



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 47 OF 2013**

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN GITHAIGA KARURI..... ACCUSED

**JUDGEMENT**

The accused **STEPHEN GITHAIGA KARURI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge are that

***“On the 26<sup>th</sup> day of April, 2013 at Farainya Village within Nyandarua County, jointly with another not before court murdered CYRUS NDUNGU GITHAIGA”.***

The accused pleaded ‘**Not Guilty**’ to the charge. His trial commenced on 18/3/2014 before **Hon. Lady Justice R. Wendoh**, who heard the evidence of the first two prosecution witnesses. Following the transfer of the trial Judge to the Meru High Court, I took over the matter and heard the remaining four (4) witnesses. A total of six (6) witnesses testified for the prosecution.

**PW1 GAKURU MACHIRA MACHARIA** was the main prosecution witness. He told the court that on 26/4/2013 he went to Karagitha Centre. There he found people saying that the accused had beaten his son (the deceased) and it was feared that the boy would not survive.

**PW1** then went to the home of the accused where he found the deceased ‘**Cyrus Ndungu**’ tied up with ropes on his hands and legs seated on the ground. The accused who was armed with a chain was whipping the deceased. Other family members were standing by encouraging the accused to continue beating the boy.

**PW1** then left to go back to his work as a boda boda rider. Later he heard people saying that the accused had killed his son. **PW1** then returned to the scene and found the deceased lying dead on his bed. Again **PW1** just left the scene and went on his way.

Later on 27/4/2013 **PW1** called the DCIO Nyahururu and reported what he had seen. Police went to the scene and recorded statements from various persons. The accused was later arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he categorically denied having beaten and

killed the deceased. This court must now analyze the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt as required by law.

Section 203 of the Penal Code Cap 63, Laws of Kenya defines murder in the following terms

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.***

In any charge of murder the prosecution is required to tender evidence to prove beyond reasonable doubt the following three ingredients of the charge

- (1) The fact as well as the cause of death of the deceased
- (2) That the deceased met his death due to an unlawful act or omission on the part of the accused
- (3) That said unlawful act or omission was committed with malice aforethought.

In this case the fact of the death of the deceased cannot be in any doubt. **PW2 GRACE WAIRIMU KIMUNYA** a sister-in-law to the deceased and **PW3 TABITHA NJERI GITONGA** a sister to the deceased both confirm the fact of his death. The witnesses who knew the deceased well gave his name as ‘Cyrus Ndung’u’.

**PW4 DR. TITUS NGULUNGU** a Consultant Pathologist based at the PGH Nakuru testified that on 30/11/2013 he conducted an autopsy on the body of the deceased. The doctor noted multiple bruises on the head, chest and upper and lower limbs of the body of the deceased. **PW4** opined that the cause of death was ‘**multiple body injuries involving head, chest and subdural haematoma due to blunt force trauma**’. **PW4** filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 1**. This was expert medical opinion evidence which was not challenged at all by the defence. Thus from the evidence it is clear that the deceased met his death due to a brutal and vicious attack on his person.

Having proved the fact as well as the cause of death the prosecution is required to go further and tender evidence to prove that it was the accused who so brutally assaulted and fatally injured the deceased.

The only alleged eyewitness called by the prosecution was **PW1**. This witness told the court that on 26/4/2013 while he was at Karagitha Centre he heard people saying that the accused was beating his son. **PW1** went to the home of the accused where he claims that he saw the accused whipping the deceased with a chain. Strangely enough even on seeing this terrible and unusual sight **PW1** did nothing at all. He did not try to stop the accused, he did not try to rescue or save the deceased, neither did **PW1** rush to report this incident either to the police or to any other authority. In his own words **PW1** stated at Page 7 line 21

***“People were asking why he was beating his son. I did not ask why I left them and went to my work”.***

It is highly unusual for one to find a man brutally beating another with a chain and to do absolutely nothing **PW1** just left and went back to his duties as a boda boda rider.

Later **PW1** says that he heard from members of public that the deceased had died. Again he did nothing. **PW1** says he went back to the home and found the deceased lying dead on his bed. He did not report the matter. As **PW1** stated at Page 7 line 26.

***“I confirmed he was dead..... I did not report to police or chief.***

It was not until the next day that **PW1** decided to phone the OCS Haraka police station to report the incident. As I have mentioned earlier the behavior of this witness borders on bizarre. Anyone witnessing such a terrible incident would have taken some action. Even if **PW1** feared to intervene he would have

taken some action if only to alert the authorities.

**PW1** told the court that he found several other people at the scene and it must be assumed that these other people also witnessed what **PW1** saw. It is strange that apart from **PW1** no other witness has come forward to testify to the events of that date. Was there no other person in that village who was ready to speak out against the brutality allegedly meted out on the deceased.

The other prosecution witness totally contradicts the evidence of **PW1**. **PW2** who as stated earlier was in-law to the deceased stated that when she saw the deceased he had injuries on the hand head and legs. **PW2** appears to have no idea how the deceased sustained those injuries. She stated that

***“My father-in-law (accused) is alleged to have killed him”***

**PW2** did not name the persons who made these allegations and as stated earlier, **PW2** herself did not witness anything.

On her part **PW3** told the court that on the material day she was at home. The deceased came to her and said that he was ill and needed medication. **PW3** purchased panadol for the deceased and gave him. **PW3** states that all this time the accused was seated close by outside his house.

**PW3** told the court later the accused went to check on his son. He came back crying and told **PW3** that the deceased was not responding. It is at this point that they realized that the deceased was dead. At no time did **PW3** see the accused attack or assault the deceased in any manner whatsoever.

**PW3** insists that the deceased sustained his injuries as a result of a beating by a mob. Under cross-examination **PW3** reiterated that

***“I am a sister to the deceased. I am the daughter of the accused. The accused had been beaten by a mob. This was because he was found with somebody’s wife. The beating occurred after the accident..... my father did not kill the deceased.....”***

Thus there is no agreement between the prosecution witnesses as to how the deceased sustained the injuries which led to his death. There is no consistency between the two eye-witnesses. Each one says a different thing. This court has no reason to choose to believe one and disbelieve the other. In the final analysis the prosecution have failed to mount a cogent case. In the face of these major contradictions between the prosecution witnesses this court cannot make a finding of fact that it was the accused who fatally attacked the deceased.

Based on the foregoing I find that the prosecution have failed to prove beyond reasonable doubt that it was the accused who killed the deceased. In the absence of proof of ‘**actus reus**’ this charge of murder cannot stand. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit the accused. 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. Terer holding brief for Mr. Keboga

Ms Chigiti for Accused

**Maureen A. Odera**

**Judge**