



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 52 OF 2004**

**REPUBLIC.....PROSECUTOR
VERSUS**

**DAVID MANYARA NJUKI.....1ST ACCUSED
JOHN NJENGA.....2ND ACCUSED
JEREMIAH MUTURI.....3RD ACCUSED
JEREMIAH WANJAU WANJIKU.....4TH ACCUSED
DANCAN CHEGE NDICHU.....5TH ACCUSED
JOHN IRUNGU KIAI.....6TH ACCUSED
SAMWEL MWANGI MAINA.....7TH ACCUSED
PETER KIRAGU GITHUKA.....8TH ACCUSED
FRANCIS MAINA NJOROGE.....9TH ACCUSED
PAUL GITHI KIMANI.....10TH ACCUSED
MTO MUCHIRI MKOLOI.....11TH ACCUSED
KARIUKI MUGO.....12TH ACCUSED
DAVID KARANJA WANYOIKE.....13TH ACCUSED**

R U L I N G

The thirteen (13) accused persons jointly faced ten (10) counts of **murder** contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the night of 4th and 5th January, 2003 at Nakuru Township within Nakuru District of the Rift Valley Province they jointly murdered the following persons:- Andefunda Saul Likuyi, Bernard Wamaru Mukuthi, Harun Chege Mwaura, Jackson K. Bunei, Zakayo Chomba Gikunju, John Kamutu Mutua, David Nyaolango Nyandere, Joel Muhia Kimotho, Peter Mwariri Ndirangu and Joseph Wandera Asango. They all denied the charges and the prosecution called thirty (30) prosecution witnesses to testify on various aspects in support of its case and at the conclusion thereof, Mr. Karanja Mbugua, learned defence counsel for the first accused and Mr. Gordon Ogola, learned defence counsel for the rest of the accused persons submitted that the prosecution had not established a prima facie case as would have warranted the accused persons to be put on their defence.

It is important to restate the prosecution case against each of the accused persons, albeit briefly.

PW1, Karoli Asango Wandera testified that on 6th January, 2003, he was at their home in Bundalangi sub-location, Busia District when he received the bad news to the effect that his father, Joseph Wandera Asango (deceased) had been killed by some members of an unlawful society known as “**mungiki**” at Nakuru. He travelled to Nakuru and went to the municipal mortuary and removed the body to the Provincial Hospital mortuary where a post mortem was later carried out and thereafter the body was released to him and his relatives for burial.

PW2, Christine Mangeni Wandera was the mother to PW1 and her evidence was just the same as that of PW1 as she received the news of the death of her late husband when she was with PW1 at their aforesaid home and they travelled together to Nakuru.

PW3, Agnes Mumbi Mwariri was the wife to one of the people who were allegedly murdered by the accused, the late Peter Mwariri Ndirangu. She told the court that on 6th January, 2003 she was at home in Nyeri when she was telephoned by her late husband's sister and told that her husband had been killed at Kimathi Estate, Nakuru, where he was staying. She then travelled to Nakuru, identified the body at the mortuary and a post mortem was performed and the body was later released to her for burial.

PW4, Humprey Ben Andefunda testified that on 5th January, 2003 at about 11.00 p.m. he was in his house at Flamingo Estate, Nakuru when his neighbour told him his son, Saul Likuyi Andefunda had been slashed to death by some people in his house at Kimathi Estate within Nakuru Township. PW4 went to his late son's house and confirmed the bad news. Thereafter the matter was reported to the police and he recorded a statement. On 7/1/2003 a post mortem was performed and the body was thereafter released for burial.

PW5, Benard Wamalu Karuri testified that on 6/1/2003 he was told that his nephew, Benard Wamalu had been killed and later on the same day he went to the Provincial Hospital mortuary where he identified the deceased's body for post mortem.

PW6, Police Constable Mwasheria Mbwana was at Bondeni Police Station, Nakuru at the material time and on 5/1/2003 at about 8.00 p.m., he was deployed on patrol duties with one Police Constable Tanui to Lake View Estate near Kimathi and Flamingo Estate. At around 9.00 p.m., while they were in an area known as "Mahindi Choma" they heard people wailing at Kimathi and Flamingo Estates as they called for help. They rushed there and as they approached the area, they saw a crowd of about 50 people shouting and attacking members of the public. The people were armed with pangas and rungs. The police officers were armed with guns and as they approached the people, they started shouting, advancing towards them. The police officers ordered them to stop but they refused thus causing the police to shoot at them, felling down two instantly and the rest ran away.

PW6 further testified that the said people had white ribbons on their heads and long jackets. The Officer Commanding Bondeni Police Station came in a motor vehicle after a short while and they pursued the people towards Flamingo area where they met two suspects, one of them armed with a sword which was sharpened on both sides. PW6 said that they arrested the two suspects and called the duty officer who went to the scene of the arrest and they handed over the two suspects to him.

In cross examination, PW6 said that the two people whom they shot down were armed with pangas and swords and were posing danger to them. He however said that the two suspects they arrested that night were not among the accused. PW6 had personally arrested a man by the name Anthony but he was not one of the accused persons. After his arrest, PW6 never saw the white ribbon which the arrested person wore on his head as well as the knife which he had. In re-examination by Mr. Gumo, the Assistant Deputy Public Prosecutor, PW6 stated that the name of the other person whom they arrested was Peter Kiragu but he was not sure whether he was among the accused.

PW7, Jonah Kiplangat Bunei said that on 6/1/2003 he was in Mombasa when he received a report that his brother, Jackson Kimaiyo Bunei had died at Nakuru and he travelled there and identified the body for purposes of a post mortem which was carried out on 9/1/2003.

PW8, Police Constable Livingstone Lihanda was attached to the Provincial Criminal

Investigations Department and on 7/1/2003 at about 11.45 a.m. at the Municipal Mortuary he was shown nineteen (19) bodies which had different types of injuries and cuts. He photographed the bodies and processed the film and he prepared a certificate to the effect that the film was processed, developed and printed under his supervision. He produced the certificate and the photographs as exhibits before the court, Prosecution Exhibit No. 1. The photographs were truly horrifying, depicting human bodies badly mutilated by what must have been sharp objects. PW8 however did not know the names of the deceased persons whose bodies he photographed.

PW9, Police Constable Bunei was a brother to Jonah Kiplangat Bunei, one of the people alleged to have been murdered by the accused persons. He identified his late brother's body for purposes of a post mortem on 9/1/2003 at War Memorial Hospital.

PW10, Hannah Wambui Limui testified that on 7/1/2003 she learnt that her son, James Njoroge had been killed and a post mortem was later carried out and it showed that he died as a result of a bullet injury which shot the back of his neck and exited from the front. The deceased was not among the people alleged to have been killed by the accused.

PW11, Joyce Mbitu Waweru told the court that she was staying with her husband, David Olango Nyandere (deceased) at Flamingo Estate, Nakuru. The said deceased was a teacher at Lake Nakuru High School. On 5/1/2003 at about 9.00 p.m. while they were in their house with her husband and one Bernard Wamaru, she heard the sound of breaking glass from a distance of about 20 metres. Her husband went to one of the windows to check what it was and PW11 put off the lights that were on. Then suddenly their main house door was kicked from outside and four people got in and shouted "TOA MUNGIKI, TOA MUNGIKI". She replied that there were no mungiki members there and at that time, six other people got in. She said that they had white ribbons tied to their foreheads and some had caps. She further testified that her husband was asked if he was a "Manamba" i.e. matatu conductor or a driver and he replied that he was a teacher. He was then asked what tribe he was and he said he was a Luo and then the assailants said they wanted people like him and then they started to slash him with a panga. They dragged him out of the house and forced him to walk with them as they continued to assault him. The attackers also assaulted PW11 before they slashed PW11's husband to death. PW11 then heard gun shots behind them and when she went back to their house, she found that Bernard also had been slashed to death. She identified the **third** and the **fifth accused** as being among the people who forced their way into her house on the fateful night, saying that she talked to the two for almost twenty minutes beseeching them not to kill her husband.

In cross examination, she said that when the people got into her house there were lights and so she was able to see them. She said that she could recall their faces and insisted that the 3rd and the 5th accused were among the people who stormed into her house. She clarified that the house had two main rooms, an inner one and an outer one and the lights she put off were those in the inner room while those in the outer room remained on so she could see the people who broke into the house.

She further told the court that on the same week she identified the third accused in an identification parade conducted at the C.I.D's offices. When she was asked how the identification parade was conducted, she said that five (5) people were seated down at the said office and she did not know what the sitting position of the third accused was. She also could not remember the police officer who conducted the parade. She further stated that the room where the members of the parade were seated had windows and from outside one could see inside. She was in the room when the suspects were brought. During the parade she did not touch or point at the third accused and the accused could not even know whether he had been identified. She did not identify the 5th accused then but she identified him in the dock.

In her evidence during re-examination, she told the court that she had not been told by the police whether she was going for an identification parade and insisted that she was able to identify the 3rd accused at the parade because she had talked to him at length in her house. She said that the third accused was seated as the second person from the left during the identification parade.

PW12, Police Constable Dominic Ireri who was at the material time attached to Bondeni Police Station testified that on 4/1/2003 at about 11 a.m., he was at the station when the O.C.S. ordered him, Police Constable Wanyonyi, Police Constable Kamau and others to arm themselves with rifles and accompany the O.C.S. to Lake View Estate. Upon arrival, they found that one person had been slashed to death by people suspected to be mungiki members and the suspects had fled towards Mwariki Estate which borders Lake View Estate. The police officers pursued them and upon reaching Mwariki Sewage area, the suspects fled towards Kokoto area and the police caught up with them at the farm of Rift Valley Institute. They found them seated along Nakuru Njoro road. Some of them had pangas and they took off when they saw the police but the police chased them and arrested four (4) of them and took them to Bondeni Police Station. PW12 said he personally arrested one of the four people but he was categorical that the person he arrested was not among the accused. He did not tell the court what happened to that one suspect. However, and ironically so, he stated that the four suspects were charged in the present case.

In cross examination, he said that the person he arrested had a panga and was known as Nderitu Juma who is not among the suspects in court. He also said that they shot one suspect as he was trying to run away and they took him to hospital. The name of that suspect was not given and neither was the court informed of his fate. PW12 further stated that the people they arrested had three (3) pangas and they were all booked in the occurrence book at the police station and he was sure that the four people were among those who attacked residents of Lake View Estate. The pangas which the arrested people had were not produced before the court either, though the evidence of PW12 was that the events he narrated were taking place on 4th January, 2003 during the day whereas the accused persons were alleged to have committed the offences of murder on the night of 4th and 5th January, 2003.

PW13, Dr. Noah Oloo Kamidigo, the Rift Valley Provincial Pathologist testified that on 13/1/2003 he was requested by a C.I.D. officer to perform a post mortem on the body of Jacton Owino Ogodo and his findings were that he had died due to bullet injuries which he received on his upper part of the body.

On 8/1/2003 PW13 also performed another post mortem on the body of Patrick Maina Kiarie. His opinion was that the cause of his death was brain damage due to a depressed skull following blunt head injury.

Between 7/1/2003 and 13/1/2003 he also performed post mortems on the bodies of Jackson Kimaiyo Bunei, John Kamutu Mutua, Joel Muhia Kimotho, David Olango Nyandere, Andefunda Saul Likuyi and in respect of all of them, there was evidence that they died due to multiple bodily injuries which were inflicted upon them by use of sharp objects.

On 8/1/2003 PW13 performed a post mortem on the body of James Karanja Njoroge and in the opinion of the witness, the deceased died due to various bullet inflicted injuries.

PW14, Inspector Leonard Luta testified that on 6/1/2003 at around 3 p.m. he was in the C.I.D. offices in Nakuru when he was called by the Provincial Criminal Investigations Officer (P.C.I.O.) to accompany him with other police officers to the Provincial Police

offices. He was instructed to wait at the waiting room where the first accused and other men whom he did not know at the time but was to learn later that their names were Mr. Njoroge and Mr. Zakayo were sitting. The P.C.I.O. instructed PW14 and the other police officers to inform the first accused that he should accompany them to the Rift Valley Provincial C.I.D. offices. PW14 gave the instructions as ordered and the first accused and the other two people accompanied them. PW14 further testified that the police had information from an informer that the first accused was funding mungiki members in Nakuru. That information, he said, had been received between 1st and 3rd January, 2003 and they had been looking for him to verify the same. PW14 said that they had evidence that the first accused was connected with the killings that had taken place and so he was charged together with the other accused persons. PW14 was in the investigations team that was headed by the then District Criminal Investigations Officer, Superintendent Chelule.

In cross examination, PW14 said that the police were not told the names of the people who were allegedly being financed by the first accused. They were also not told where he was meeting with the people he was financing. He knew that the first accused was staying at Bondeni area and PW14 had gone there twice to lay ambush against the first accused but he did not manage to get him. He said that on 2/1/2003 he had gone there with other police officers and left a message for the first accused to contact the police but he had failed to do so. They were later told that he was at the Stanley Hotel, Nairobi and they relayed that information to Nairobi Police headquarters but they did not find him at the Hotel.

The informer then told the police that the first accused was seen within the precincts of parliament. That information was allegedly given to superintendent Chelule and the police went and found their informer near parliament but did not get the first accused. Thereafter they got information that chaos had erupted in Nakuru and they were ordered to go back and reinforce security.

PW14 told the court that he did not know how the first accused went to the Provincial Police Officer's office where they found him seated at the waiting room. The informer had told the police that the first accused was buying pangas and giving them to mungiki members to cause the mayhem but PW14 did not get any evidence to that effect. He never interviewed any suspect who alleged to have been financed by the first accused neither did he get the shop from which the first accused was allegedly buying the pangas.

The only real complaint that PW14 had against the first accused is that he went to his house severally to trace him without any success and that he failed to report to the police station after he left a message at his house that he should avail himself to the police. Whether the first accused went to the Provincial Police Officer's office from where he was arrested in response to the message left by PW14 in his house or not, the court was not told and as aforesaid, PW14 did not know how and why the first accused went to the P.P.O's office. PW14 further said that his specific role as against the first accused's case was to investigate his whereabouts but the bulk of the investigations were undertaken by his superiors; presumably the District Criminal Investigations Officer, Superintendent Chelule.

PW15, Police Constable Kirwa told the court that on 9/1/2003 he was instructed by the D.C.I.O. Nakuru to accompany two ladies by the names Angeline Wambui and Hellen Kagure to the Provincial General Hospital mortuary to witness a post mortem on the body of Benard Wamalu which he did and the post mortem was carried out.

PW16, Police Constable Justus Kiptanui was attached to Bondeni Police Station and on 5/1/2003 at about 8.00 p.m. he was on patrol duties within Lake View Estate with PW6. At about 9.00 p.m. they heard people calling for assistance from Kimathi and

Flamingo Estates and they rushed there and as they approached, they saw a group of about fifty (50) people armed with swords and rungu with white ribbons on their heads and they were assaulting members of the public. They ordered the group to stop but instead they approached them dangerously as they shouted. The police then shot two of them dead and the rest disappeared towards Kivumbini area. They followed them up and at Kivumbini they got scattered and the police arrested two of them. They searched them and recovered a sword from one of them known as Anthony Mwangi. The other person whom they arrested was **accused number 8, Peter Kiragu** who was identified in the dock by the witness. He had no weapon but had a white ribbon on his head. The sword that was taken from Anthony Mwangi was labelled and taken to Bondeni Police Station. The two arrested persons were taken to Bondeni Police Station as well as the white head bands which they wore. PW16 told the court that Anthony Mwangi was charged with the offence of being armed in public but not with murder.

Cross examined by Mr. Ogola, he stated that when they went to Kimathi Estate there were people running helter-skelter. They arrested accused number eight (8) with no weapon at all but he had a white ribbon which was not produced in court although it had been taken to Bondeni Police Station, he stated. Anthony Kiragu and accused No. 8 were both booked at Bondeni Police Station for being members of an unlawful society and Anthony Kiragu who had a very sharp sword was charged for that offence but accused No.8 who had no weapon was charged with murder.

PW16 further told the court that on the material night, that is of 5th January, 2003 the O.C.S. Bondeni Police Station came in a Land Cruiser and it broke down and at about midnight he took it to a garage which belonged to the first accused. The house of the first accused was next to the garage and he helped them to repair the vehicle. The garage was next to Bondeni Police Station and about 200 metres from Flamingo. The witness said that the first accused was aware of the mayhem that had taken place.

According to the evidence of PW14, Inspector Leonard Luta, the police were busy looking for the first accused from 2nd January, 2003 upto 6th January, 2003 when they extended their search to Nairobi yet on the night of 5th January, 2003, the person the police were desperately looking for was there helping the police to repair their motor vehicle at his garage so that they could pursue the assailant who had caused so much bloodshed in the area. Why did not the O.C.S. Bondeni and his team composed of PW6 and PW16 among others arrest the first accused that night if at all he was a wanted man in connection with the killings? Is it possible that the O.C.S. and his team did not know that the P.C.I.O. and his team of investigators were looking for the first accused? Was the conduct of the first accused on the night of 5/1/2003 consistent with that of a person who was avoiding the police and refusing to hearken to their calls that he avails himself to the police as per the evidence of PW14?

PW17, P.C. Rose Wanjiru Mwangi attended the post mortem of the body of the late Peter Ndirangu on 9th January, 2003 which was performed by Dr. Koech.

PW18, Geoffrey Njoroge Kimotho identified the body of her son, George Muhia for purposes of post mortem on 13/1/2003.

PW19, Hannah Waithira Kiarie testified that she was the mother of Patrick Maina who was allegedly killed on 5th January, 2003. However, this deceased person was not among the people who were alleged to have been murdered by the accused persons.

PW20, Corporal John Mbaruku was employed by the Kenya Wildlife Services at Lake Nakuru National Park and his evidence was that on 3rd January, 2003 at about 10.00 a.m. he was at the main gate with one Samuel Mwaluma when they saw some two people running towards the main gate. The people had crossed the electric fence surrounding the

park and were inside the park. The two men had pangas and PW20 and his colleague stopped them and ordered them to drop the weapons which they did. They were arrested and taken to Bondeni Police Station. These two men identified themselves as Joseph Irungu and David Etole. The two said that they were running away but PW20 could not identify them among the accused persons. The two were booked in the occurrence book at the police station as having trespassed into the National Park. The witness was categorical that the two people were in custody at Bondeni Police Station by 3/1/2003 at about 10.30 a.m. and so they could not have committed the alleged offence of murder on the nights of 4th and 5th January, 2003.

However, Joseph Irungu and David Etole are not among the accused and it is not clear to the court why the prosecution called PW20 to testify. Even if Joseph Irungu and David Etole had been among the accused, no charges of murder having been committed on the nights of 4th and 5th January, 2003 could be sustained against them if the two were in police custody on 3rd January, 2003 at about 10.30 a.m. and had not been released by the time the killings were taking place.

PW21, Police Constable Joseph Chirchir was attached to Bondeni Police station and on 4th January, 2003 at about 11.00 a.m. he was in the office when PW20 handed over to him two suspects, John Irungu and James Patrick kitole. He said he was also given two pangas and he identified one of the pangas in court although he did not tell the court how he identified it as it had no label at all. PW21 told the court that he charged the two with the offences of being armed in public and entering into a National Park without consent. The witness confirmed that the two were not among the accused.

Questioned by Mr. Karanja regarding the date when the two were handed over to him by PW20, he insisted it was 4th January, 2003 during the day and not on any other date. The two were later picked by the C.I.D. officers.

PW22, Anthony Muchiri Gitau did not give any evidence that was of any relevance to the charges against the accused because he talked of having seen some 3 men dressed in jackets and alighting from a matatu carrying pangas and sticks in their jackets. He alleged that the three people beat him up with the sticks. That was on 3/1/2003.

PW23, Inspector Joseph Muguna testified that on 5/1/2003 at about 10 p.m. together with police constable Leleruk and Police Constable Erastus were on patrol duties inside a vehicle when they received communication that there were some people believed to be mungiki members terrorising people at Flamingo and Bahati Estates and they were directed to go and reinforce security. On reaching Section 58 they met 8 to 10 young men who were dressed in heavy jackets and were running from Bondeni area towards Section 58 and they were armed with pangas and rungas. They arrested two (2) of them, Ngoroi Muchiri and Kimani and recovered a panga and a simi from them. He identified a panga which he said was with **Nkoloji Muchiri** (11th accused) and a sword which he said was with the 10th accused, although the names of the accused as given by the said witness is different from the names given in the charge sheet. The two arrested persons were escorted to Nakuru Police Station together with the panga and the sword.

In cross examination, he stated that he booked the two for the offence of being armed in preparation to commit a felony. He insisted that the panga and the sword which he produced in court were the same ones which the two suspects had on the material night. The weapons had no blood stains, he stated.

PW23 denied a suggestion by Mr. Ogola advocate that the people arrested were

watchmen in the area. Asked to identify the two people from the dock, he was unable to do so. He also said that the suspects did not wear white ribbons on their heads.

PW24, John Ndung'u Kamani testified that he was attached to Bondeni Police Station as Deputy Station Commander. On 4/1/2003 at about 8.00 a.m. he was the duty officer at the station and at about 10.00 a.m. the O.C.S., Menengai Police Station, told him that he met a group of mungiki people along KANU street removing passengers from matatus and beating the touts. They went there and met a group of more than 20 people and they managed to arrest 5 of them who had pangas and the pangas were taken to Bondeni Police Station. However, the witness said that the 5 people they arrested were not among the accused. At about 11.00 a.m. the witness received a report that another group of mungiki members had beaten somebody at Lake View Estate and several police officers went there. They found that a person known as Joel had been cut with a panga and had been taken to hospital. Members of the public showed the police a group of people and the police followed them up. They were more than 30 in number and the police followed them up to sewage works where the group confronted the police and the police fired in the air to scare them. Some people ran towards the National Park and others towards Njoro. PW24 and his team followed the group that ran towards Njoro. 11 of the people were arrested and taken to Bondeni Police Station and the witness said that it was the O.C.S. who dealt with the arrested persons although later they were picked from the station by C.I.D. officers. In cross examination, he admitted that none of the 11 people arrested that day were among the accused persons in court. The witness merely stated that the arrested people remained in custody for about a week. I assume that they were released thereafter. The court was not told what became of them. The court expected the prosecution to call as a witness the person who was serving as the O.C.S. Bondeni Police Station at the time since his station seems to have been the nerve centre of the police operations but he was not called. PW6, PW12, PW21 and PW24 were all attached to Bondeni Police Station and they all received various instructions from their O.C.S. PW20 from the Kenya Wildlife Service also booked two suspects at the same station. The first accused was staying near the station where he also had a garage. Most of the recovered weapons were also stored at that station.

PW25, chief Inspector John Mbaluka was the O.C.S. Central Police Station, Nakuru and he testified that on 6/1/2003 at around 1.00 a.m. he was patrolling along Nairobi-Nakuru Road with other police officers. As they approached Nakuru Blankets he saw a group of 15 people wearing jackets and long coats and he ordered them to stop but they started running away in different directions. The police officers fired in the air to stop them but the suspects ran and hid themselves in some flowers and thickets there. They searched and arrested 8 of them, some of whom were armed with rungas and pangas. They took the suspects and the arms to the police station and handed over the case to the Criminal Investigations Department. The witness purported to identify 4 pangas which were allegedly recovered from the arrested people but the pangas had no labels or any distinguishing feature except for one of them which had a label reading: **“C.R. NO. 204, Accused: Muchiri”**. It showed that it had been recovered by Inspector Muguna at Section 58. On being cross-examined by Mr. Ogola, the witness said that he could not connect the people he arrested with the murders that the accused had been charged with. He said that the arrested people were booked at the police station as being members of an unlawful society. And upon re-examination by Mr. Gumo, he said that he was not the investigating officer in this case and he was not able to tell whether the people he arrested were among the accused persons. In any event, the people who were arrested by PW25 and his team were arrested on 6/1/2003 while the accused persons are alleged to have committed the offences of murder on the night of 4th and 5th January, 2003.

PW26, Joseph Kanyi Kihika testified that on 5/1/2003 at about 9.00 a.m. he was at his home in Muranga when he was informed that his son, Benard Kihika Kanyi had been assaulted at Nakuru by Mungiki members. He travelled to Nakuru on 6/1/2003 and

confirmed that his son had actually been killed and thereafter he identified the body for post mortem.

PW27, Paul Ndirangu Mwariri stated that on 5/1/2003 at about 9.00 p.m. he was in a house at Kimathi Estate with his father, Peter Mwariri Ndirangu when he heard the house windows being hit as well as the door. The door was suddenly broken open and some people entered but he managed to escape. After ten to fifteen minutes he heard screams and then gun shots. When he went back to the house, he found his father having been slashed to death. He never saw the assailants, he stated.

PW28, chief Inspector Timothy Chepngabit was at the material time the head of Scenes of Crime, Nakuru. He produced 25 photographs which he took at different scenes of murder showing dead bodies of human beings and the surroundings where each body was found. He also prepared a certificate to certify that the film was developed and printed under his supervision and signed the same. The photographs and the certificate were produced as Prosecution Exhibit 14(a) and (b) respectively.

PW29 Dr. Kogutu Vitalis, a Senior Medical Officer at the Provincial General Hospital, Nakuru, examined all the accused persons except the 10th, 11th, 12th accused who were examined by Dr. Sirengo.

All the accused except for number 12 were found to be of sound mental status and thus fit to stand trial. With respect to accused No.12 Kariuki Mugo, Dr. Sirengo found that he was unkept in appearance, his behaviour was inappropriate, his speech was incoherent and sometimes inconsistent, he appeared disoriented in time, place and persons and had impaired memory, both short and long term. The Doctor therefore recommended that the accused be re-examined by a Psychiatrist Doctor. It would appear that the accused was not re-examined as required and it is highly doubtful whether he was fit to stand trial. The police should have had this accused person re-examined by a psychiatrist before he was charged.

PW30, Dr. Paul Gachunga was a medical officer working at Nakuru at the material time. He carried out post mortems on the bodies of Benard Waweru Mukuthi and Zakayo Chomba Gikunju and he formed the opinion that the two died as a result of head injuries. He produced the post mortem reports. PW30 also produced a post mortem report prepared by Dr. Ochieng who carried out a post mortem on the body of Benard Kihika Kanyi, who also died due to severe head injuries which he received.

The prosecution then applied to recall PW14, Inspector Leonard Luta to produce some exhibits on behalf of superintendent Jonathan Abraham Chelule, who was the head of the investigating team. Mr. Gumo, Assistant Deputy Public Prosecutor, said that Mr. Chelule had been retired prematurely from the police force and he was a bitter man. But when the court enquired whether he had been bonded to attend court and testify it was realised that he had not been bonded at all. The application was not opposed by the defence counsel and the court allowed it.

PW14 testified that on 6/1/2003 he was in the office investigating a case of murder when Chief Inspector Mbaluka and Inspector Muguna delivered to him 3 pangas, one sword and one dagger knife and told him that they were recovered from some suspects within Flamingo and Section 58. He took possession of the exhibits and kept them. He then produced them as exhibits before the court.

In cross examination, he stated that the said exhibits were handed over to Superintendent Chelule in his presence and they were recorded in the Exhibit Memo. He further stated that superintendent Chelule, who was heading the investigations and who kept the investigations diary retired from the police force in May 2004 before he recorded any

statement. The exhibits he produced had no labels except the panga which was referred to by PW25 which showed that it had been recovered from a Mr. Muchiri in a different case all together. The exhibits memo was also not available, he said, and so it was not easy to tell what exhibit had been recovered and from who. PW14 was not able to tell where the exhibits he produced were recovered from.

The prosecution then closed its case and the defence counsel submitted that all the accused had no case to answer. It is well known that the standard of proof in criminal cases is beyond any reasonable doubt and where at the close of the prosecution case the court entertains any doubts as regards the culpability of an accused person, he has to be given the benefit of doubt. So, did the prosecution establish a prima facie case as would warrant the accused persons to be put on their defence?

In **MUNYOLE VS REPUBLIC [1985] K.L.R. 662** the Court of Appeal stated that in a joint trial involving more than one accused person, as in the present case, the evidence against each accused must be considered separately and the case against each accused must be such as to prove the guilt of that particular accused beyond reasonable doubt. The court must therefore be satisfied that there is sufficient evidence to warrant each of the accused persons to be placed on their defence.

And what is a *prima facie case* ? Mr. Karanja cited the Court of Appeal decision in **RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332** where Sir Newnham Worley P. delivered himself as follows:-

“It may not be easy to define what is meant by a ‘ prima facie case ’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.”

He had earlier in the same judgment stated that:-

“Remembering t hat the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution, the case is merely one ‘which on full consideration might possibly be thought sufficient to sustain a conviction’. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question wh ether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

I may as well add that in my view, if at the close of the prosecution case the court is of the view that on the basis of the facts of the case and the evidence adduced and considering the relevant law applicable, the court is not in a position to convict an accused person if he elected to offer no evidence, it would be a miscarriage of justice to place him on his defence. In **MURIMI VS THE REPUBLIC [1967] E.A. 542** an appeal was allowed because the trial magistrate in refusing to acquit an accused at the close of the prosecution case (as he should have done) occasioned a failure of justice on the facts of the case.

I have carefully considered the prosecution evidence that was adduced as against the first accused and in my view it is totally wanting and too weak to sustain such serious charges as the ones which he faces. The only evidence that was adduced against him was that of PW14. I have earlier in this ruling analysed that evidence and if I may revisit it, albeit

briefly, the police had been told by an informer that the first accused was financing mungiki members in Nakuru and thereafter the police started looking for him. The informer seems to have taken the police on a wild goose chase to various places in Nairobi. He first told them that he was at the Stanley Hotel in Nairobi but that turned out to be untrue. The informer then told the police that the first accused was within the precincts of parliament and the police rushed there and apparently found the informer near parliament buildings but they did not get the man they were after. The informer, if at all he was truthful to the police, did not tell them when the first accused disappeared from there. Since the informer was within parliament buildings where the first accused allegedly was also, the informer should have noticed if the first accused left the said premises. The first accused is a former member of parliament and was therefore well known and it would have been easy for the informer to spot him and track his movements. It was incumbent upon the police to verify the truth and accuracy of the information which they allegedly received from their informer but they do not seem to have carried out any independent investigations at all. The informer did not tell the police where the first accused was allegedly meeting with the mungiki members or where the first accused was buying the pangas from and the police do not seem to have made any headway in their investigations towards that end. The pangas that were produced in evidence did not appear to have been recently purchased, if at all it was true that the first accused was buying the pangas for the assailants. The police seem to have believed the information given to them by the informer as the gospel truth.

According to PW14, the first accused was found seated in the waiting room of the Provincial Police Officer's office on 6/1/2003 from where he was arrested. The court was not told why and how he went there.

PW16 told the court that on the night of 5/1/2003 the first accused was helping the police to repair their vehicle at his garage so that they could pursue the killers yet they did not arrest him if at all he was a wanted man in connection with the killings.

While it is trite law that the police cannot be compelled to disclose the identity of their informers leave alone call them to testify in court, it hehoves the police to subject such information to thorough investigations to determine whether it is credible as to be sufficient to form the basis of effecting an arrest and sustaining a charge, and particularly so where that charge to be preferred against an accused is a non-bailable one.

I find that there is no evidence, direct or circumstantial to connect the first accused with the offence as charged with and it would therefore be a violation of the law to put him on his defence in the circumstances. I acquit him of all the counts under Section 210 of the Criminal Procedure Code.

I now turn to consider the evidence relating to the other 12 accused persons. There were some accused persons who were not mentioned at all by the prosecution witnesses and it was not clear why they had been arrested in the first place. They are accused number 2, John Njenga, accused number 4, Jeremiah Wanjau, accused number 7, Samuel Mwangi Maina, accused number 9, Francis Maina Njoroge, accused number 12 and accused number 13. PW24 testified that they arrested 11 people on 4/1/2003 at about 11.00 a.m. or there about but he said that the eleven were not among the accused. In any event, the alleged offences took place on the nights of 4th and 5th January, 2003 and during the day. At the close of the prosecution case, no witness mentioned the aforesaid accused persons or linked them to the offences with which they were charged or even knew why and from where they had been arrested.

The court cannot therefore place such accused persons on their defence. I hold that they have no case to answer and consequently accused No.2, John Njenga, accused No.4, Jeremiah Wanjau, accused number 7, Samuel Mwangi Maina, accused number 9 Francis

Maina Njoroge, accused number 12 Kariuki Mugo and accused number 13 David Karanja Wanyoike are hereby acquitted of all the counts under Section 210 of the Criminal Procedure code.

PW20 testified of having arrested two people for the offence of trespassing into the Nakuru National Park. He said that they were arrested on 3rd January, 2003 at about 10.00 a.m. He gave their names as Joseph Irungu and David Etole. The sixth accused is known as **John Irungu Kiai** and not **Joseph Irungu**. PW20 said he was not sure of the English names of the two people he arrested. Even if it was assumed that he meant John Irungu when he talked of Joseph Irungu, the witness was very clear that the two people, whoever they were, could not have been involved in the killings which were taking place on the night of 4th and 5th January, 2003 because by that time they were in police custody for the said offence of trespassing into a National Park. More or less the same evidence was given by PW21 although according to him, the names of the two people were John Irungu and James Patrick Kitole but the two were handed over to him by PW20 at Bondeni Police Station on 4th January, 2003 at about 11.00 a.m. PW2 equally said that the two were in police custody when the alleged offences were being committed. He added that the two were charged with the offences of being armed in public and entering into a National Park without consent. He also said that the two were not among the accused in court.

What then was the basis of arraigning the sixth accused in court? I see no justification at all and therefore I acquit John Irungu Kiai of all the counts against him in accordance with Section 210 of the Criminal Procedure Code.

PW16 said that one of the people arrested on the night of 5/1/2003 was accused number 8, Peter Kiragu. He was not having any weapon at the time of his arrest and it was alleged that he had a white ribbon on his head and was taken to Bondeni Police Station and the white ribbon was also kept there. That white ribbon was not produced in court as an exhibit. He was booked in the police station for being a member of the mungiki sect. PW16 was with PW6 at the time when they arrested the eighth accused. PW6 could not identify the 8th accused but PW16 identified the said accused in the dock. The accused was arrested as he was running away. There was evidence that on that material night people were running helter-skelter, innocent members of the public running away from mungiki members and the assailants running away from the police and it was total chaos. The arrest was effected at night. There was no indication whether at Kivumbini area where accused number 8 and Anthony Mwangi were arrested there was sufficient light as would have enabled the police to identify accused number 8 appropriately. The two police officers saw the accused only that night and PW16 did not tell the court whether accused No.8 had any distinguishing mark which could have made him to positively identify the accused. Mistaken identity cannot be ruled out. It is also possible that accused number 8 was an innocent member of the public who was just running away after the pandemonium broke out. This possibility is given credence by the fact that he had no weapon when he was arrested whereas the mungiki members were said to have been armed with crude weapons like pangas. It is also ironical that PW6 and PW16 arrested accused No. 8 without any weapon and was charged with murder while Anthony Kiragu who was also arrested as he ran away and was carrying a sharp sword at the time was charged with the offence of being armed in public and is consequently not among those who were charged for murder.

In my view, there was no sufficient evidence against the 8th accused, Peter Kiragu Githuka, to connect him with the murder charges and consequently I acquit him under Section 210 of the Criminal Procedure Code.

In this case, the prosecution relied almost entirely on circumstantial evidence to prove its case. In the often cited case of **KIPKERING ARAP KOSKE AND ANOTHER VS REX**

(1949) E.A.C.A. 135 at Page 136, the Court of Appeal for Eastern Africa stated as follows:-

“As said in Wills on ‘Circumstantial Evidence’ 6 th Edition P.341 in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”

I must therefore consider whether the evidence of PW23 as against the 10th and 11th accused is incapable of any other explanation other than the inference that they are the ones or were among the people that caused the death of the persons named in the charge sheet. It is also important to recall the definition of Circumstantial Evidence as stated in **Blackstones Criminal Practice, 1995 Edition F1, 10 at Page 1777 :-**

“Circumstantial Evidence is evidence of facts from which the existence or non -existence of facts in issue may be inferred. It works by cumulatively in geometrical progression, eliminating all other possibilities. It is however necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co -existing circumstances which would weaken or destroy the inference”.

According to the evidence of PW23, the 10th and 11th accused were arrested in possession of a panga and a sword and were booked for the offence of being armed in preparation to commit a felony. There was, however, nothing to prove that the two people were involved in the killings of the deceased persons as per the charge sheet. The said weapons had no blood stains and neither did the clothes of the two accused have such stains. PW23 further stated that after he effected the said arrests he did not carry out any further investigations into the matter.

As was stated by the Court of Appeal in **MARY WANJIKU GICHIRA VS REPUBLIC** Criminal Appeal No. 17 of 1998 and restated by the same court in **JOAN CHEBICHII SAWE VS REPUBLIC** Criminal Appeal No. 2 of 2002: ***“Suspicion, however strong cannot provide a basis for inferring guilt which must be proved by evidence .”***

It is evident that the police investigations were dismal and disjointed. The person who headed the investigations and co-ordinated the police operations, superintendent Jonathan Abraham Chelule was not called to testify and tie together the many loose ends of the prosecution case. There was no good reason why he was not called. I cannot accept the simplistic explanation that he was retired prematurely from the police force and was therefore a bitter man and was unlikely to co-operate. That is a speculative argument because the man was simply not bonded to attend court and testify. If that had been done and he refused, the court has coercive powers to compel attendance of witnesses. It was said that he is the one who kept the investigations diary and the exhibit memo. The prosecution should have called him to testify. It must be remembered that it is not enough for the police to round up as many suspects as possible when a serious crime occurs and arraign them in court without having carried out sufficient investigations as would reveal the involvement of each and every accused in the commission of the offence as charged with. A court of law cannot convict accused persons en masse or on mere suspicion without evidence pointing to the guilt of each and every accused person before it no matter how serious the alleged offence is, otherwise it would be acting just like some members of the public who administer the so called “mob justice” upon

suspects. A court of law must resist the temptation to convict on public sympathy or on any other consideration but proper evidence, direct or circumstantial.

I find that the case as against the 10th and 11th accused is not established to such an extent as would require that they be placed on their defence and I acquit them of all the counts in terms of the provisions of Section 210 of the Criminal Procedure Code.

And lastly, I turn to the evidence of PW11 as against the third and fifth accused persons. She identified these two accused as having been among the people who broke into her house. She said that there was sufficient light to enable her identify the two yet there was a group of about ten (10) men who broke into her house on the night of 5th January, 2003.

She also purported to have identified the third accused in an identification parade which was held at the C.I.D's offices. She said that the same was done when five (5) people were seated down at the said office. The manner that was used to identify the 3rd accused was contrary to the well known Judges rules as were spelt out by the Court of Appeal in **SIMON MUSOKE VS R (1958) E.A. 715**. Among them is that the accused is placed among at least eight (8) persons, as far as possible of similar age, height, general appearance and class of life as himself. The identifying person must also touch the person he identifies.

It was improper for the police to ask PW11 to pick out the suspect out of a group of only five people who were seated down. That could not have been an identification parade by any stretch of imagination. In any parade people must be standing or walking but never seated down.

She never touched the third accused at all, she merely pointed him out to the police. The accused person could not know that he had been identified at all. She could not tell which police officer conducted that botched up exercise. The 3rd accused was not asked to sign the identification parade forms, if any. She was unable to identify the 5th accused then but purported to identify him at the dock. Dock identification is insufficient unless the accused was previously known to a witness.

The prosecution did not adduce any other evidence against the 3rd and the 5th accused. It relied entirely on the evidence of PW11 which was totally insufficient. I therefore acquit the 3rd and 5th accused of all the counts against them under Section 210 of the Criminal Procedure Code.

The end result is that all the accused persons are acquitted, there being no sufficient evidence to warrant placing them on their defence and they should be set at liberty unless otherwise lawfully held.

DATED, SIGNED & DELIVERED at Nakuru this 15th day of December, 2004.

DANIEL MUSINGA

JUDGE

15/12/2004