



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 62 OF 2012**

REPUBLIC.....PROSECUTOR

VERSUS

SIMON KINYANJUI NYAMBURA.....ACCUSED

**JUDGMENT**

The accused **SIMON KINYANJUI NYAMBURA** alias **KIJANA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

***“On 8<sup>th</sup> day of July, 2012 at Kanyi Estate in Nakuru District within Nakuru County jointly with others not before court murdered ISAAH MOYOM YOOL”***

The accused pleaded ‘**Not Guilty**’ to the charge. His trial commenced on 6/10/2012 before Hon Lady Justice Helen Omondi who heard the first six (6) witnesses. Following the transfer of the Honourable Judge to Bungoma High Court I took over the case and heard the last witness. A total of seven (7) witnesses testified in the case.

This case concerned a fatal assault which occurred on the evening of 8/7/2012 **PW1 SOLOMON MAMER KWAL, PW2 APEJ ALITH, PW3 CHRIS AJAK and PW6 LIEN ATANYI MAYAM** were four South Sudanese youths. They told the court that on 8/7/2012 they together with the deceased had attended a Sudanese Cultural Festival at KITI Institute. As they headed towards Nakuru No. 58 near Kabachia two men stopped them and offered to sell them condoms. The four youths declined to buy. Suddenly a group of boda boda riders joined the first two men and began to assault them.

The four all ran in different directions each seeking to save their own life. Later the youths regrouped and realized that the deceased was missing. **PW1** told the court that he called the deceased’s mobile number and the stranger who picked the call told him that his friend was lying injured on the ground. The four returned to the scene and found the deceased lying unconscious on the ground with severe injuries to his head. They hired a motor cycle and rushed the deceased to hospital but he was declared dead upon arrival. The matter was reported to police after which the accused was arrested and charged.

At the close of the prosecution case, this court must determine whether a prima facie case has been established to warrant placing the accused onto his defence.

The definition of a prima facie case was given in the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A** where it was held

*“..... 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 could convict if no explanation is offered by the defence”*

The fact of the death of the deceased is not in any doubt. **PW1, PW2 PW3** and **PW6** all testified that they together with the deceased were assaulted by a group of boda boda riders. The deceased was later declared dead upon arrival in hospital.

**PW4 DR. TITUS NGULUNGU** a pathologist based at PGH – Nakuru, told the court that he conducted an autopsy on the body of the deceased. He noted bruises and lacerations on the head of the deceased and the skull was fractured. **PW4** opined that the cause of death was **‘severe head injury attended by skull fractures brain lacerations and subarachnoid haemorrhage due to blunt object trauma’**. **PW4** filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 1**.

This was an incident in which there were four (4) eye witnesses. However none of the four witnesses were unable to identify any of the men who assaulted them. More pertinently none of the four witnesses who were present at the scene was able to identify the accused as one of the men who assaulted them.

**PW1** under cross examination stated

*“I would not be able to identify even one of the people who attacked us”.*

**PW2** states

*“I cannot identify our attackers. The whole thing happened in a split second”.*

**PW3** on his part said

*“I would not be able to identify any of our attackers”.*

Finally on this point **PW6** stated

*“I did not identify any of our attackers”*

**PW7 CORPORAL RENOS MUSUNGU** who was the investigating officer told the court that the accused was arrested following information supplied to the police by an informer.

**PW5 INSPECTOR MUNYWOKI** testified that on 8/7/2012 he conducted an identification parade at Nakuru police station at which parade the accused was positively identified. **PW5** produced the parade forms as exhibits in this case **P. exb 2**. A look at those parade forms indicate that the name of the identifying witness was **‘Brian Amollo Owidi’**. No witness bearing this name has testified in court. The evidence of **PW5** is worthless without corroboration from the identifying witness.

**PW7** told the court that police were totally unable to trace this witness. **PW7** concedes that

*“The witness Brian has not testified. I do not know where he is’*

This was a crucial witness as he was the only one who would have been able to link the accused to the fatal assault on the deceased. The failure to avail this **‘Brian Amollo’** as a witness is fatal to the prosecution case.

**PW7** in his evidence told the court that the said **‘Brian Amollo’** told police that he saw one **‘Hamisi’** hit the deceased on the head with a panga. **PW7** goes on to admit that **‘the accused is not named Hamisi’**. It is not explained why when **‘Hamisi’** was named as the assailant, the police proceeded to arrest and charge the accused for the offence. No connection has been shown to exist between this **‘Hamisi’** and the accused. This is an anomaly which was never explained by **PW7**.

On the whole I find that there is no evidence to link the accused to this offence of murder. None of the eyewitnesses has placed the accused at the scene. I find that there has not even been a pretence at proving a prima facie case. I enter a verdict of '**Not Guilty**' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Nakuru this 21<sup>st</sup> day of July, 2017.**

Mr. Kipkoech for Accused

Mr. Chigiti for State

**Maureen A. Odero**

**Judge**