



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

**Criminal Case 14 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MUTUA KAKUNGA NJOROGE ..... ACCUSED**

**R U L I N G**

Mutua Kakunga Njoroge faces a charge of Murder Contrary to Section 203 and 204 of the Penal Code. He is alleged to have murdered Richard Mwanzia Nzau on 30/9/01 at Kitanga sub-location, Katheka Kai in Machakos district. The prosecution called a total of five witnesses.

The first witness Veronica Wanjiru Wainaina told the court that she sells Changaa and on 29/9/01 the deceased and the accused were at her house at about 8.30 p.m. Mwanzia the deceased bought Changaa of Kshs. 50/=. PW 1 was given 300/= by deceased. She gave back 200/= note. Deceased also bought alcohol for accused. The deceased left and the accused left soon after. The deceased then came back and asked if he owed any thing to the accused. Then, accused remained outside. The deceased repeated it three times.

They then went away and accused later returned after about two hours and asked for beer. He gave PW 1 a note of Kshs. 200/= which is the same note she had given deceased. PW 1 refused to accept the note but kept it and said that she could only release it to accused if the deceased did not claim it. Accused then produced 50/= and asked for Changaa but she recognized it as the same one she gave the deceased as change. Accused made noise but left. On 30/9/01 PW 1 met the accused as she came back from collecting milk. Accused informed her that he had found the deceased dead near the gate of a neighbour. PW 1 went to wake up her father PW 2 and informed him of what the accused had said. They went to the place mentioned by accused and found the deceased's body. By then accused had left. The deceased's body was covered with some leaves and the body half naked. Accused returned and asked PW 2 to take him to report at the police station which they did. PW 2 Charles Wainaina recalled how he was woken up by PW 1 on 30/9/01 and went to the scene where the body of the deceased lay. He noted that the deceased had injuries on the back of his head. PW 2 recalled that he escorted the accused to go and report at Kyumbi Police Post and police accompanied them back to the scene and collected the deceased's body and the deceased's clothes which were found nearby. He too was arrested and charged for this offence but was discharged after 8 months. PW 3 Margaret Mwikali Njau recalled that on 29/9/01, at about 6.00 p.m the accused brought home cattle, he ate and he went to sleep in the kitchen where he used to sleep whereas the witness went to sleep with her children in her house. She left him in the kitchen. Next morning at 6.00 a.m and he did not look well. They took tea, he went away and after an hour came back changed into other clothes and went away. Later in the evening, the accused came back in company of police and they carried away the clothes accused had changed from.

PW 4 Police Constable Ogutu was one the Investigating Officer and visited the scene, collected the body, clothes and recorded statements of witnesses. Kshs. 250/= was handed over to PW 4 as the money which accused took to PW 1 for Changaa bill. PW 1 identified it was what the deceased had had earlier.

PW 4 Dr Patrick Ondao produced a postmortem report prepared by Dr. Mwangi dated 8/10/01 who had opined that the cause of death was due to Cardio pulmonary arrest secondary to massive head injury

implicated by a blunt object.

None of the prosecution witnesses ever witnessed the deceased's murder.

The accused became a suspect because he was the last to be seen with the deceased at PW 1's house on the night of 29/9/01. PW 1 said that the deceased and accused used to walk together. On that night they had not disagreed save that after the deceased left accused followed and thereafter the deceased came back asking whether he owed the accused anything and he went away after the 4th time of asking. Further suspicion is raised when PW1 says accused came back with 250/= which PW 1 suspected to have belonged to the deceased. Money will normally look alike unless the witness had recorded the numbers of the note which the court has not been told or unless there was a special mark on the notes. The court was not told of any mark. The court was told that the clothes which accused wore on the night of 29/9/01 were taken by police. The court has not been told whether there was any evidence found on the clothes to link accused with the offence. The prosecution has totally failed to prove the nexus between the accused and the offence save for suspicion. The prosecution was expected to establish a prima facie case against the accused which is such that if accused was placed on his defence and he opted to be quiet there would be evidence to warrant a conviction. Such evidence is lacking and I will accordingly order the accused acquitted at this stage under Section 306 (1) of the Criminal Procedure Code.

Dated at Machakos this 14th day of December 2004

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**