



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL CASE NO. 3 OF 2014 (MURDER)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PETER MUSAU MAWEU..... 1ST ACCUSED**

**JONATHAN NZIVO.....2ND ACCUSED**

**JOHN NABEA.....3RD ACCUSED**

**BENARD ENGOLET ODIKOR.....4TH ACCUSED**

**SAMMY MWOVA.....5TH ACCUSED**

**J U D G M E N T**

1. The five accused persons are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 11<sup>th</sup> January, 2014 at Umau village in Mbeere North District with others not before the court, murdered one Danson Wachira Nyaga. A plea of not guilty was entered for each of the accused person.

2. The case proceeded for trial with the prosecution calling thirteen (13) witnesses. Briefly, the facts are that on the 11<sup>th</sup> January 2014, the 1<sup>st</sup> accused who was an Administration Police Inspector attached to the Deputy County Commissioner Mbeere North led a team of one officer, the 2<sup>nd</sup> accused and three recruits 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> accused persons for a crackdown on illicit brew. The 2<sup>nd</sup> accused was an AP officer and driver on the material day. The party went to Mwangaza Bar where PW2 was the bar attendant. The deceased and PW1 and another who were regular customers and were sited inside the bar taking their drinks. There was a courtyard outside the bar that served Mwangaza Bar and another one next to it. In this area about twenty customers were sited there.

3. On arrival the 1<sup>st</sup> and 2<sup>nd</sup> accused entered the bar where they arrested the deceased and PW1. They were taken to the Administration police vehicle parked outside. The bar attendant PW2 was also arrested and 40 litres of liquor seized as exhibit. The three were taken to Kiritiri police station where PW3 PC Peter Ole Kingasi and PC Edward Waswa were on duty at the report office.

4. PW1 and PW2 were booked in the Occurrence Book and locked in the cells. PW3 observed that the deceased had an injury on the forehead at the time he reached the station. PW3 who was on duty at the report office refused to admit him at the station and directed the 1<sup>st</sup> accused to first take him to hospital for treatment.

5. About four days later the body of the deceased was found dumped at Umuu market about 14 metres from the main road. The body was in a state of partial decomposition and had severe injuries on the head and chest. The body was removed to Embu Level 5 hospital where postmortem was conducted.
6. The evidence of PW1 is that he was drinking with the deceased at Mwangaza Bar from 6.00 p.m. and each had taken about two drinks. PW1 said the two were drunk at around 8.00 p.m. when the accused persons raided the place. The officers arrested them on allegations that they were drunk.
7. The two suspects boarded the vehicle and were handcuffed using one handcuff. PW2 was also arrested and liquor seized from the bar. On the way to the police station PW1 said he complained that the handcuffs were too tight and were hurting. The officers unlocked the handcuffs releasing PW1 but the deceased remained handcuffed.
8. At the station PW1 said he was locked in the cells overnight and released the following day. He said he was the first to be locked in the cells and does not know what happened to PW2 and the deceased.
9. PW2 testified that the deceased and PW1 were arrested from Mwangaza bar where she worked as an attendant. On the material day, the 1<sup>st</sup> and 2<sup>nd</sup> accused raided the bar, arrested the deceased and PW1 who were enjoying their drinks. PW2 was also arrested and some liquor seized from her business premises.
10. The three suspects were taken to Kiritiri police station where she and PW1 were detained till the following morning. The deceased was taken to hospital for he had a wound on the head with blood oozing down his face. She recalls that the 1<sup>st</sup> and 2<sup>nd</sup> accused were told by the officer manning the report office to take the deceased to hospital.
11. PW3's testimony was that he was the officer on duty at the report office in the evening of 11/01/2014 when the 1<sup>st</sup> and 2<sup>nd</sup> accused accompanied by three recruits brought the suspects to the station. For the deceased, PW3 said he noticed a bleeding wound on the forehead and refused to admit him at the station. He booked PW1 and PW2 and locked them in the cells. The 1<sup>st</sup> and 2<sup>nd</sup> accused were advised to take the deceased to hospital. PW3 was to learn a few days later that the body of the deceased had been recovered at Umuu area. He saw the body and confirmed from the appearance and clothing that it was the same prisoner he had rejected at the station on 11/01/2014.
12. PW4 was a customer at the bar at the material time. He says he escaped when he saw the officers come to the bar and hid in the bush nearby. He saw the deceased being escorted to the vehicle by the officers. The deceased resisted to board the vehicle and was beaten up by the officers using a stick. PW4 said he identified the 4<sup>th</sup> accused as the person who hit the deceased with a stick on the head several times.
13. PW5 was an identifying witness during the postmortem while PW7 was the area Assistant Chief. It was reported to PW7 that the body of deceased had been spotted near Umuu market. He went to the scene and involved police from Kiritiri police station.
14. The evidence of PW8 an officer from Kiritiri police station visited the scene of recovery of the body at Umuu with other police officers.
15. PW10 Dr. Phyllis Muchonja a forensic pathology officer produced the postmortem report on behalf of Dr. Maingi. The cause of death due to severe head injuries due to blunt force trauma.
16. PW12 testified that he visited the scene together with other police officers from Kiritiri Police station. He said the deceased's body had injuries on the head and left leg. It was moved from the scene to Embu Level 5 Hospital for postmortem.
17. PW13 Dr. J.K. Thuo examined the accused persons as to their mental status and found them fit to plead.

18. The accused persons gave sworn statements in their defence. The 1<sup>st</sup> accused said he was working as an Administration police inspector at the Deputy County Commissioner's office, Mbeere North. He testified that on the material day, he and other officers acting on information that Mwangaza Bar was selling illicit brew proceeded there to carry out an operation. They arrested the bar attendant PW2 and seized 40 litres of illicit brew as exhibit after pouring 600 litres at the scene. The 1<sup>st</sup> accused said he also arrested the deceased and PW1 who were customers at the bar at the material time.

19. He said his party was not armed and that the three prisoners were handed over to Kiritiri police station in good state health contrary to what the witnesses said.

20. The 2<sup>nd</sup> accused said he was the driver of the vehicle used for the raid GK A 74 C make land rover. The raid was led by the 1<sup>st</sup> accused who also authorized the journey in the work ticket and the three recruits attached to the DC's office 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused accompanied them.

21. At the bar, many customers were sited outside ran away on spotting the officers. The 2<sup>nd</sup> accused said that two customers including the bar attendant were arrested. The first two suspects were drunk and 1<sup>st</sup> accused assisted them to board the vehicle. All the three suspects were handed over to Kiritiri police station.

22. The 3<sup>rd</sup> accused said that at the material time, he was an Administration police recruit attached to the Deputy County Commissioner's office. He said that no particular duties were allocated to them as recruits but they were occasionally they were called upon to accompany the officers going out on duty.

23. The 3<sup>rd</sup> accused further stated that on the material day, the 1<sup>st</sup> accused requested 3<sup>rd</sup> accused and his two colleagues the 4<sup>th</sup> and 5<sup>th</sup> accused to accompany him to Mwangaza bar for an operation. It is the 1<sup>st</sup> and 2<sup>nd</sup> accused who carried out the operation in the premises and brought with them three prisoners including the deceased. The suspects boarded the rear of the vehicle as the 3<sup>rd</sup> accused and his colleagues were instructed to load the illicit brew on the vehicle. The 3<sup>rd</sup> accused said that the three suspects were handed over to the police at Kiritiri police station and left there.

24. The 4<sup>th</sup> and 5<sup>th</sup> accused echoed the defence of the 3<sup>rd</sup> accused. They denied the offence and added that the three suspects were in good health at the time of the handing over to the station.

25. Mr. Momanyi represented the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons. He submitted that the prosecution have not proved the case against the two accused persons beyond any reasonable doubt. He challenged the evidence of PW2 and PW4 as not being truthful especially on the issue of claiming that they saw the deceased with a fresh injury on the forehead. The circumstances in which PW2 observed the injury inside the vehicle was said to be negative.

26. The evidence of PW4 that he saw the deceased being beaten up from his (PW4's) hideout was said to be untrue as it was not confirmed by PW1 and PW2. Mr. Momanyi said the defences of the accused persons were plausible and that the case has not been proved beyond any reasonable doubt.

27. Mr. Mugambi Nguthari for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused submitted that there was evidence to show that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused did not arrest the deceased and the other two suspects. The trio said they did not assault the deceased either or even handcuff him. As recruits, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused had no authority to carry out the duties of police officers and were merely under instruction of the 1<sup>st</sup> and 2<sup>nd</sup> accused.

28. It was further submitted that the evidence of PW2 was contradicted on whether she saw the injury on the deceased. Mr. Mugambi further argued that the evidence of PW4 was fabricated and therefore unreliable and further argued that the circumstantial evidence on record did not pass the test of the laid down principles.

29. The issues for determination in this case are as follows:-

- (1) Whether the death of the deceased was proved.
- (2) Whether the accused persons committed the unlawful act that caused the death of the deceased.
- (3) Whether malice aforethought was proved on part of the accused persons.

30. The evidence of PW1, PW2 and PW4 put the five accused persons at the scene of crime. This was not disputed in the defence of the accused persons who all explained their mission at Mwangaza bar at the material time. It is not in dispute that the deceased PW1 and PW2 were arrested at the bar by the 1<sup>st</sup> and 2<sup>nd</sup> accused persons.

31. The witnesses were in agreement that, assisted by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused the three suspects were ferried in the police land rover. GK 746 C driven by the 2<sup>nd</sup> accused to Kiritiri police station. PW1 and PW2 were handed over to the police at the report office while the deceased was turned away.

32. The defence maintained that the deceased was left at the station. PW3 one of the officers at the report office testified that he refused to accept the deceased as a prisoner because he had a severe injury on the forehead which required that it be treated first as required by regulations governing police operations. According to PW3, the deceased had been arrested by the 1<sup>st</sup> and 2<sup>nd</sup> accused who were police officers. Having sustained an injury which was fresh, it was the responsibility of the arresting officers to ensure that treatment was given before the suspect could be admitted at the police station.

33. The evidence of PW3 was corroborated by PW11 as to the turning away of the deceased and on advising the 1<sup>st</sup> and 2<sup>nd</sup> accused to take him for treatment.

34. The evidence of the two officers was not shaken during cross-examination and this court found them credible witnesses.

35. As for the existence of the injury on the deceased's forehead, PW2 who was arrested together with him said she saw the injury on the deceased after alighting from the vehicle since it was dark inside the vehicle. There is evidence that the deceased and PW1 were the first to be arrested and to board the vehicle. PW2 was left behind leading the officers to the stores where liquor was kept.

36. It was said that about 40 litres of Alsops and Dume beer were seized as exhibits. The 1<sup>st</sup> and 2<sup>nd</sup> accused further stated that 600 litres of illicit brew were recovered and poured out at the premises. This was not supported by the prosecution witnesses present. I suppose that this process must have taken some time before PW2 was escorted to board the vehicle.

37. PW4 confirmed in his evidence that PW2 was arrested after the deceased and that she (PW2) may not have witnessed the handling of the deceased by the officers as he boarded the vehicle. If it was dark inside the vehicle, as she said, it may not have been possible to see the injury on the deceased's forehead for she found him already seated in the vehicle. She said that she saw it after alighting from the vehicle at the station. There was no evidence that the vehicle was lighted.

38. This court takes judicial notice that police stations including the report offices are normally lighted to facilitate official business be carried out. This lighting provided PW2 with the opportunity to see the injury.

39. It is not clear whether PW1 and the deceased after being arrested were escorted to the police vehicle at the same time or at different times. This may explain the reason why PW1 did not witness the deceased boarding the vehicle or being assaulted like PW4 did. PW4 said in cross-examination that PW1 was very drunk and may not have seen or noticed what was happening around him. This explains why PW1 said he did not see or notice what PW2 experienced.

40. PW4 said he escaped from the bar when the police arrived and went to a hideout about 20 metres from where the police vehicle was parked. He said he saw the deceased being beaten up with a stick after he resisted to board the police vehicle. He said he was aided by the light from the torches of the police officers at the vehicle which were being flashed around to see what was happening.

41. The evidence of PW4 was challenged by the defence as being untruthful. During cross-examination, the witness was firm and described the scene including the layout and the sitting arrangements at PW2's bar and Njeru's bar in vivid details. This sense of alertness and confidence rules out the alleged lack of credibility. This court found PW4 a credible witness.

42. PW4's evidence that the deceased was hit on the head by the 4<sup>th</sup> accused several times was corroborated by PW10 the doctor's evidence on the location of the fatal injuries. PW10 said the cause of death was the severe head injuries caused by blunt trauma. The stick or piece of wood used by the officer was of course a blunt object.

43. The defence also took issue with PW2's evidence in relation with that of PW9 the wife of the deceased. In her statement to the police, PW9 told the police that she was informed by PW2 that the deceased had been locked up at Kiritiri police station and released the following day. PW9 explained that she had talked to some women prisoners at Kiritiri police station who told her the deceased had been released. PW9 did not mention that she talked to PW2 in particular. During cross-examination she said she had not met PW2 even as she recorded her statement.

44. There is evidence that PW9 never witnessed the incident nor any event at the police station on the material evening. All that she knew was through hearsay from her relatives, and friends of the deceased as well as the women prisoners she says she talked to at the police station. Hearsay evidence is unreliable and not comparable to direct evidence like that of PW2 who testified on what she witnessed. I find no contradiction by PW9 to the evidence of PW2.

45. The defence of the accused persons was that they handed over the deceased to the police at Kiritiri police station. This defence was disapproved by that of PW2, PW3 and PW11 who testified that the deceased went back with the 1<sup>st</sup> and 2<sup>nd</sup> accused so that he could be taken to hospital first for treatment of the injury on the head. PW3 said he booked the two prisoners he admitted at the station in the Occurrence Book (OB). He could not book the deceased since he did not take him in at the station. It was argued by the defence that PW3 ought to have booked the deceased in the OB and indicated that he had rejected him. In my view, such an entry would not have served any useful purpose.

46. The defence also said that the deceased had no injury at the time he was handed over to the regular police at the station. This could not possibly be true because the injury had been spotted by PW2 as the deceased alighted from the vehicle on arrival at the station. PW4 testified that he had witnessed the assault by the accused persons outside Mwangaza Bar immediately after the arrest of the deceased.

47. As I have already said, the evidence of PW4 on the assault and the location of the injuries was corroborated by the postmortem report. PW2 and PW4 testified that the deceased was in good health at the bar before he was arrested.

48. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused raised the issue of lack of authority to arrest, carry weapons or perform any lawful duty for they were not qualified to do so. The issues in this case relate to an unlawful act which caused the death of the deceased. The subject therefore relates to criminal liability under Section 11 of the Penal Code which every individual will be held personally liable subject to the evidence presented to court. The fact that the three accused persons were recruits does not exempt them from criminal liability. None of them raised the issue of duress or coercion by the 1<sup>st</sup> and the 2<sup>nd</sup> accused. The act of the arrest of the deceased has not been faulted from this case but the assault which led to his death.

49. The defence raised the issue of why the body was not discovered at the earliest chance possible since it had been dumped on a public road used by members of public. The evidence of PW12 who visited the

scene was that the body was about 14 metres from the road. No evidence was led as to whether there was a thicket which would have made the body not visible to passersby. It is highly probable that there was either a thicket or high vegetation for the body to be dumped there. The distance of 14 metres in such a situation would be a hindrance to visibility. However, the time of discovery may not be material in the circumstances and what matters is who killed the deceased and dumped the body there.

50. The defence in their submissions alleged that the police at Kiritiri are the ones who killed the deceased and dumped his body near the police station. It is important to note that none of the accused persons made any such allegation. This was a statement from the bar which was disapproved by the evidence of PW2, PW3 and PW11 that the deceased was not left at the police station.

51. The five accused persons were conducting the crackdown on illicit brew together. Although the 1<sup>st</sup> and 2<sup>nd</sup> accused were the qualified officers authorized to arrest suspects in the course of their duties as police officers, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused aided in the execution of the duties and in assaulting the deceased. PW4 testified that the three officers were at the place where the vehicle was parked and received the prisoners forcing or aiding them to board the vehicle.

52. PW4 identified the 4<sup>th</sup> accused as one of the officers who hit the deceased with a stick. The involvement of the 4<sup>th</sup> accused and his colleagues confirms that the five accused were acting with common intention and executing a common purpose of arresting the deceased and others and consequently ferrying them to the police station. It is in the course of the execution of the common purpose that the assault on the deceased was committed.

53. The evidence of PW3 was that at the station the deceased could walk by himself. This means that the injuries inflicted were on several parts of the body. Apart from the head injuries, the body was found to have abrasions on the right side of the chest, bruised right rib cage, rib fractures among others.

54. The assault witnessed by PW4 coupled with the description of the health status of the deceased by PW3 and PW1 did not give a grim picture of the injuries sustained. The deceased was still able to walk by himself when he reached at the police station. This scenario leads to the conclusion that more injuries were inflicted by the accused persons before the deceased was dumped.

55. I have already stated that all the five accused persons participated in the illicit brew crackdown with each playing a part. The 1<sup>st</sup> and 2<sup>nd</sup> accused arrested the deceased. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused received the deceased and are said to have assaulted him when he resisted to board the vehicle. The three 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused must have been acting on the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons who were qualified police officers but are still responsible individually to any criminal act done by them.

56. The deceased boarded the same vehicle that had taken him to the station driven by 2<sup>nd</sup> accused and carrying the other four accused persons. He was never taken to hospital but was but was dumped at the place where the body was later found. The deceased may have been killed at the time of dumping of his body or may have died of the injuries inflicted after being dumped.

57. In the absence of direct evidence, circumstantial evidence is relevant in this situation. It was held in the case of **MUSILI TULO VS REPUBLIC Criminal Appeal No. 30 of 2013** that:-

*“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”*

58. It was further held in the case of **ABANGA Alias ONYANGO VS REPUBLIC Criminal Appeal No. 32 of 1990** that:-

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency*

*unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

59. The facts that can be gathered from the evidence of the witnesses are as follows:-

- a. *That the deceased was in the custody of the 1<sup>st</sup> and 2<sup>nd</sup> accused from the time of the arrest to the time he was taken to Kiritiri police station.*
- b. *That the deceased was not received at the police station.*
- c. *That PW3 advised the 1<sup>st</sup> and 2<sup>nd</sup> accused to take the deceased to hospital first.*
- d. *That the deceased was never booked in the Occurrence Book at the station like the other two suspects.*
- e. *That the deceased was never returned to the police station.*
- f. *That the deceased never went to his home that night.*
- g. *That he was found five days later and his body dumped at Umau.*
- h. *That all the five accused left the station together with the deceased in the vehicle.*

60. All the facts above have been firmly established by the evidence on record and point the guilt to no other person(s) but the five accused persons. The facts form a complete chain of the deceased's journey from the time of arrest to the time of his death, and subsequent discovery of his body. This court has a good basis for drawing the conclusion that the deceased died in the hands of the five accused persons and they must jointly and severally be held responsible for their acts.

61. It was held in the case of **NJOROGE VS REPUBLIC [1983]** that:-

*“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”*

62. From the direct evidence of PW2, PW3, PW4 and PW11 on the assault and the circumstantial evidence on the death of the deceased, I find that the prosecution have established that the five (5) accused persons committed the unlawful act that caused the death of the deceased.

63. The prosecution must prove that the five accused persons had malice aforethought as they did the unlawful act or omission.

64. Malice aforethought is defined under Section 206 of the Penal Code as follows:-

*206(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

65. In view of the above provisions and the evidence on record, I find that the prosecution have failed to establish malice aforethought on the part of the five accused persons. The charge of murder has not been proved as required.

66. It is my finding that the evidence on record establishes the lesser offence of manslaughter against the accused persons.

67. I find them guilty of manslaughter contrary to Section 205 of the Penal Code and convict them accordingly.

68. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF MARCH, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**All the accused persons present**

**Mr. Njage Morris holding brief for Mr. Momanyi and Mr. Mugambi for accused persons**