



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**Criminal Case 22 of 2003 (1)**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1 WENSLAUS WABWIRE NYONGESA ..... 1<sup>ST</sup> ACCUSED**

**2 KENNEDY WAFULA SUMBATI) ..... 2<sup>ND</sup> ACCUSED**

**RULING**

Wenslaus Wabwire Nyongesa and Kennedy Wafula are before this Court on information of the Attorney General dated 9th September 2003 duly charged with offence of murder contrary to section 203 as read together with section 204 of the aforesaid code. It is said that on the 24th day of August 2003, at Siritanyi village, Kanduyi Location in Bungoma District of the Western Province jointly murdered Augustine Sifuna Nyongesa.

The prosecution called six witnesses to support the case against the accused before this Court. The defence counsel and the learned Principal State Counsel did not submit under Section 306 (1) of the criminal Procedure Code.

I have considered the evidence of the six prosecution witnesses. The evidence of P.W2, P.W3, P.W4 and P.W6 all point to the fact that the deceased and the two accused persons fought while taking chang'aa in the house of Eunice Nasambu (P.W.5). The evidence shows that the trio had taken chang'aa and were heavily influenced by that stuff. It is also clear from the testimonies of these witnesses that no weapons were involved in the scuffle. It is also clear that the deceased and the accused persons used to fight occasionally. It is not clear from the evidence as to what made them always fight. The documentary evidence tendered by P.W.6, in form of a post mortem report shows that the deceased died as a result of head injury.

After a careful consideration of the evidence it is evident that the prosecution did not establish that the 2 accused persons had malice aforethought to commit the offence of murder. There was also no clear evidence that the 2 accused persons jointly and actually participated in killing of the deceased. The P3 forms in respect of the accused persons did not show that the accused persons had recent physical injuries. If indeed, the 2 accused persons exchanged blows with the deceased then physical injuries should have been noted.

The upshot is that I find that there is no sufficient evidence to show that the two accused persons committed the offence of murder. I find them not guilty hence it is not necessary to place them on their defence. The duo should be set free forthwith from custody unless lawfully held.

**Dated and delivered this 28th day of October 2005.**

**J. K. SERGON**

**JUDGE**