



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE NO.10 OF 2019**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JACKSON MONG'ARE MANYARA.....1<sup>ST</sup> ACCUSED**

**FANEL OURO OUKO.....2<sup>ND</sup> ACCUSED**

**MONG'ARE MANYARA alias JOSPHAT.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons, **JACKSON MONG'ARE MANYARA**, **FANEL OURO OUKO** and **MONG'ARE MANYARA alias JOSPHAT** have been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars set out in the information dated 5<sup>th</sup> March 2019 are that on 20<sup>th</sup> February 2019 at Nyabomite village in Nyameru sub-location, Keera location within Nyamira County in the Republic of Kenya, jointly with others not before the court, the accused persons murdered **EVANS MINARO AYANA**.

2. This case was transferred to this court by the High Court at Nyamira as a precautionary measure following the attack of probation officers in the course of conducting pre-bail reports. 11 witnesses were called to testify in support of the prosecution's case.

3. **Polycarp Nyakundi Bwoma (PW2)** recalled that on 20<sup>th</sup> February 2019 he was looking for parking at the parking lot at Huduma Centre in Nyamira Town when he saw a motorbike lose control and go to the opposite side of the road. The rider hit an Isuzu double cabin motor vehicle registration no. GK 785 R, which had been parked. PW2 testified that *bodaboda* operators came in droves as they usually do. They spoke for about 5 minutes and led the motorbike to the stage. PW2 testified that he saw the rider pushing the motorbike to the stage. He recalled that the rider had luggage at the back and the head lump of the motorbike was also at the back. He could not see any injury sustained by the rider from where he was.

4. PW2 testified that he knew that the vehicle belonged to the 1<sup>st</sup> accused, he called him a few times but he did not pick his calls. At that moment, he saw the 3<sup>rd</sup> accused person pass by. He told the court that he knew all the accused persons who were drivers at various government offices. The 1<sup>st</sup> accused was a driver of National Government Ministry of Education, the 2<sup>nd</sup> accused was a driver of the Ministry of Health County Government of Nyamira and 3<sup>rd</sup> accused person was the driver of the County Government of Nyamira. He was himself a driver of the County Government of Nyamira. He added that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons were brothers whom he had known since 2007 when he got employed.

5. PW2 informed the 3<sup>rd</sup> accused about the incident and the 3<sup>rd</sup> accused told him that he had seen the 1<sup>st</sup> accused at the stage. They boarded the 3<sup>rd</sup> accused person's vehicle and went to the stage where they found the 1<sup>st</sup> accused. PW2 told the 1<sup>st</sup> accused that his vehicle had been hit by a motor bike. The 1<sup>st</sup> accused boarded the vehicle they were in. They also found the 2<sup>nd</sup> accused nearby who told them that the motorbike had gone towards Nyamira - Nyabindo road. The 2<sup>nd</sup> accused and another person whom PW2 did not know before also entered the vehicle. PW2 testified that the 3<sup>rd</sup> accused was the one driving and he was seated at the co-driver's seat. The 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and the stranger sat at the back.

6. He testified that they drove along Nyamira- Nyabundo road and when they got to a bridge called Nyabomite, they asked the people there whether a motor bike without a headlamp had passed by. After about a minute, they located the motorbike. They drove past him and stopped. The rider realized that they were following him. He let go of the motor bike, fell down, stood up and ran into the trees near the river. PW 2 testified that the speed in which the motorcycle was in caused the rider to fall down. The motorbike went into the trench and he fell on the left side. The 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and the other person chased the rider into the trees.

7. PW2 testified that he remained outside the vehicle alone while the 4 others chased the rider. Other motorcyclists realized what was going on came around. After about 10 minutes the accused persons came with the rider. The 2<sup>nd</sup> accused was holding him from the left side and the stranger was holding him on the other side on the trouser. PW2 recalled that there were some women at the scene shouting "thief." He recalled noticing that the rider's forehead was swollen and there was blood on the left side of his ear. The 2<sup>nd</sup> accused hit him with a blow and pushed him into the vehicle using a blow on the left side. They placed the motorbike inside the vehicle and started to moving towards Nyamira. The deceased started to bleed. He asked them settle the matter instead of taking him to the police and the 1<sup>st</sup> accused person's response was that they reach the vehicle first to see the damage.

8. PW2 recalled that before they got to Nyamira, the rider asked for water. He looked back and saw the rider was down. He recalled that the rider appeared tired as they drove to the place the vehicle was parked. They got to the damaged vehicle and put the motorbike down. The rider got of the vehicle they were on his own volition and sat on the motorbike.

9. At that point, PW2 left to go to the office. He stated that the place where the vehicle was parked to the place they got the rider was about one (1) kilometer. Many motorcyclists came and he was afraid that they would beat them up. PW2 testified that the 1<sup>st</sup> accused had wrestled with a person who had asked why they were beating up motorbike people. He went home after leaving the office. At about 5:00 p.m., he got a call from the DCIO Nyamira requesting him to go to his office. He was informed that the rider they had chased had died.

10. **Gilbert Obwocha Bundi (PW6)** testified that he saw a stationary county vehicle about 200 meters from his home on his way from work at about 12:00 to 12:30 p.m. on the material day. He saw his cousin PW2 standing by the vehicle and thinking that they lacked fuel, went to talk to him. PW2 informed him that someone had hit their vehicle and disappeared. Before he finished, PW6 saw 3 people emerging from the trees nearby. The 3 people had arrested a person whom they were leading towards the vehicle. PW6 testified that the person who had been arrested did not look okay and looked like he had been hit a little.

11. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons were among the 3 people PW6 saw with the frail looking man. They put him in the vehicle and left. PW6 recalled seeing the 2<sup>nd</sup> accused slapping him on the head while they were in the vehicle. PW2 later on called him to inform him that the man had died.

12. That same day at about 12: 30 p.m. **Clement Achoki Onsare (PW4)** was on his way to the KNUT office in Nyamira County when he found a crowd of people outside Huduma Centre. He went to establish what was happening and saw a boy he had taught in primary school lying down. Beside him was a red motorbike. The boy called out to him, gave him some money and asked him to buy him water which he did. PW4 testified that the boy had a lot of sweat on his head and blood was flowing out of his left ear. He recalled that the boy was wearing a dark tan trouser, black T-shirt, a black, grey jacket and he was bare feet. The appellant appeared weak. Another rider gave PW4 the boy's phone and PW4 took him to hospital. The clinical officer went to look for X-ray and when he returned, he declared him dead. Later on, the deceased's family arrived. PW4 testified that he did not see the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused when he arrived at the scene.

13. The deceased's father, **Kennedy Ayara Mangare (PW1)** testified that his son was a teacher at Aringo Primary in Mbita sub-county. On the fateful day, his son left for Nyamira at about 8:30 a.m. At 1:00 p.m. he got a call from PW3 informing him that the deceased had been hit and was at Nyamira referral. PW1 went to the hospital where he found many people. He asked the guard at the gate about the accident and the guard told him that the deceased had died and his body was at the mortuary. At the mortuary, PW1 saw that the deceased had been bleeding from the left ear and his trouser was torn at the knees.

14. Later on PW1 was asked to identify the body for postmortem. Someone claiming to be the lawyer representing the 1<sup>st</sup> and 2<sup>nd</sup> accused persons came in and said that the postmortem should not be done but the DCIO directed that it be carried out and the postmortem was conducted. During cross-examination, PW1 stated that the deceased had been driving a motorcycle for over a year. He also testified that the deceased was not drunk nor had he ever seen him drunk in his presence.

15. **Vincent Nyambane Ayara (PW3)** the deceased's brother received a call from a friend at Nyamira informing him that his brother had been killed. He was in Nairobi at the time. He went home and on 26<sup>th</sup>, they were called for the postmortem. PW3 testified that he saw that the deceased had been bleeding on the left ear and had a mark on the left leg at the thigh area which was bleeding. It appeared to him that the deceased had been beaten.

16. **Chief Inspector Osman Saidi (PW7)**, formerly the base Commander at Nyamira, testified that at around 1:00 p.m. on 20<sup>th</sup> February 2019, he met PC Menyo who informed him of a traffic accident that had occurred at the Junction of the County Council of Nyamira. PW7 testified that his colleague was standing with the 1<sup>st</sup> accused, Fanel Ouko. His colleague showed him a motor vehicle Reg. No. GK B 785 R. Isuzu D-Max double cabin belonging to the Ministry of Education parked in the parking lot of Nyamira Huduma Centre just beside the road. There was a motor cycle registration mark KNIDY 434 N PSV Star lying beside the vehicle. The officer informed him that the rider had been rushed to Nyamira County Hospital after being chased by the driver of the vehicle and his accomplice. PW7 secured the scene and called PC Opiyo to reinforce him. He asked PC Opiyo to go to the hospital to confirm the condition of the rider when he arrived at the scene. A few minutes later the officer called him and told him that the rider had died. He arrested the 1<sup>st</sup> accused person and asked PC Menyo to take him to the police station as he called for a vehicle to assist him carry the motorcycle.

17. The GK Vehicle was later on brought to the police station where it was inspected alongside the motor vehicle by the inspector on the 21<sup>st</sup> February 2019. The GK Vehicle was slightly damaged at the back bumper and the motor cycle was damaged at the front part rear view mirror and the fuel tank.

18. PW7 testified that he was informed that the rider was beaten up by the accused persons and sustained injuries which caused his death. He informed the DCIO Nyamira about the incident and handed over the case to him for investigations. Although he admitted that he had not investigated the accident further, PW7 stated that the death was as a result of an assault and not the accident.

19. **Doctor Timothy Ombati Mokuu (PW9)**, conducted the postmortem on the deceased's body on the 26<sup>th</sup> February 2019 at the Nyamira County Referral Hospital Mortuary. He observed that the body was that of a black male African about 34 years of age, well-nourished physique and the height was 178 centimeters. The body was well preserved for postmortem. On the external appearance on the left ear lobe there was laceration and blood discharge from the ear opening. There were bruises on the left posterior elbow joint and also laceration with bruises on the right knee cut and a bruise on the feet on the right foot. On internal appearance there was no abnormality detected on the respiratory system, cardio vascular system. On the digestive system there was acute hepatic inflammation on the middle and lower lobes. There was a chronic inflammation on the upper lobe and an acute inflammation of the omentum. On the head there was inflammation on the left temporal region as they opened through the skull bone there was intracranial pressure noted. On exploring further there was vegetative grey matter with pungent smell that was blood stained. No abnormality was detected on the nervous system, genital, urinary system, spinal column and spinal cord.

20. PW9 testified that he had done the postmortem with doctor Samwel Ombati a medical officer and superintendent of Nyamira Referral Hospital. He testified that they were unable to make a conclusive determination of the immediate cause of death. They took samples of the brain tissue, kidney tissue, liver tissue stained with its blood content, toe, and finger nail clippings and the chest cartilage to the Government chemist for histological examination and chemical analysis.

21. He explained that the term acute meant a short term injury and that acute hepatic injury meant that there was an injury to the liver. He testified that the injury to the liver was recent and was healing. The injury to the upper lobe was a long term injury and the second part of the injury had been there. He testified that when they operated on the head, they observed an injury that had occurred recently. He stated that there was a possibility that the injuries to the head could have led to the death. He also testified that they explored the brain and saw pus coming out inside parts of it. They had a tough time understanding what happened. Due to the inconclusiveness of their examination, they sought further explanation.

22. **Jane Nyabutoto Waya (PW5)** from the Government Chemist Kisumu, testified that the DCIO Nyamira referred case no. Cr.651/138/2019 to them on 6<sup>th</sup> March 2019. They received a black plastic container marked 'A1' containing a liver; a white plastic container brain tissue Marked 'A2'; a white plastic container marked 'A3' containing kidney; a plastic container marked 'A4' containing brain tissue laced with formalin; a plastic container marked 'A5' marked stomach and contents; blood in a vile and urine in a syringe placed in a white plastic container marked 'A6'. All exhibits were accompanied with the exhibit memo form requiring the Government Analyst to ascertain whether the exhibits marked A1, A2, A3, A4 and A6 had any trace of toxic substance and if so, whether the substance could have been administered on the body after death or before death which could have led to the deterioration of the organ within a short period; whether there were traces of chemical formalin on the exhibits A1, A2, A3, A5 and A6 as exhibit A4; whether there was toxic substance if any as found in exhibits A1, A2, A3, A5 and A6 as in exhibit A4.

23. PW5 testified that they got the exhibits which they kept in chest freezers. On 13<sup>th</sup> May 2019, they did the analysis and found that the blood alcohol content was 15:50 milligrams per 100 mls which is equivalent to 0.4 half -litre bottles of beer or 0.8 tots of whisky while methanol concentration was 427.91 milligrams per 100 mls. Urine methanol concentration was found to be 661.459 milligram per 100 mls. No other chemically toxic substances were detected in the other exhibits. PW5 informed the court that methanol was fatal when ingested. She explained that the blood and urine had been injected on the GLC Machine which gave them the results. She added that methanol could not be detected in the stomach contents and that the substance went through the blood and got excreted through the urine.

24. **Polycap Lutta Kweyo (PW8)** who was a senior analyst in the Government Chemist testified that the following samples were received on 6<sup>th</sup> March 2019:

- (1) A khaki brown long pair of trousers
- (2) A yellow stripped long sleeved shirt
- (3) A yellow reflector sleeveless jacket
- (4) Soil sample

25. On the 8<sup>th</sup> March 2019, they received nails and cartilage of samples from the chest of the deceased. On the 12<sup>th</sup> April 2019 they received samples from the mouths of all accused persons. They were requested to determine the origin of the stains and any genetic relationship using chemical, physical and instrumental method of analysis.

26. PW8 was able to analyze the exhibits and made the finding that the red stains on the long pair of trousers, the yellow reflector sleeveless jacket and the yellow stripped long sleeved shirt and the stains on the soil were positive for human blood. He generated DNA sample on all the exhibits and concluded that:

- (1) The DNA profile generated from the blood stains of the khaki, long pair of trouser and yellow stripped long sleeved shirt belonged to the DNA of unknown male person.
- (2) The DNA from the yellow sleeveless reflective jacket and the soil belonged to the deceased.
- (3) The generated DNA profile of Jackson Mongare, Fanuel Ouko and Mangare Manegare did not match with any of the generated profiles for the listed items.

27. PW8 explained that every human being has a unique DNA which is obtained from the biological father or mother. It was therefore possible to conclude positively the origin of samples.

28. **Sgt Rono Rotich (PW10)** attached to crime scene support services Nyamira recalled that on 20<sup>th</sup> February 2019 at about 14.23 hours he was in the company of Inspector Mugalla the Deputy DCI Nyamira, Sgt Joseph Kimando and PC. Mathew Omondi all of DCI Nyamira. They arrived at Nyamira District Hospital where he was shown a dead body of a male adult identified by his father as that of his son Evans Minara Ayana. Upon the request of the investigating officer, PW10 took photographs of a general view of the deceased taken at the mortuary; a close-up view of the deceased halfway stripped of his clothes to capture any injuries sustained; a close-up view of the deceased backside showing blood on the left side of the ear; a close-up of the deceased's face for identification purpose; a close-up general view of motor vehicle Reg. No. GKB 785-R Isuzu Double Cabin Pick Up taken at the state where it was detained; a close up view of the same vehicle showing damaged plastic bumper front view and a close up front view of the motorcycle Reg. No. KMDX 434N make TVS taken at the station showing damage at the front mudguard. PW10 took the film to CID Headquarters Nairobi where it was processed and printed under his supervision. He produced the photographs he had taken as exhibits and stated that they had not been tampered or interfered with in any way. In cross examination, PW10 confirmed that the motorcycle's front mudguard, indicators and left side mirror were damaged. He stated that the front light was not captured and it was possible that it was damaged. In the photo capturing the vehicle, he confirmed that there was a plastic bumper hanging from it.

29. The investigating officer, **PC Mathew Omondi (PW11)** stationed at DCI office Nyamira South Sub County gave a recap of the evidence given by the prosecution witnesses on the events leading up to the death of the deceased. He testified that he went to Nyamira County Referral Hospital Causality Department but did not find the deceased at the reception as he had been pronounced dead at the casualty and taken to the hospital morgue. PW11 testified that they found the dead body on a stretcher outside the morgue where friends and relatives of the deceased who had received information of the incident were viewing his body. They did a physical examination of the body and observed that there was blood oozing from his left ear. The left ear lobe had a visible injury and the left upper thigh also had bruises. PW10 took photos of the body and they went back to the office.

30. PW11 testified that a post-mortem was conducted on 26<sup>th</sup> February 2019 by PW9 and the medical superintendent Dr. Samwel Ombati. The examination was conducted in the presence of the father and other relatives of the deceased. PW11 testified that the body was in a bad state in that the organs inside the body had decomposed. PW9 could not explain the rapid deterioration of the body since the body had been stored in the mortuary. The observation made by the doctor in their presence was that the liver was swollen and harder. When the skull was opened PW11 observed that the brain tissue was completely decomposed to the extent that there was nothing the doctor could do to enable him make a conclusive opinion on the cause of death of the deceased. As a result, the decomposed brain tissue, the stomach and its contents, finger and toe nail clippings and chest cartilage were taken to the government chemist in Kisumu. They also submitted swabs from the 3 accused persons and clothes from the 1<sup>st</sup> accused person including a long trouser and long sleeved shirt which had blood stains as well as a reflective jacket the deceased was wearing when he was on the motorbike. PW11 testified that the DNA analysis found that the blood stains on the 1<sup>st</sup> accused person's trouser belonged to an unknown individual who was at the scene.

31. The accused persons elected to give sworn testimonies when placed on their defence. They filed written statements which they adopted as their evidence. The 1<sup>st</sup> accused, **Jackson Mongare Manyara** in his defence filed on 20<sup>th</sup> July 2020, stated that on the material day, he parked the Isuzu Double Cabin pickup at the Nyamira County public parking slots outside Nyamira Huduma Centre on the Nyamira - Konate Road and walked into the shops inside Nyamira bus stop about 300 metres away. He encountered his brother the 3<sup>rd</sup> accused who was driving his employer's motor vehicle and accompanying him was PW2 who was the chairman of the Nyamira Government Drivers Association. PW2 told him that he had witnessed the vehicle he had parked being hit badly by a motorcyclist and he knew where he was headed.

32. The 1<sup>st</sup> accused got into the back seat of his brother's vehicle and PW2 directed them to turn into Nyamira-Mabundu Road. PW2 instructed his brother to stop and pick up some two men that he claimed would help them. As they pursued the motorcyclist, PW2 informed him that he had tried to reach him earlier to inform him about the incident without success. After a distance of around 1.5 km to 2 km, they caught up with the motorcyclist at a place called Bonyabomite. The headlamp of the motorcycle was broken and tied to the back of the motorcycle. The cyclist realized that they were following him. He panicked and fell off the motorcycle with the motorcycle still in motion. He hit a stone on the left side of his head. He abandoned his motorcycle and ran into a forest towards a river valley. The 2<sup>nd</sup> accused and the other unidentified man pursued the motorcyclist into the forest down to the river while he and the 3<sup>rd</sup> accused person waited near the road. PW2 run with them to the edge of the forest but did not pursue the motorcyclist further. The 2<sup>nd</sup> accused and the other unidentified man brought the motorcyclist from the forest. The 1<sup>st</sup> accused noticed that when the deceased was brought back, he was bleeding through his left ear. He was resisting getting into the vehicle. They put him in the vehicle, loaded his motorcycle on the vehicle and drove towards the scene of the accident. While they drove back, the deceased started pleading with them not to take him to the police station, he told them that he was willing to pay for the damage he had caused. They agreed that they would go back to the scene of the accident to assess the damage and come to an agreement on payment.

33. By the time they got to the scene the deceased appeared tired and was asking for water. He alighted from the vehicle and sat on his motorcycle which they brought down from the back of the 3<sup>rd</sup> accused person's vehicle. The 3<sup>rd</sup> accused drove off since he was travelling to Kakamega on official duties. The other accused persons left the scene as he and the deceased discussed on how he would pay for the damage. A police officer arrived at the scene which was teaming with motorcyclists. One of the motorcyclists took the deceased to Nyamira Level 5 Hospital. The 1<sup>st</sup> accused went to Nyamira Police Station to report the matter in the company of PC Menjo. The motorcycle was loaded into a police Land Cruiser and they headed to the police station. The 1<sup>st</sup> accused recalled that shortly after, he heard a crowd of people shouting which he later realized was motorcyclists from Nyamira town. He was informed by a police officer at the station that the motorcyclist who had been taken to the hospital had died.

34. During cross-examination, he stated that he had been a driver for 17 years up to date and had never caused any accident during that period. He testified that in this incident, he was told that the vehicle he had packed at Huduma centre had been hit by a motorcyclist. PW6 picked him and told him about the accident as they drove along. He testified that they followed the man in his motorcycle to bring him back to the scene of accident and found him about 1.5 kilometers away. The 1<sup>st</sup> accused recalled that the deceased resisted getting into the vehicle but denied that they forced him to enter the vehicle. They took him to the scene and wanted to take him to the police station.

35. The 2<sup>nd</sup> accused person, **Fanel Ouru Ouko** in his written statement dated 9<sup>th</sup> July 2020, informed the court that he was on his way from Huduma Centre with one Ronald on the day in question, when he saw a motorcycle coming from the Nyamira- Kisii direction being ridden at a high speed direction. It rammed into a parked GK vehicle from behind and the motorcyclist fell to the ground. People gathered to see what had happened and he heard some telling the cyclist to run away because the owner of the parked vehicle was not around. The motorcyclist began removing his bike and rode away towards tea sacco road. On his way to the stage he was called on phone by PW2 who asked him whether he had seen what had happened. PW2 later caught up with him and asked him where the motor cyclist had run to. The 2<sup>nd</sup> accused and PW2 started walking towards the direction the motor cyclist had taken. A GK vehicle came from the direction they were going and PW2 stopped the driver and informed him that a motorcycle had knocked the GK vehicle driven by the driver's brother. PW2 entered the GK vehicle and drove off leaving him. After sometime the GK vehicle came back and PW2 told the driver to stop and pick them. They also met the 1<sup>st</sup> accused and he boarded the vehicle.

36. The 2<sup>nd</sup> accused stated that on reaching Nyabomite, they caught up with the motorcyclist. He jumped off the motorcycle and fell down. He was knocked by a stone near the left ear. They all went after him and brought him back to the GK vehicle. They asked the deceased to board the vehicle but he resisted and PW2 pushed him forcing him to enter the vehicle. They put his motorcycle on the vehicle and left to Huduma center. He stated that the 1<sup>st</sup> and the 3<sup>rd</sup> accused persons offloaded the motorcycle and the deceased sat on it. He left the deceased with them and went back to work. At around 2:30 p.m. he received a call asking him to go to the CID and on getting there he was asked about the deceased and put in a cell.

37. In cross- examination, he stated that he had witnessed the deceased hit the 1<sup>st</sup> accused's vehicle. People came and advised him get up and get away as the owner of the vehicle was not around. The deceased got up and headed towards the direction of Kisako. He testified that PW2 asked him to get in the vehicle so that they could get the person who had hit the vehicle. They found him about 1.5 kilometres away. On seeing them, the deceased jumped off the moving motor bike. He fell down and hit a stone and ran towards the river. They all got off the vehicle and followed the deceased. The accused person testified that the deceased reached the river and fell down. The 2<sup>nd</sup> accused and PW2 held the deceased and returned him back to the vehicle. He testified that he saw PW2 pushing the deceased to enter into the vehicle.

38. The 3<sup>rd</sup> accused, **Mongare Manyara alias Josphat**, in his statement filed on 20<sup>th</sup> July 2020, indicated that he was driving from Nyamira County Headquarters on his way to Kakamega County when PW2 called him and told him that a motorcyclist known to him had smashed a vehicle assigned to his brother, the 1<sup>st</sup> accused. He tried to call his brother but his phone went unanswered. He headed to the bus stop where he met PW2 and he urged him that they pursue the motorcyclist quickly before he went too far. PW2 jumped into the front seat of the vehicle he was driving. They picked the 1<sup>st</sup> accused along the way and two men unknown to the 3<sup>rd</sup> accused. The 3<sup>rd</sup> accused reiterated the 1<sup>st</sup> accused's statement that when they caught up with the deceased, he fell down hitting his head on a stone on the left side. He stated that the 2<sup>nd</sup> accused and the other unidentified man pursued the motorcyclist into the forest while he, PW2 and the 1<sup>st</sup> accused waited. He indicated that he also noticed that the deceased was bleeding through the left ear when he was brought back to the road. They put the deceased and his motorcycle in the vehicle and went back to the scene of the accident to assess the damage. The 3<sup>rd</sup> accused noted that the deceased looked tired by the time they arrived at the scene. The motorcyclist alighted from the vehicle and his motor cycle was brought down. After that, the 3<sup>rd</sup> accused travelled to Kakamega.

39. During cross-examination, the 3<sup>rd</sup> accused, testified that the 1<sup>st</sup> accused was told about the accident while he was inside his vehicle. They got the deceased about 1.5 kilometers away and he ran towards the river. The 3<sup>rd</sup> accused testified that he tried to turn the vehicle and did not see who went to get the deceased. He went to town and on returning he found PW2 and the 1<sup>st</sup> accused standing and saw the rest return with the deceased.

## **SUBMISSIONS**

40. At the close of the defence case, all parties filed written submissions. Counsels for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons filed their respective submissions on 1<sup>st</sup> September 2020. In summary, they urged that from the very onset, the police officers and investigators charged with attending to the matter were highly influenced by misplaced public outrage so much so that they failed to investigate the matter exhaustively. They argued that if the State had objectively vetted the facts and the evidence in the matter, the accused persons would not be charged of murder or any other offence. Counsels reminded the court that an accused person was deemed innocent until proven guilty. They argued that it had not been demonstrated at any point in the proceedings that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons beat up the deceased or inflicted any form of violence on him. The post-mortem report did not indicate what caused the death of the deceased. The prosecution did not therefore discharge its burden of proving its case to the required standard.

41. They further submitted that none of the ingredients of murder including the element of malice aforethought was proved against the accused. With the lack of medical proof on the cause of death, counsels argued that, the case of murder against the accused persons ought to have failed. Counsels submitted that the toxicology report indicated that the deceased was driving under the influence of alcohol. They submitted that it could not be ruled out that the manner in which he handled the ensuing transaction was because of the effect of alcohol in his blood. That the prosecution also failed to rule out the possibility that the deceased died as a result of methanol poisoning. They also insinuated that the deceased was not an experienced motorcyclist since no current driver's licence had been produced. Additionally, the report presented by PW8 failed to connect the accused persons to the death of the deceased.

42. Counsels opined that the deceased could have died as a result of the accident that resulted from him falling when he jumped off the motorcycle as he attempted to run away from the search party. They urged that the accused persons were not immediately or remotely connected to the death of the deceased. They insisted that there was no evidence that the accused persons had beaten up the deceased. That there were various reasons that may have caused the death of the deceased and therefore the prosecution had not discharged its duty to prove its case beyond reasonable doubt. In support of his submissions, counsel cited the cases of *PON v R [2019] eKLR*, *Joseph Kimani Njau v R [2014] eKLR*, *Dickson Mwangi & another v R [2014] eKLR*, *Nzuki v R [1993] eKLR*, *Simon Kiptum Arap Choge & 3 Others v R [1985] eKLR*, *R v Harun Kinyanjui [2018] eKLR*, *R v Mjomba Jason Mwambili [2016] eKLR*, *R v Peter Nguigi Mwaura [2016] eKLR*.

43. For his part, counsel for the 2<sup>nd</sup> accused person submitted that for the accused to be convicted of murder it had to be proved that he had caused death of the deceased with malice aforethought by an unlawful act or omission. She urged that the prosecution had to discharge its duty to prove its case beyond reasonable doubt. Relying on the cases of **Woolmington vs DPP 1935 AC 462**, **Miller vs Minister of Pensions, Bakare vs State 1985 NWLR, Re Winship, 397 U.S. 358, 370**, counsel submitted that it was not enough for the State to show that the defendant was probably guilty. The State had to prove each element of the crime by evidence that firmly convinced and left no reasonable doubt. If the court found that there was reasonable doubt that the accused was guilty of the crime that it had to give the accused, the benefit of doubt and find him not guilty of the crime under consideration. In this case, the prosecution had failed to prove the salient ingredients of murder as it had not established that the 2<sup>nd</sup> accused had caused the deceased's death.

44. Counsel for the State on the other hand submitted that the accused persons had testified that they chased after the deceased and the deceased on realizing that he was being chased by the accused persons, fell off his motorcycle while trying to evade them. Counsel submitted that the logical sequence of events should have been that after the deceased hit the 1<sup>st</sup> accused's vehicle, the deceased would have been on his way and would have been sought after by the police for fleeing an accident scene after the 1<sup>st</sup> accused reported to the police. However, the accused persons decided to take matters into their own hands and pursue the deceased and he died almost instantly after his interaction with them. Counsel submitted that the accused may have been pursuing a lawful object but did so in an unlawful means leading to the death of the deceased.

45. He referred to **Section 21** of the **Penal Code** on common intention and the case of **Dickson Mwangi Munene & Another v Republic [2014] eKLR** where the Court of Appeal held that a common intention did not only arise where there was a pre-arranged plan or joint enterprise but could develop in the course of the commission of an offence. In this case, the accused persons did not pursue the deceased so as to murder him, but their unlawful act of pursuing him when they could easily have reported the matter to the police, hitting him as they forced him into their vehicle, contributed to the death of the deceased. Counsel submitted that malice aforethought may not have been established by their actions based on the circumstances but the court could convict the accused persons for manslaughter.

46. In brief rejoinder, counsels for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons urged that role played by the prosecution's witness PW2 was bigger than that played by the accused persons. They submitted that fearing arrest, PW2 decided to jump to the prosecution's side to frame his colleagues and brought in his cousin PW6 to complete the picture. The evidence of PW2 and PW6 was therefore without credit. Guided by the case of **Faizal Kweya Amasa v Republic of Kenya [2013] eKLR**, counsel submitted that a private person could effect an arrest of a person who in his view had committed a cognizable offence or whom he suspected of having committed a felony. **Section 21 (2)** of the **Criminal Procedure Code** provided that if a person forcibly resisted the endeavor to arrest him or attempted to evade arrest, the police officer or other person could use all means necessary to effect the arrest. The accused person's act of pursuing the deceased person was therefore lawful. They reiterated that no evidence had been led by the prosecution to show that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons had caused any bodily harm to the deceased. They argued that it was not a coincidence that the deceased had injuries on the left part of his body considering the fact that he had fallen twice with abnormal impact both times on the left side of his body. Therefore, the logical construction from the events was that the injuries the deceased sustained were self-inflicted and may have caused his death. Counsels argued that the deceased was riding his motorcycle under the influence of alcohol and it cannot be ruled out that the act of losing control of his motorcycle was due to the effect of alcohol.

47. Counsels also contended that the burden of proof always rested on the prosecution and could only shift to the accused where the prosecution had presented compelling evidence that the deceased was in perfect condition when the accused persons encountered him. In this case, the deceased had sustained multiple injuries, he was under the influence of alcohol and had methanol in his blood by the time he came into contact with the accused persons. The medical evidence did not point to death through beating. It had also not been shown that the accused had an intention to execute any unlawful objective. Instead the evidence on record pointed to the accused's attempt to make a lawful arrest. The prosecution had therefore failed to prove its case against the accused.

## **ANALYSIS AND DETERMINATION**

48. The offence of murder is defined under **Section 203** of the **Penal Code** thus; "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" From this definition, the prosecution is expected to prove the following facts beyond reasonable doubt:

- (1) The death of the deceased and cause of that death;
- (2) That the accused committed an unlawful act or omission that led to the death; and
- (3) That the accused committed the unlawful act with malice aforethought.

49. The fact of the deceased's death is undisputed. PW1, PW3, PW4, PW9, PW10 and PW11 all testified that they saw the deceased body lying at Nyamira County Referral Hospital Mortuary. Having established the fact of the deceased's death, the prosecution was required to prove the cause of death and that the accused persons committed an unlawful act or omission that led to the death of the deceased.

50. **Section 213** of the **Penal Code** outlines the circumstances under which a person is deemed to have caused the death of another thus:

### ***213. Causing death defined***

*A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—*

- (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment*

which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts bodily injury on another which would not have caused

death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

51. There was consensus between the prosecution and defence on what transpired before the deceased died on 20<sup>th</sup> February 2019. The deceased father, PW1 testified that the deceased left home for Nyamira on a motorcycle at about 8:30 a.m. that morning. At about noon, PW2 saw the deceased lose control of his motorcycle and hit an Isuzu Double Cabin registration no. GK 785R which was parked at Huduma Centre on the rear side of the vehicle. The 2<sup>nd</sup> accused also claimed that he saw the motorcycle which was being driven at a high speed coming from the Nyamira-Kisii direction and ramming into the parked GK vehicle. He heard people advising the deceased to run away because the owner of the parked vehicle was not around.

52. Being the chairman of the Nyamira Government Drivers Association, PW2 felt compelled to follow up on the matter. He called the 1<sup>st</sup> accused who was the driver of the damaged vehicle and when he failed to pick up, he went in search of him with the 3<sup>rd</sup> accused who was nearby. They found the 1<sup>st</sup> accused and came by the 2<sup>nd</sup> accused person and together with another unidentified individual, went in pursuit of the deceased. The 3<sup>rd</sup> accused was driving the vehicle, PW2 was seated in the co-driver's seat and the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and the unidentified man were at the back seat. After travelling for a distance of about 1.5 kilometers, they caught up with the deceased at Nyabomite. PW2 testified that they drove past him and stopped abruptly. The deceased realized that they were after him and let go of his motorbike. He fell down, stood up and ran into the trees towards the river.

53. According to the particulars of the information, the accused persons caused the death of the deceased at Nyabomite village which is where they had caught up with him. The traffic officer, PW7, insisted that what caused the death of the deceased was not the accident but assault of the deceased by the accused persons. However, none of the prosecution witnesses saw what happened when the accused persons caught the deceased in the forest. PW2 testified that he remained beside the vehicle as the accused persons went after the deceased. PW6 came by him as he was waiting for them by the roadside. PW2 and PW6 testified that the only time they saw the deceased being roughed up was when he resisted to get into the vehicle. They testified that they saw the 2<sup>nd</sup> accused hitting the deceased and pushing him into the vehicle. PW2 told the court that when the accused persons came back with the deceased after catching him, his forehead was swollen and there was blood trickling from the left side of his ear. PW6 testified that the deceased appeared weary and looked like he had been hit.

54. PW9, who conducted the post-mortem on the body of the deceased could not establish the cause of death. He testified that the deceased had a laceration on the left ear lobe and blood discharge from the ear opening. He also noted bruises on the left posterior elbow joint, a laceration with bruises on the right knee cut and a bruise on the right foot. He observed acute hepatic inflammation on the middle and lower lobes of the digestive system which had been there previously. He also noted an acute inflammation of the omentum. There was inflammation on the left temporal region of the head and intracranial pressure in the skull. He also observed vegetative grey matter with a pungent smell that was blood stained in the head. PW9 admitted that they had a hard time understanding what had happened and could not ascertain the cause of death.

55. However, medical evidence is not the only means by which the prosecution can establish the cause of death. In the case of **D M G v Republic Criminal Appeal 74 of 1991 [2006] eKLR** the Court of Appeal held that medical evidence is merely opinion evidence, and a Judge must test it against other evidence before acting on it.

56. Was there other evidence to prove the cause of the deceased's death or that the accused persons caused his death?

57. The prosecution's case is that when the accused persons emerged from the forest with the deceased person in tow, his forehead was swollen and there was blood trickling from his left ear. These observations by PW2 and PW6 were corroborated by PW1, PW3, PW10 who saw the injury on the deceased's body. PW9 also confirmed that there was a laceration and blood discharge from the deceased ear opening. On the head, the doctor observed an inflammation on the left temporal region and also noted intracranial pressure in the skull bones. He also observed internal inflammation and other soft tissue injuries.

58. The deceased died shortly after his interaction with the accused persons. In the case of **Wilson Wanjala Mkendeshwo v Republic Criminal Appeal No 97 of 2002 [2002] eKLR** the Court of Appeal held:

*As a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance, Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The said section is*

*silent on what would happen if he fails to do so. But section 119 of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact is rebuttable.”*

59. None of the accused persons confessed to assaulting the deceased. The 1<sup>st</sup> accused denied pursuing the deceased into the forest all together. He stated that he and the 3<sup>rd</sup> accused waited at the edge of the forest together with PW2 as the 2<sup>nd</sup> accused and the unidentified man went after him. The 3<sup>rd</sup> accused stated in cross-examination that he since he was the one driving the vehicle, he was preoccupied with turn it towards Nyamira and did not pursue the deceased into the forest. He also claimed that he went to town and that he came back to find the 1<sup>st</sup> accused and PW2 beside the road. For his part, the 2<sup>nd</sup> accused stated that all who were in the vehicle pursued the deceased and brought him back to the vehicle. He also claimed that the deceased had fallen down and hit a stone when he jumped off his motorbike.

60. Since there was no direct evidence to prove that the accused persons assaulted the deceased, I will interrogate the facts to determine whether the prosecution adduced sufficient circumstantial evidence to prove that the accused assaulted the deceased or caused his death in any way other way. In doing so I am mindful that circumstantial evidence must point unerringly towards the guilt of the accused person. There must be no other plausible inference to be drawn other than the guilt of the accused from the inculpatory facts which must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (See *Joan Chebichii Sawe v Republic Criminal Appeal No. 2 of 2002 [2003] eKLR*)

61. With the above principles in mind, this court analyzed the evidence and found that there were other plausible reasons for the frail appearance of the deceased person when the accused persons apprehended him. There was proof that the deceased rammed his motorcycle onto the rear of 1<sup>st</sup> accused person's vehicle. This was confirmed by the motor vehicle assessment report produced by PW7. PW2 also testified that when they caught up with him, the deceased let go of his motor cycle and fell before he ran into the forest. The prosecution failed to rule out the possibility that the deceased sustained fatal injuries as a result of the two incidences.

62. The position taken by counsel for the prosecution in his written submissions is that instead of reporting the matter to the police the accused persons acted unlawfully by taking matters into their own hand. They chased the deceased and it was after they caught up with him that he needed medical attention and died almost instantly. Counsel argued that the accused persons may not have pursued the deceased in order to kill him but their unlawful act of chasing the deceased when they could easily have reported the matter contributed to his death.

63. In response, the 1<sup>st</sup> and 3<sup>rd</sup> accused person's counsel rightly argued that a private person is permitted to arrest any person who in his view, commits a cognizable offence. He referred this court to **Section 21 (2)** of the **Criminal Procedure Code** which provides:

*21 (2) If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.*

64. **Section 21(3)** of the **Criminal Procedure Code** prohibits the use of greater force than reasonable in the circumstances for the apprehension of the offender. Nothing has been placed before this court to show that the accused persons used excessive force on the deceased. The prosecution's argument that the accused persons acted unlawfully in pursuing the deceased in order to arrest him therefore lacks basis.

65. Under **Section 213 (c)** of the **Penal Code** above, if an accused person threatens violence on a deceased person and causes the deceased to act in a manner which in the circumstances appear natural to the deceased and he dies as a result, the accused person is deemed to have caused the deceased's death.

66. It may be argued that the deceased let go of the motorcycle and fell from it as he tried to escape from the accused persons because he feared what would befall him once they caught up with him. That argument would however not aid the prosecution's case since the evidence on the cause of death is inconclusive. It is not clear whether the deceased died as a result of injuries sustained when his motorcycle hit the 1<sup>st</sup> accused person's vehicle or whether sustained fatal injuries when he fell of the motorcycle as he tried to escape from the accused.

67. The analysis conducted by PW5 also brought up another possible cause of the deceased's death. She subjected samples extracted from the deceased and found that the deceased's blood and urine contained methanol. PW5 told the court that methanol could not be detected in the stomach contents and went through the blood and was excreted through the urine. PW5 testified that methanol if ingested was fatal. There is therefore a possibility that the deceased's death was caused by methanol the source of which is unknown. The DNA analysis conducted by PW8 also failed to establish any link between the deceased's injuries and the accused persons.

68. In criminal cases, the burden lies with the prosecution to prove its case against an accused person beyond any reasonable doubt. Suspicion, however strong, cannot provide the basis of inferring guilt. Having considered all the evidence before this court, I find that the prosecution failed to prove the cause of the deceased's death or that the accused persons caused his death by an unlawful act or omission.

69. Accordingly, **JACKSON MONG'ARE MANYARA, FANEL OURO OUKO** and **MONG'ARE MANYARA alias JOSPHAT** are acquitted of the murder of **EVANS MINARO AYANA**. They are discharged from these proceedings unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF APRIL 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused Persons All Present**

**Ms. Ndubukire for 2<sup>nd</sup> Accused person and holding brief for Mr. Mamboleo for 1<sup>st</sup> Accused person and Mr. Nyamweya for 2<sup>nd</sup> Accused Person**

**Mr. Otieno Principal State Counsel ODPP**

**Ms. Rael Court Assistant**