidence he talked of 1st, 3rd, 4th and 10th Accused persons only.

PW.2 also identified him but in his evidence he talked only about 4th Accused. Similarly PW.7 although said to have identified 6th Accused only talked about 4th Accused in his evidence. 9th June, 2003 he conducted another Identification Parade in respect of 9th Accused. I must note that none of the witnesses before the court mentioned this Accused person. PW.1 was one of the witnesses who identified 9th Accused who has not stated a word against him.

PW.29 Inspector of Police Philip Mwenya conducted an Identification Parade in respect of 2nd Accused person.

PW.7 and another witness one Simon Kimani (not before the court) identified him. However, PW.7 never mentioned 2nd Accused in his evidence. PW.30 Inspector of Police Richard Lumiri conducted an Identification Parade on 6th June, 2003 at Ruaraka Police Post in respect of 1st Accused person. According to him PW.3 and PW.11 identified him. No evidence of such identification is coming from either of these witnesses. PW.31 Chief Inspector Said Mohammed conducted an Identification Parade on 8th June, 2003 at Muthaiga Police Station in respect of 4th Accused. Nine of the witnesses identified him. PW.1 was one of them but in his evidence he did not testify that he attended any Identification Parade. I

have sufficiently made my observations on his testimony in earlier part of my ruling.

PW.24 also did state he did not look at the attackers and not mentioned that he was able to identify and how he was so able in his evidence. Again he was on 3rd floor and 4th Accused was said to be between ground floor and the 2nd floor. Even the person only identified as 'Joffy' by him who was alleged to have been cut by the 4th Accused is not identified and I am not told whether he is one of the twelve deceased persons. PW.2 similarly did not testify that he attended any Identification parade. PW.4 similarly did not testify that 4th Accused was at the scene but managed to identify him at Identification Parade.

PW.7 was also one of the witnesses who had identified 4th Accused. I have similarly detailed his evidence as to identification earlier which is lacking credibility. Evidence of PW.8 also is specified earlier. He said he did not identify the attackers but saw them. Furthermore he said he had tied his hands. He also agreed that 4th Accused had injuries but others did not have any. Evidence of this witness (PW.31) that he gave all members to wear jackets to hide their hands cannot be taken as credible, first of all due to the fact that he had not specified that fact in Identification Parade forms as being a special feature. He agreed also that the 4th Accused had a bandage on his hand.

Furthermore O.B. of Kasarani Police Station for the date i.e. 8th June, 2003 was not made available to the court on the ground that it was untraceable although requested by the Defence. This is relevant in view of the Defence's averment that the witnesses and the Accused person came from the same cells and witnesses had opportunity to see him there. The reasons for this unavailability was not explained or given. I also note that there were many Identification Parades held on the same day by other Officers at different stations. PW.34 Inspector of Police Jesson Mukango conducted an Identification Parade in respect of 8th Accused at Marangari Police Station on 9th June, 2003. Out of three witnesses who identified 8th Accused two are not before the court. The third witness to identify was PW.24 who did not even mention 8th Accused in his evidence. PW.36 Inspector of Police Stephen Lelei conducted an Identification Parade on 8th June 2003, in respect of 7th Accused. One of the three witnesses who identified this Accused is not before the court. Other two are PW.24 and PW.4. None of them referred 7th Accused in their respective evidence.

Other police witnesses went to the scene after calls were made reporting the incident. They are PW.25 P.C. Francis and PW.32 P.C. David Wandeto. In their testimonies they stated that they found dead bodies along the foot path (four and ten bodies respectively as per their evidence). PW.25 stated that the crowd gathered "was swelling upto 1000 people". PW.32 also stated that he fired five rounds of ammunition to disperse the crowd. None of them stated that they saw anyone with any weapon. Anyway none is before me. I also revisit my observations made earlier to the effect that they found dead bodies along foot path. None of Police witnesses has stated that they recovered bodies inside the building along any of the floors which have been mentioned by several witnesses.

To top up the above evidence, they both agreed that 4th Accused was the one who was helping the police to cool down the crowd. This is in short the evidence before me. It is obvious that the Prosecution case rests squarely on evidence of those witnesses who had gone to the building in big numbers wielding hammers and crowbars. First of all they were many and the crowd gathered did consist of large number of people. No doubt there was physical conflict between these two groups and the crowd was aroused by the numbers and the activity of the group entering. I have no doubt that in resulting mayhem the twelve deceased persons lost their lives. But I have these 10 Accused persons jointly charged with offence of murdering those deceased persons. Apart from P.C. David Kihara (PW.26) who arrested one of the suspects (my note states 11th Accused and I have 10 Accuseds before me), I do not have any evidence how, from where, and when these Accused persons were arrested. On the issue of identifications of the Accused persons, from what I have observed earlier none of the Accused persons is identified satisfactorily. None of them is positively placed at the scene by any credible piece of evidence. I must mention the positive placing of 4th Accused at the scene as he is also place by the police witnesses as a helper to them.

I do not have to reiterate my own comments and observation of evidence of other witnesses who had identified him. Three of them were injured and lost conscious or fallen down when they claim to have

identified him. They all have crowded up after the police arrived and 4th Accused was prominently there at the scene then. That could be probably the reason he has been mentioned by many witnesses. If their evidence was presented in a proper manner by the prosecution, this court could have some reasons to place the 4th Accused in his defence. But I am afraid, I cannot do so when confronted with confused and contradicting evidence. The circumstances under which these heinous acts were committed were not prone to rational and consistent testimonies, which can result in evidence as per law against any of the Accused persons. I may observe in short the principle of common intention as these Accused persons are jointly charged to have committed the twelve murders with others not before the court.

I can unhesitatingly find, from the evidence, that there is no evidence that there was a prearranged plan to commit these unlawful acts. But this fact does not rule out the possibility of this common intention developing in the course of events. Have the prosecution presented that possibility? I do not think so as evident from the evidence as a whole presented before me. Even if it can be presumed from resultant deaths of the twelve deceased persons, I do not have evidence linking all these Accused persons with that common intention.

My sincere sympathy goes out to the families of victims of this beastly behaviour by the members of our society. I wish and pray, as often I do, that the Investigating and Prosecuting sides of the state should pause and ponder and then brace themselves with producing a credible case before the court so as to enable the Judiciary to deal with culprits of this unpardonable incident. Similarly, I also wish that in the future the courts are also properly assisted by the Defence Counsel.

But for the moment and so far as this case is concerned I have no other option but to find, which I hereby do, that the Prosecution has failed to lead any evidence against any of the Accused persons. Thus I enter finding of not guilty against all the Accused persons before me and acquit them under Section 306(1) of the Criminal Procedure Code. I thus also direct that they be discharged unless held otherwise as per law.

**Date and signed at Nairobi this 14th day of November, 2005.**

**K.H. RAWAL**

**JUDGE**

**14.11.2005**