



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Case 40 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

R.M.M.....SUBJECT

JUDGMENT

The subject, RMM, was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the night of the 8th and 9th of February 2004 at Lakeview Estate, Naivasha, the subject murdered John Mwaura Kimemia (*hereinafter referred to as the deceased*). The subject pleaded not guilty to the charge. The prosecution called a total of six witnesses to prove its case against the subject.

PW1 Moses Omollo Ouma testified that he was a friend and neighbour to the deceased. He used to reside on the same compound with the deceased. PW1 knew the subject. He testified that the subject worked for the deceased. The deceased had employed him to bake cakes for sale. On the 8th of February 2004, the deceased went to the house of PW1 at about 4.30 pm. He borrowed the sum of Kshs 250/= from PW1. PW1 told the deceased that he did not have any money. PW1 saw the deceased ride away from the compound on his bicycle. On the material day, PW1 slept at about 10.00 pm. In the middle of the night, PW1 was woken up by a sound of a bang emanating from the house of the deceased. PW1 heard as if something had been banged on the wall separating the house of the deceased with that of PW1. The dogs were barking. PW1 heard the deceased say “*God, I am not dying. Mwenyezi Mungu, I am not dying. Wewe ni mwenye uwezo.*” PW1 thought that the deceased was drunk. He heard the deceased groaning. PW1 waited until the dogs stopped barking. He went to the house of the deceased. It was locked. PW1 went back to his house. When he reached his house, he heard movements in the deceased’s house. It was as if utensils were being moved in the house of the deceased. The noise went on between about ten to twenty minutes then everything became quiet.

On the following morning PW1, again went to the house of the deceased. He found the house padlocked from the outside. There was nobody in the house. PW1 went to work. When he returned in the evening, he again went to the house of the deceased. He again saw the door to the house locked from the outside. At about 9.00 pm PW1 heard as if soil was being poured on the iron sheet roof of the house of deceased. He then heard people screaming from the direction of the house of the deceased. He went out to investigate. He saw the subject in the compound. The subject was hesitating as if he wanted to go into the house of the deceased. The subject threw out a container which was burning. PW1 inquired from the subject what was going on. The subject told PW1 that the deceased was burning. PW1 went inside the house of the deceased. He saw a body of a person lying on the ground. A blue flame was coming out of the body. PW1 saw many containers outside the house. He picked one container which had water in it and poured the water on the body of the deceased. The house was also on fire.

PW1 with the help of other neighbours managed to put out the fire. After the fire had been put off PW1 saw the body of the deceased. It was badly burnt. PW1 sent the subject to go and call the father

of the deceased who lived nearby. The father of the deceased and the police later arrived at the scene. PW1 recalled that the deceased had rented a two-roomed house. PW1 saw the subject the first time on the 8th of February 2004. PW1 further recalled that the subject used to sleep in the same house with the deceased. He testified that at the material time, the deceased used to live alone with the subject as he had disagreed with his wife who had ran away from the matrimonial home. PW1 recalled that the deceased had employed the subject to make cakes for sale. For this purpose he had installed an oven in his house. PW1 reiterated that he was a friend to the deceased. They used to borrow money from each other, whenever either of them was hard up in cash.

PW1 recalled that he was woken up by a bang. It was as if the deceased was banging his head on the wall. It was about 1.00 am. He testified that the deceased was talking but was not screaming. He reiterated that when he went to investigate the source of the noise, he was unable to see or hear anything as the noise had subsided. PW1 testified that when he first heard the noise, he could not go to the house of the deceased immediately because he was scared of the dogs which were barking and roaming about the compound. PW1 reiterated that in the morning of the following day and in the evening at about 7.00 pm, he saw the door to the house of the deceased padlocked. At about 9.00 pm, he heard as if someone had poured soil on the iron sheet roof of the house of the deceased. PW1 went out to investigate. He then saw the subject remove a container which was burning. He reiterated that he assisted the subject to put off the fire which had engulfed the house of the deceased. He recalled that he saw the body of the deceased lying on the ground having been burnt. He testified that although the deceased was a drunkard, he was not a bad person. PW1 recalled that the deceased was drunk about twice or three times in a week. He further recalled that when he had heard the commotion at night, he had thought that the deceased was drunk.

PW2 Joseph Njoroge Kimemia testified that he was a younger brother to the deceased. He recalled that on the 8th of February 2004 he had met with the deceased at about 9.00 pm in a nearby butchery. PW2 bought meat. They then decided to go to the house of the deceased to have supper. The deceased gave the meat to the subject to prepare supper. PW2 knew that the subject had been employed by the deceased to bake cakes for sale. PW2 and the deceased ate supper. At 11.30 pm, PW2 left the house of the deceased. On the following day, (*on the 9th of February 2004*) at about 7.00 am, PW2 passed by the house of the deceased to pick a packet of cakes, which he used to pick daily from the said house of the deceased. He found the subject digging a hole on the ground which was about five feet by two feet. The subject had dug a depth of about two feet. PW2 greeted the subject and asked him where the deceased was. The subject informed PW2 that the deceased had gone to collect money from a merry-go-around group. The house of the deceased was locked. The door had been padlocked from the outside. The subject told PW3 that he (the subject) had not been left with the keys of the house.

PW2 left the subject with a message to deliver to the deceased to the effect that should the deceased arrive, he should go and find PW2 at their mother's house. At 2.00 pm on the same day, PW2 again went to the house of the deceased. He did not see the subject. Upon making inquiry from a neighbour called Mama Sai, PW2 was informed that the subject had opened the door of the deceased's house, removed the bicycle, locked the house again and had ridden off on the bicycle. PW2 went back home. At about 11.00 pm on the same day, he was woken up by his father. He was sleeping in his house. He was informed of the death of the deceased. He was informed that it appeared that the deceased had burnt himself. PW2 woke up and immediately went to the house of the deceased. He could not however access the house of the deceased as the gate of the compound of the deceased's housing unit had been locked. PW2 recalled that the deceased and the subject, although employer and employee, had a good relationship. PW2 reiterated that the deceased had employed the subject two weeks prior to his death. PW2 further recalled that when he went to the house of the deceased on the material night that he was told the deceased had died, he had slept at the gate of the compound until the following morning. PW2 testified that during the entire period, he had not entered the house of the deceased.

PW3 Hellen Akoth, a housewife was a neighbour to the deceased. She recalled on the 8th of February 2004, she had spoken to the deceased at about 10.00 am. PW3 asked the deceased if he was going to church. The deceased answered in the negative. He told PW3 that he was not going to church because he was waiting for some visitors. PW3 saw the subject with the deceased. It was her testimony that the deceased had lived together with the subject for about two and half weeks prior to the material

day. PW3 last saw the deceased at about 1.00 pm on the 8th of February 2004. She did not see the deceased the whole day on the 9th of February 2004. At about 9.00 pm, he saw fire emanating from the house of the deceased. PW3 screamed. PW3 saw the subject standing outside the fence to the house of the deceased. PW3 asked the subject that was happening. The subject answered PW3 that the deceased was burning. www.kenyalaw.org Republic v R.M.M. [2005] eKLR 5 PW3 was surprised that the subject had not screamed or raised alarm. When PW3 screamed, the subject appeared shocked. The subject then went into the house of the deceased. PW3 saw PW1 arrive at the scene. She then saw the subject throw out a five litre plastic container. Her screams attracted many people who came to the scene and assisted in putting out the fire. When the fire had been extinguished, PW3 went to the house of the deceased. She saw the deceased lying on the floor next to the door to the bedroom. PW3 stood outside the house of the deceased until the police arrived. PW3 recalled that the deceased and the subject lived together happily. Their relationship was good. PW3 recalled that the deceased was a good neighbour who used to visit her. She reciprocated his visits. She did not remember having heard that the subject had quarrelled with the deceased.

PW4 John Mwaura Kabiru, a resident of Naivasha recalled that on the 11th of February 2004 at about 3.00 pm, he made a decision to visit the house of the deceased. PW4 wanted to see where the deceased had been killed. He was accompanied by the brother of the deceased called Njoroge (PW2) and their uncle called Muturi. When they reached the house of the deceased PW2 and Muturi entered the house. PW4 remained outside the house. After a while he was called inside the house. He saw PW2 and Muturi had discovered a polythene bag containing clothes. In the polythene bag was a jeans trouser, a towel, a half cap, a sun visor and a black belt. Behind the jeans pocket was a knife-holder. PW4 saw that the clothes had blood on them. After seeing the items, PW4 went to Naivasha Police Station and reported the matter. A police officer accompanied them to the scene. The police took the clothes to the station. PW4 saw two buckets full of blood. The buckets were inside the house. A sample of the blood was taken by the police. PW4 then accompanied the police to Naivasha District Hospital where the recovered blood was stored. PW4 recalled that the house of the deceased was opened by PW2 who had the key to the said house. PW2 had locked the house after the said incident. PW4 testified that on that occasion he had visited the house of the deceased only for the second time. PW4 testified that the deceased was his cousin. PW4 recalled that he had visited the deceased a month prior to his death

PW5 Peter Kimemia Mwaura, a pastor with the Kenya Assemblies of God testified that the deceased was his son. He recalled on 9th of February 2004 at about 8.30 pm as he was going to his house, he met women screaming. He was informed that the deceased had burnt himself inside his house. PW5 went to his house, picked his motor vehicle and went to the deceased's house. When he reached his house, PW5 met with the subject. The subject confirmed the information that PW5 had received. PW5 then went to the house of the deceased with the subject. PW5 saw that the deceased's hand and legs had been tied with a piece of cloth. The deceased's head had been covered with a bed sheet. PW5 saw wet blood. He also saw that the deceased had been stabbed on the chest. He saw two jerricans full of bloody water. The jerricans were in the sitting room. PW5 then made a decision to report the incident to the police. The police went to the scene and ordered the house to be locked up. PW5 did not believe the theory that the deceased had committed suicide. PW5 locked the house and gave the keys to PW2. PW5 recalled that the police took the subject to the police station.

PW5 later learnt that the police had released the subject because they were of the view that the subject was a witness and not a suspect. PW5 was not happy with the turn of events. He reported the matter to the OCS, Naivasha Police Station. The OCS told PW5 that the deceased had committed suicide. PW5 vehemently disputed this allegation. He was referred to the DCIO. The DCIO ordered the subject to be arrested. The DCIO visited the scene of crime with PW5. The scene of crime officers were called and they examined the house of the deceased. PW5 recalled that the way the police acted in the matter was very suspicious. He recalled that the subject had taken the bicycle of the deceased but returned it when he was arrested. PW5 witnessed the post-mortem performed on the body of the deceased

PW5 was not satisfied with the way the police had investigated the matter. PW5 was informed that the deceased and the subject used to live together. The subject had been employed by the deceased to bake cakes for sale. PW5 admitted that he rarely visited the deceased in his house. He recalled that he had

been with the deceased on the Sunday prior to the day he was killed. PW5 conceded that after the incident, the subject did not run away. He recalled that the subject had told him at about 8.30 pm on the material night that the deceased had burnt himself. PW5 saw that the body of the deceased was slightly burnt when he first went to the scene. PW5 was not certain if the deceased took alcohol.

www.kenyalaw.org Republic v R.M.M. [2005] eKLR 7 PW6 Police Constable Joseph Obao (P/F No. 67030) testified that on the 11th of February 2004 he was approached by the father of the deceased (PW5). He was accompanied by other people. They requested PW6 to visit the scene of crime with them. PW6 went to the scene. Inside the house he found a blue long trouser, a towel, a knife holder and a cap, all of which were blood stained. PW6 testified that the items were positively identified by PW2 as belonging to the subject. PW2 recalled that he had seen the subject wear the trouser the same day that he was in the house of the deceased prior to his death. PW5 also saw that there was blood in a container. From the look of it, it appeared as though someone had mopped blood and squeezed the contents into the container. PW6 took charge of the items recovered, and sent them to the Government Chemist. At the time of trial the said exhibits had not been returned to PW6. PW6 was present when the post-mortem was performed on the body of the deceased. He produced the post-mortem report as prosecution's exhibit No. 1. The post-mortem was conducted by Dr Musalia. He formed the opinion that the deceased had died due to multiple chest stab wounds. PW6 investigated the case, assisted by Police Constable Kilatia. PW6 established that the information which the subject had initially given to the police that the deceased had committed suicide was untrue. He also established that the deceased had not died from fire but rather from the stab wounds that he had sustained to his chest cavity. PW6 also interrogated witnesses and recorded their statements. He discovered that the subject had concealed the death of the deceased. The subject's conduct was suspicious. The subject had given contradictory statements as to how the deceased came to sustain chest stab wounds. PW6 did not believe that the subject had single handedly subdued and killed the deceased. PW6 posited the theory that the subject was in the company of a gang who had attacked and killed the deceased. PW6 established that the subject had purchased petrol and attempted to set the house of the deceased on fire in order to conceal the murder of the deceased. PW6 recalled that the subject did not raise any alarm until PW3 saw the fire and screamed thus alerting the neighbours. The subject stood aside and did nothing until the neighbours intervened. PW6 did not believe that the subject was a good employee. The subject had not made any effort to secure the safety of his employer.

PW6 was certain that the subject had participated in the killing of the deceased. He made the decision to charge the subject with the offence of murder. PW6 was of the view that the subject might have been used by a rival baker to eliminate the deceased from the cake baking business. PW6 recalled that the OCS was called Chief Inspector Mwangi whilst the D.C.I.O. was called Mr Alusa. The two officers had visited the scene of crime before PW6

. Later PW6 visited the scene with Police Constable Kilatia. PW6 did not know what had transpired on the 9th of February 2004 at the scene. PW6 recalled that the house of the deceased had three rooms. The clothes that were recovered were in a bag hidden in a corner. PW6 reiterated that the bloody jeans found in the bag had been worn by the subject on the day that the deceased had been killed. PW6 interrogated the subject. He could not make a statement in English. The OCS recorded the statement of the subject in Kikuyu and later translated it into English. PW6 established that the subject was seventeen years at the time of his arrest. He admitted that when he interrogated the subject, no relative of the subject was present. He testified that an effort was made to trace a relative of the subject, but one could not be found at the time. PW6 established that the deceased was murdered in the night of 8th of February 2004. Information reached the family of the deceased on 9th of February 2004 at night, when the subject had attempted to burn the house of the deceased. PW6 recalled that several items belonging to the deceased including his clothes, bed sheets and utensils were burnt. When PW6 saw the body of the deceased, he saw that the deceased was well built, stout and nutritionally healthy. PW6 did not independently verify that the deceased had taken alcohol on the night that he was killed. PW6 established that the deceased used to live with the subject in the same house. The deceased used to sleep in his bedroom whilst the subject slept in the sitting room. PW6 did not independently verify this fact. PW6 established that the cakes were baked in a separate room from that which the deceased slept. He recalled that he had found the knife-holder which was blood stained at the scene. PW6 testified that the knife-holder was found together with the other items which were later identified to belong to the subject. PW6 admitted that at the time he visited the scene, the scene had been disturbed. PW6 did not recover the

knife at the scene of crime. PW6 testified that the subject bought petrol which was used to burn the house of the deceased. He confirmed that the subject was arrested on 9th of February 2004, released and then rearrested again on the 10th of February 2004 at Naivasha District Hospital. The prosecution then closed its case. After the close of the prosecution's case, this court ruled that the prosecution had established a prima facie case to enable the court to put the subject on his defence. In his sworn testimony, the subject testified that he was seventeen years old. He recalled that prior to being employed by the deceased, he had worked in a bakery baking cakes at Naivasha for an unnamed lady. He was employed by the deceased three weeks prior to his death. The deceased had agreed to pay the subject Kshs 100/= per day. The subject testified that the deceased did not pay him as agreed. The subject testified that the cakes were baked in the house that the deceased used to reside with the subject. The house was three roomed. There was a kitchen and a sitting room. There was a bed in the kitchen where the subject used to sleep. The subject recalled that his relationship with the deceased was good. They used to eat together the food that the subject cooked.

The subject testified that on the 8th of February 2004 at about 2.00 pm, he requested the deceased to pay him his salary which then amounted to Kshs 2,000/=. The deceased did not have the money. He told the subject to wait for him at home as he went out to fetch the money. The subject recalled that the deceased came at about 8.00 pm. He requested the subject to accompany him to town. The deceased and the subject went to several bars at Naivasha town where the deceased and the subject took several alcohol drinks. At about midnight they decided to go back home. They hired a taxi. The taxi dropped them on the road near their home. When they reached the house, the subject testified that he was instructed to make dough for cakes. It was about 1.00 am. The deceased was watching television. The subject took the opportunity to ask the deceased to pay him his money. The deceased answered that he did not have any money to give to the subject. A quarrel ensued. The deceased removed a sword from under seat. He then told the subject that if he continued demanding the money he was going to kill him.

The subject testified that the deceased then threatened to kill him. The subject stated that at that time, he jumped at the deceased and disarmed him. The subject testified that he tried to disarm the deceased because he was drunk. A struggle ensued. The subject was able to take the knife away from the deceased. The deceased picked a bottle and hit the subject on his knees. The subject said he fell to the ground. The subject stated that he was holding the knife with his right hand. As he was falling down, he stepped on a stool which tripped the deceased. The deceased also fell to the ground. As the deceased was falling down, the subject stabbed him on the chest. The subject testified that he did not have the intention of stabbing the deceased. Upon being stabbed, the deceased fell on the subject. The subject managed to extricate himself by pushing the deceased aside. He then removed the knife from the deceased's chest and walked outside the house

. When he was outside the house he was agonising what to do more so because he feared the repercussions if he confessed to the parents of the deceased what he had done. He feared that he was going to be beaten. He went back to the house. He confirmed the deceased was already dead. He picked a rug and started mopping the blood from the floor and squeezing its contents into a bucket. He then slept. The following day, the subject removed all the clothes that he had worn (which were bloody) and put them under the bed. He recalled that PW2, the brother of the deceased came inquiring on the whereabouts of the deceased at about 9.00 am. He lied to him and told him that the deceased was not in the house. The subject then made a decision to buy petrol in order to burn the body of the deceased. It was his intention to make it appear as if the deceased had burnt himself. The subject bought petrol for the sum of Kshs 100/= from a place called Boma. It was about one litre of petrol. The subject waited for the night. At night, he poured petrol on the body of the deceased and set it on fire. He then decided to put off the fire. The neighbours saw the fire. They came and assisted him put off the fire. The subject then went to the deceased's parents and told them that the deceased had burnt himself to death. The father of the deceased and the police arrived at the scene. The subject was taken to the police station. He was interrogated and released. The subject had sustained burns from the fire. He went to seek medical attention at Naivasha District Hospital. It was at the hospital that he was re-arrested by the police. He was again interviewed by the police in the absence of any of his relatives. He was detained at the police for over one month and later charged with the offence of murder. The subject reiterated that he had not fought with the deceased prior to the fateful day but recalled seeing the deceased fighting with other people when he was drunk.

The subject further reiterated that it was not his intention to kill the deceased. He testified that the knife which he used to stab the deceased belonged to the deceased. The subject admitted that he knew the parents of the deceased. He testified that during the entire period that he had worked with the deceased he had not been paid by the deceased. He reiterated that after taking the alcoholic drinks from various bars in Naivasha, the deceased became drunk. The subject himself was slightly drunk at the time of the incident. He recalled he had dropped out of school and had gone to live with his sister at Naivasha, two years prior to the incident. He repeated that when the deceased tripped on the stool, he fell on the knife which the subject was holding as he was lying on the ground. The subject conceded that he did not immediately report the incident to the police, the neighbour or to the parents of the deceased. The subject did not report the incident because he was in shock. He testified that he had purchased the petrol in order to burn the body of the deceased so that the deceased's parents could believe that the deceased had burnt himself. He wiped out the blood to conceal the fact that the deceased had bled to death. He reiterated that it was the deceased who had attempted to stab him first before he was stabbed accidentally on the chest. The subject reiterated that he had no intention of stabbing the deceased. After adducing his evidence, the subject closed the defence case. I have considered the evidence adduced by the prosecution and that offered by the defence. The issue for determination by this court is whether the prosecution has succeeded in establishing the guilt of the subject to the required standard of proof beyond reasonable doubt. This court is aware that the burden of proof of establishing the guilt of an accused person in criminal cases, in most cases, lies with the prosecution. The court can only consider the defence offered by an accused after it has exhaustively evaluated the evidence of the prosecution to establish whether or not the guilt of the accused has been established to the required standard. The court can only consider the evidence offered by the defence in the light of the evidence adduced by the prosecution. The court cannot use the evidence adduced by an accused in his defence to corroborate the evidence offered by the prosecution.

In the instant case, the facts of this very unfortunate case are rather straight forward. On the 8th of February 2004 PW1, a neighbour to the deceased saw the deceased at about 4.30 pm. The deceased visited PW1's house. He borrowed Kshs 250/- from PW1. PW1 told the deceased that he did not have any money to lend to him at the time. PW1 saw the deceased ride off on his bicycle. He then slept as usual at about 10.00 pm. At about 1.00 am, PW1 was woken by noises emanating from the house of the deceased. The house of the deceased and that of PW1 was separated by a wall. PW1 heard as if something had been banged on the wall. The dogs were barking. PW1 then heard the deceased say "*God, I am not dying. Mwenyezi Mungu, ("God" in Kiswahili) I am not dying. Wewe in mwenye uwezo, ("You are the one who is able" – in Kiswahili).*" PW1 thought that the deceased was drunk. He wanted to step outside and investigate but was prevented from doing so by the dogs which were furiously barking at the time outside his house.

After the dogs had stopped barking, PW1 went to the house of the deceased and saw that the door to the house was securely locked. He went back to his house. He then heard some movement from the house of the deceased. It was as if utensils were being washed. The noise continued for about ten to twenty minutes and then it stopped. In the following morning, PW1 went to the house of the deceased. He saw the door of the house had been padlocked from the outside. He went to work.

Meanwhile PW2, the brother of the deceased, visited the house of the deceased at about 7.00 am in the morning. He found the subject digging a hole outside the house of the deceased. The door of the house of the deceased was padlocked from the outside. PW2 asked the subject the whereabouts of the deceased. The subject told PW2 that the deceased had gone away in the morning. PW2 thought it unusual for the deceased not to be at his home at the time. He told the subject to inform the deceased to see him at their mother's house immediately upon his return. PW2 testified that on the night before, he had been at the house of the deceased until 11.30 pm. They had taken supper together, a meal which had been prepared by the subject. PW2 was with the deceased at his house for about two and half hours. When PW2 left the house of the deceased, PW3, a neighbour to the deceased, saw the subject unlock the house of the deceased, remove a bicycle and then ride away. PW2 later in the day, again visited the house of the deceased and found the door padlocked from the outside.

At about 9.00 pm on the same day, PW3 saw the house of the deceased burning as the subject was watching whilst standing outside the house. PW3 was surprised that the subject had kept quiet whilst

the house of the deceased was being consumed by fire. PW3 immediately screamed. The neighbours came to the rescue. They managed to put off the fire. Among the neighbours who assisted in the putting off of the fire was PW1. When the neighbours started putting out the fire, the subject then enthusiastically joined in. After the fire was put out, PW1 and PW3 discovered the deceased lying on the floor of his house. He was dead and had been badly burnt. A decision was made to inform the parents of the deceased.

PW5 the father of the deceased, and PW2 his brother immediately visited the scene. PW5 saw the charred remains of the deceased. He also saw the deceased had stab wounds on his chest. He made a decision to inform the police. The police visited the scene. The police ordered the house of the deceased to be securely locked. The body of the deceased was taken to Naivasha District Hospital Mortuary. PW5 was not however satisfied with the conduct of the police during the investigation of the case. He discovered that when the subject was taken to the police station, he was released ostensibly because the police had put forward a theory that the deceased had committed suicide by burning himself. PW5 persisted in his demand that the subject be arrested and charged for causing the death of the deceased. PW5 persistence paid off and the subject was rearrested and detained by the police.

Meanwhile on the 11th of February 2004, PW4 accompanied by PW2 visited the house of the deceased. PW2 who had the key to the house of the deceased opened the door to the house of the deceased. When PW4 entered inside the said house, he discovered a polythene bag with bloody clothes inside. The clothes included a pair of blood jeans, a half cap and a black belt. Beside the pockets of the jeans trouser, there was a knife-holder. PW2 identified the bloody clothes. They belonged to the subject.

PW2 had seen the subject wear the clothes the night prior to the death of the deceased. The items were taken by the police who sent them to the Government analyst for further forensic examination. PW4 and PW5 saw two buckets that were full of bloody water. The police took the sample of the bloody water for the purposes of forensic analysis. PW6 investigated the case. He established that it is the subject, in company of unknown persons, who had subdued and killed the deceased. PW6 also produced the post-mortem report of the deceased prepared by Dr. Musalia of Naivasha District Hospital. The post-mortem report was produced as prosecution's exhibit No. 1. In the said post-mortem report, the Doctor noted that the deceased had been stabbed severally on his head and his chest. He was later suffocated to death. Dr Musalia formed the opinion that the cause of death of the deceased was cardiopulmonary arrest due to multiple scalp and chest cut wounds and thereafter suffocation from light dressing applied to the head that led to severe acute respiratory distress. Thereafter the body of the deceased was burnt. When the subject was put to his defence, he admitted that he caused the death of the deceased but insisted that the deceased's death was accidental. He did not have the intention to kill the deceased. I have evaluated the evidence adduced by the prosecution. The prosecution has proved beyond any reasonable doubt that it is the subject who killed the deceased. The prosecution has established that at the time of his death, the deceased and the subject were the only two people in the house of the deceased. Although the subject testified that he accidentally killed the deceased in the course of a struggle that ensued between him and deceased, evidence adduced by the prosecution points to the contrary. PW2 was with the deceased upto 11.30 pm of the material night. PW2 took supper and stayed with the deceased from about 9.00 pm to 11.30 pm. PW2 did not see the deceased being drunk as alleged by the subject. At about 1.00 am, PW1 heard the deceased groaning in distress. PW1 tried to investigate what could have transpired in the house of the deceased. He went out and investigated. He saw the door to the house of the deceased locked. He assumed that the deceased was drunk. He then heard noises emanating from the house of the deceased. It was as if utensils were being moved inside the house of the deceased. This noise went on for about ten to twenty minutes. It then stopped. PW1 heard nothing else during the night.

From the evidence adduced by the prosecution, and especially the post-mortem report prepared by Dr Musalia, the most likely event that took place during the material night is that the subject viciously attacked the deceased and killed him while he was asleep. Whilst the subject has testified that the deceased was killed by a single stab wound on his chest, the post-mortem report reveals that the deceased was stabbed severally on the head and on the chest before being suffocated to death. The evidence of PW1 as regards the noise that woke him on the material night reveal that the subject attacked the deceased while he was asleep in his bed. The deceased did not scream for help. He was surprised. The

subject utilised the element of surprise to attack, subdue and finally kill the deceased. PW6 testified that the deceased was a person of a well built physique. The subject, being a person of a smaller physique could not have single handedly subdued the deceased and killed him if both were awake. PW6 in his evidence however ignored the advantage of surprise. The subject attacked the deceased when he was at his most vulnerable, i.e. when he was asleep. The subject intended to kill the deceased. The motive for killing the deceased may have been the fact that the deceased had refused to pay the agreed wages to the subject. The subject stabbed the deceased severally on the head and on the chest. When the deceased was immobilised by the subject, the subject applied a piece of cloth to the nostrils and on his mouth and thereby suffocated him to death. The subject thereafter burnt the body of the deceased in an botched attempt to conceal the fact that he had killed the deceased.

Having considered the evidence adduced by the prosecution and that offered by the defence, it is the finding of this court that the prosecution has established beyond any reasonable doubt that it is the subject who with malice aforethought killed the deceased. I enter a finding of guilt against the subject. The defence offered by the subject was a shambolic and ultimately futile attempt to exonerate himself from the irrefutable evidence that he intentional and with a cold-hearted calculation and meticulous plan executed the murder of the deceased. The subject ruthlessly killed the deceased. The assessors who heard the case with the court all entered a verdict to the effect that the subject had intentionally killed the deceased. I have no reason to disagree with their verdict.

Finally, I would like to make a comment concerning the way the police dealt with the subject after his arrest. According to the evidence of the subject, he was arrested and detained at the Naivasha Police Station for a period of over two months before he was arraigned before this court. From the evidence adduced before court, the subject was arrested on the 10th of February 2004 and arraigned before this court on the 27th of April 2004. There was no reason to justify the holding of the subject in police custody for such a long period. In any event such detention is contrary to the provisions of **Rule 4(1) of the Child Offenders Rules made under the Children Act** which

provides that:

“where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable, provided that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of the court.”

The police should abide by the law and arraign before court children who are in conflict with the law immediately upon their apprehension.

Further in this case, it emerged that the subject was interviewed and recorded his statement with the police in the absence of either a parent or a guardian of the subject or a children’s officer. **Rule 4(2) of the Child Offenders Rules** require that a child shall not be interviewed by the police in the absence of an adult to safeguard his interest. For the avoidance of doubt I shall set out the said rule in this judgment so that the police would take note.

Rule 4(2)(3) & (4) of the Child Offenders Rules provide that:

“Where a child is held in police custody the officer in charge of the police station shall as soon as practicable inform (a)the parents or guardians of the child;

(b)the Director (i.e. Director of Children’s Services) of the arrest.

(3) The police shall ensure that the parent or guardian of the child or an advocate appointed to represent the child is present at the time of any police interview with the child.

(4) Where a child’s parent or guardian cannot be immediately contacted or cannot be

contacted at all, a Children's

Officer or an authorised officer shall be informed as soon as possible after the child's arrest so that he can attend the police interview."

Police officers should be made aware of these rules so that in future the law may be applied as enacted by the Children Act to protect the rights and the welfare of children who are vulnerable persons in need of protection of the law.

DATED at NAKURU this 6th day of July 2005.

L. KIMARU

JUDGE