



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 29 OF 2012

REPUBLICPROSECUTOR

VERSUS

THOMAS KIPKEMOI KIPKORIR.....1ST ACCUSED

JOSEPH KOMEN YATICH.....2ND ACCUSED

SEBASTIAN YANO KOMEN.....3RD ACCUSED

JUDGMENT

Introduction

Thomas Kipkemoi Kipkorir, Joseph Komen Yatich and Sebastian Yano Komen, the 1st accused person, 2nd accused person and 3rd accused person respectively, are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 30th March 2012 at Kwitu Classical Bar in Eastleigh Section III within Nairobi County they jointly murdered Nicholas Ochieng Odongo, the deceased. The accused persons have individually denied committing this offence.

The 1st accused person is represented by Ms Onyinkwa, advocate, the 2nd accused person is represented by Ms Odembo, advocate, and the 3rd accused person is represented by Mr. Koeh, advocate.

Background

The three accused persons were arraigned in court on 19th April 2012. However from that date to 25th November 2014 when I took over the proceedings in this case the trial had not commenced for reasons appearing on the court file record. One of the main reasons for the delay in hearing this case is the considerable absence of 1st accused person who had jumped bail. It took the court some time to sort out this issue. He was arrested and presented in court on 15th April 2015. His bond was cancelled and he was remained in custody for the remainder of the trial. Hearing of this case commenced in earnest on 14th July 2015.

Prosecution case

The events of 30th March 2012 in respect to this case were narrated by sixteen (16) prosecution

witnesses. On that day at around 5.00pm the three accused persons went to Kwitu Classical Pub in Eastleigh Nairobi (the Pub) in company of Chepkonga Sutter (PW8) to take drinks. They were served by Anne Wothaya Waiti (PW6) and Agneta Khamsa Nakukhanya *aka* Jackline (PW4) the two attendants at the Pub. After sometime in the course of the evening Chepkonga left the three accused persons at the Pub.

Somewhere outside the Pub that same evening Nivel Ogesa Siamunyu (PW2), Aggrey Juma Onyango (PW13) and the deceased met at Sun City around 6.00pm. Court was told that the Pub is located within Sun City. According to Ogesa the three were operating a laundry business and they met that evening to take accounts in respect to that business. They were approached by a police officer described by Ogesa and Juma as working with diplomatic police. The two witnesses used to see this officer in Eastleigh before this date but both said they did not know his name. Both witnesses identified this officer as the 1st accused in this case.

The specifics of what happened after the 1st accused went to them are not clear but from the evidence of Ogesa the 1st accused asked them their names and told each of them to buy him beer. They told him they did not have money. After some exchange the 1st accused is said to have gone into the Pub and the deceased is said to have followed him inside the Pub. Juma said an argument ensued between the deceased and the 1st accused. Both Ogesa and Juma left the scene. Ogesa testified that later that evening he met the deceased having been arrested by the 1st and the 2nd accused persons. The deceased was at this time injured and his white *kanzu* was bloodstained. Juma told the court that he learned later that evening that the deceased had been injured.

Benjamin Kimuyu Mutiso (PW10) was also around the precincts of Sun City near the Pub between 8.00pm and 9.00pm. He had gone there to buy groundnuts. He found the deceased arguing with the 1st accused outside the Pub. The deceased was telling the 1st accused to return his wallet. Mutiso, who said he was six metres from the Pub, told the court that the 1st accused and the deceased entered the Pub. Before Mutiso left he heard noise of bottles dropping and breaking inside the Pub and as he was about to enter the Pub he heard someone say “close the door, close the door”, referring to the door of the Pub. The door was closed. Mutiso remained outside with other people. After about 5 minutes the door was opened. Mutiso saw the deceased inside the Pub on the ground being pulled by the 2nd accused. The deceased was left outside the Pub with a warning that he should not leave. The deceased stood up and started walking away. He was followed by the 1st and 2nd accused. Mutiso said he knew the 1st accused as he had seen him around Eastleigh in a diplomatic police vehicle but he did not know the 2nd accused.

George Okwach Ogada (PW12) was at Githunu Bar still in Eastleigh the same evening of 30th March 2012 when the deceased went there. Ogada puts the time as between 8.30pm and 9.00pm. The deceased was bleeding from the back of his head and his *kanzu* was bloodstained. Two people identified by Ogada as the 1st accused and a second person he was not able to identify went to Githunu Bar running. The 1st accused said he was looking for the deceased. Ogada said the deceased resisted arrest but the second person with the 1st accused threatened him with a gun. The deceased was taken away. Ogada said the 1st accused was known to him as he had seen him around Eastleigh in diplomatic police vehicle.

Collins James Akhamuye (PW1) was going home from college that evening around 9.00pm when he met the deceased who was injured and bleeding having been arrested by two people who Collins thought were police officers. The deceased asked Collins to help him because the two were going to kill him. Collins identified the 1st accused and the 2nd accused as the people who had arrested the deceased. He also said the 3rd accused was holding a gun. Collins followed them until they entered the Eastleigh Patrol Base with the deceased. He called Racy Nyadifa Omido (PW14) the deceased's wife and informed her. Racy met Collins at the Police Patrol Base. They started looking for the deceased. They did not find him at the Patrol Base. They later found him at a place they called Home Base. He was seated and trying to wipe blood. The deceased told them that the police had beaten him. Racy and Collins took deceased to Mother and Child Hospital in Eastleigh. They were joined there by other friends and deceased's brother Erick Oluoch Adongo (PW11). Deceased's wounds were cleaned and dressed and he was released to go home.

Racy said her husband had an injury at the back of his head and other injuries on the face. They were released to go home but the condition of the deceased deteriorated. He was taken to Kenyatta National Hospital where he died on 2nd April 2012 while undergoing treatment.

What happened inside the Pub was narrated by Agneta and Anne. Both were serving customers at the Pub. Anne had arrived earlier than Agneta. Anne reported on duty at the Pub at 5.00pm and started serving customers among them the three accused persons. According to her she left the Pub at one time to look for change and on returning she found a fight going on between the accused persons and the deceased whom she described as the man in a *kanzu*. She said when she returned she found the deceased, who was injured and bleeding, being dragged outside by two people.

Agneta captured what happened better. She told the court that she arrived at the Pub at 5.30pm, late by half an hour, and found Anne already having reported. She said she found the three accused persons and another man sitting on a table near the counter. The four ordered for meat and Agneta went outside to buy charcoal. She returned and continued selling. She said the deceased who was dressed in a *kanzu* went to the table where the accused persons were seated. Agneta heard the man tell the accused persons “*Wazee, nirudishieni kitablisho changu*” loosely translated as “return my identity card”. Upon saying this, the 1st accused pulled the deceased to sit down. Agneta said she heard the deceased say, “*Wazee sina ubaya na nyinyi. Nataka tu kitablisho changu*”, loosely translated as: “I have nothing against you. I just want my identity card.”

Agneta told the court that the 1st accused asked the deceased if he knew who they were and slapped him. The 2nd accused too slapped the deceased while telling him “*unajua sisi ni akina nani?*” loosely translated as “do you know who we are?” Agneta continued to testify on what happened after this as follows:

“The man wanted to leave. He was wearing a *kanzu*. It got caught on the table and pulled the table. The bottles dropped. Glasses and beer bottles dropped. It was by bad luck. The three stood (in reference to the 3 accused persons). 1st accused held the man and complained about the broken beer. All kicked and punched him. The man fell. While on the ground, face up, the 2nd accused lifted the leg and stepped on his head. I saw the 2nd accused step on the man’s head twice. I was at the counter. Anne left running. Other customers also left. I was scared and people wanted to enter the bar but the accused persons were stopping them.”

Agneta testified further that she hid behind the counter and when she stood up she found the deceased, the 1st and 3rd accused having gone out of the Pub but the 2nd accused was in the Pub. She saw a lot of blood where the deceased had been lying. She said that the 2nd accused was rough on her, slapped her and forced her to pour water on the bloodstain on the floor and clean it. She said that the 2nd accused had even poured water in a bucket and assisted to carry it for her.

What happened at the Patrol Base was narrated by IP Francis Muthee Gichuhi (PW9) the OCS of the Base. He told the court that on 30th March 2012 at around 9.25pm he went to the Report Office at the Eastleigh Police Patrol Base where he found 1st and 3rd accused persons booking a suspect known as Nicholas, the deceased in this case, for having created disturbance at the Pub. The two were not his officers and he did not know them but later learned they were 1st accused working with diplomatic police and 3rd accused an administration police officer. IP Gichuhi sought to know from them what was happening. They told him that they were booking a suspect who had caused disturbance at the Pub. The suspect denied this and claimed the two had assaulted him. IP Gichuhi told the court that the suspect was badly injured and because of this he refused to have him booked and placed in police cells. He told the two accused persons to take him for treatment first and after treatment to bring him back to the Base. IP Gichuhi said the suspect was not taken back to the Patrol Base and that the two accused persons did not go back to report what had happened. He said that he learned later what had happened at the Pub and that the victim died later in hospital.

IP Gichuhi further testified that he went to the Pub where he found CPL Ochieng and other police officers from Buruburu Police Station on Patrol. CPL Ochieng was talking to a man IP Gichuhi later learned was the 2nd accused in this case. IP Gichuhi said he found the Pub disorderly with broken pieces of glasses and bottles and the floor was wet with water and blood. He said that Agneta came and introduced herself to him and told him what had happened. After investigations were completed the three accused persons were charged with this offence.

Defence case

The 1st accused testified under oath and stated that at the time of the events that gave rise to this case, he worked for Diplomatic Police in Girigiri but used to live at Eastleigh Patrol Base Police Lines. He said that on 30th March 2012 his brother in law Chepkonga Sutter (PW8) in company of Sebastian Yano Komen, 3rd accused, went to his home and invited him to join them for drinks at the Pub. They arrived at the Pub at about 6.00pm and met Nicholas Njenga (PW3) the proprietor of the Pub. They were joined by Joseph Komen Yatich, 2nd accused at about 6.30pm and continued drinking. He testified that at about 8.00pm three men entered the Pub. He knew two of them as the deceased Nicholas and the other Nivel Ogesa but did not know the third person. He said the deceased was wearing a white *kanzu*; that the deceased went to the Pub counter leaving the other two at the Pub door and that there was fighting in the Pub with bottles and glasses dropping from the table. In his own words: ***“After some minutes there was rapture at the far end of the bar. I heard tables moving and bottles and glasses dropping.”*** He said that he and Chepkonga went outside the Pub because he did not want to get involved in the situation and returned after five minutes; that he found the deceased on the floor near the counter door and that he saw the 2nd accused holding the deceased and pulling him out; that when he went outside he saw the deceased standing and walking away; that he went to pay his bills but the bartender refused to accept his money; that the bartender asked him to arrest the deceased for causing the commotion; that he informed the 3rd accused about the request to arrest the deceased and that the 3rd accused joined him to follow the deceased and arrest him; that they found the deceased watching television in the next bar which was about a 5-7 minutes’ walk from the Pub; that they arrested him and took him to the Eastleigh Patrol Base for booking; that IP Gichuhi refused to have the deceased booked in; that they took the deceased to the clinic where he was accepted at the second clinic after the first one refused to accept him; that they left him at that clinic and returned to the Pub where they found police from Buruburu Mobile Police had arrived. He said that one of them, CPL Ochieng asked to be shown the deceased and they took him to the clinic where they had left the deceased but found he had left. He said he was arrested and charged in connection with the death of the deceased.

The 2nd accused, also testifying under oath and told the court that on 30th March 2012 he was on duty at Eastleigh Chief’s Camp where he was attached; that around 6.30pm he joined the 1st accused, 3rd accused and Chepkonga at the Pub for drinks; that around 8.30pm three men all wearing *kanzus* came to the Pub. He said he did not know the men but used to see one of them in Eastleigh and that one of them, identified as the deceased, went to the counter while the other two remained at the door; that he saw the man move from the counter to the door and back to the counter; that he saw bottles and glasses dropping and he noticed someone on the floor; that he thought that the person was epileptic and he decided to administer first aid on him; that he took him out of the Pub and placed him against the wall; that after sometime the person got better, stood up and left and that he did not know where the person went. He denied that he saw anyone push the person down. He said that he continued drinking until police from Buruburu arrived and he told them that the person had been taken to Eastleigh Patrol Base and that he had not witnessed any fight. He said he remained at the Pub until 1st and 3rd accused returned and they went to drink at Delta Bar where they remained until 11.00pm. He said he did not know how the person was injured.

The 3rd accused testified under oath. He told the court that before he was arrested he was based at Umoja Chief’s Camp in Nairobi and that on 30th March 2012 he was at his home when Chepkonga went to his home and invited him to join him to go to Eastleigh Section 3 to meet Njenga his friend. Njenga is PW3 and the proprietor of the Pub. They went to 1st accused’s home at Eastleigh and asked him to join them. At the Pub they found Njenga and ordered drinks. They were joined by 2nd accused at 6.30pm. He said he

went outside after some time to receive a call from his wife and while there he saw three men enter the Pub one wearing a white *kanzu* and the second one a jungle trouser. He could not remember how the third person was dressed. He did not know them. In his own words:

“All of a sudden I heard commotion from the Pub. I saw 2 of the 3 men come out and run in different directions. Shortly I saw Yatich dragging someone bleeding outside and place him next to the Pub. I did not know what had happened since I was on the phone” (sic).

He testified further that a crowd gathered and at that time Chepkonga told him that they should leave; that the 1st accused approached him and told him that the bar maid had told him that the person placed outside had caused a commotion; that the person had regained consciousness and walked away. In his own words:

“1st accused told me that he had been told to arrest the person. We ran to the nearby pub. We followed the person. 1st accused was my senior and I agreed to join him. We arrested the person and took him to Eastleigh Patrol Base. The OCS refused to have the deceased booked. He told us to take the deceased for treatment because he was injured. We followed those instructions. We escorted him to a private clinic near Eastmart but nurses turned us away because they were attending an emergency. We went to Medics Clinic. 1st accused introduced himself and requested the clinical personnel to treat deceased and make him rest until we returned.”

Further evidence by 3rd accused shows that they left the clinic and returned to the Pub where they found the 2nd accused and the police from Buruburu and that the 1st accused told them what had happened; that they returned to the clinic with the Officer in charge to see the patient but found he had left. He denied knowing one Nicholas or having met him. Nicholas is the deceased.

Submissions

At the conclusion of the case the defence team took issue with the evidence by the prosecution. They submitted that the prosecution has failed to prove the case beyond reasonable doubt and that the ingredients of murder have not been proved. Ms Onyinkwa on behalf of the 1st accused submitted that the deceased fell and got injured as he was resisting arrest and also by being stepped on by people fleeing from the Pub; that he was booked in the Occurrence Book (OB) and taken to hospital where he was left after his wife and friends arrived and that PW4 could not have seen what happened because she testified that she hid behind the counter when the fight started. Counsel asked the court to acquit the 1st accused.

Ms Odembo on behalf of the 2nd accused submitted that there were contradictions in the evidence by the prosecution specifically by PW4 and PW6 the two witnesses who were present; that the ingredients of murder have not been proved and motive has not been established and that the deceased was involved in a bar brawl and was injured or even attacked by the mob.

Mr. Koech on behalf of the 3rd accused submitted that the 3rd accused has not been directly or indirectly implicated in the murder of the deceased because there is no evidence to show physical contact between the two; that intention to cause death has not been proved and that the 3rd accused was not identified during the identification parade.

On the other hand, the prosecution submitted that the three accused persons were placed at the scene of murder; that their conduct of attempting to book the deceased with causing disturbance and abandoning him without taking him for treatment after the deceased was injured portrays their intention to conceal what had happened; that their contradictory defences also points to their attempts to conceal their involvement.

Determination

Section 203 of the Penal Code creates the offence of murder. It provides that:

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

For the offence of murder to be complete section 203 Penal Code is cited together with section 204 of the Penal Code which creates the death penalty for the offence of murder. From section 203 of the Penal Code, several components of the offence can be identified. These are (i) the death; (ii) the victim; (iii) the person causing the death; (iv) intention to cause the death (*mens rea*) and (v) an unlawful act or omission causing the death (*actus reus*). The onus of proving all these components rests with the prosecution. The standard of proof required is proof beyond reasonable doubt.

This court has been told that the death of Nicholas Ochieng Adongo occurred on 2nd April 2012 at Kenyatta National Hospital while he was undergoing treatment. Before he was taken to Kenyatta, he had sustained visible injuries on the head. Majority of the witnesses have attested to this. He was attended first at Mother and Child Hospital in Eastleigh according to Racy his wife and other witnesses as shown in evidence and released to go home. He did not get well and was taken to Kenyatta where he died about 4 days after the day he was injured.

Dr. Minda Okemwa (PW5) examined the body of the deceased on 2nd April 2012 at Kenyatta National Hospital Mortuary. He told the court that the deceased had a 5cm laceration or cut at the back of his head extending deep to the soft tissues and that this wound had been stitched; that he had bruises on the shoulders and lower limbs and a black left eye. Internally, the deceased had injuries on the abdomen and intra-abdominal bleeding with perforated small intestines and outpouring of abdominal contents causing an infection. On the heart the deceased had tiny bleeds attributed to shock and the brain had mild contusions. The doctor formed the opinion that deceased died as a result of perforated small intestines with infection due to blunt trauma. He told the court on cross examination that the perforation of the intestines cannot be caused by food poisoning. He denied the suggestion by defence that a fall can cause perforation of intestines unless one falls from a high height. He said that kicks and blunt objects could cause perforation of the intestines. The doctor told the court further on cross examination that infection in the intestines cannot stay in the body for a long time and that the injuries on the body of the deceased were fresh. With the above evidence I have no doubt in my mind that death of the deceased and what caused it have been proved beyond reasonable doubt. It was an unlawful death.

Who caused the death of the deceased and by what unlawful act or omission? The prosecution says it is the accused persons who initiated a cause of events that culminated in the death of the deceased. The accused persons say this is not so. But despite these varied positions held by opposing sides, there are certain factors that are not in issue. It is not disputed that the three accused persons were at the Pub in the evening of 30th March 2012. Specifically they all arrived at the Pub between 6.00pm and 6.30pm. It is not disputed that they met Njenga the proprietor. It is not disputed that the three of them and one Chepkonga sat at one table. It is not disputed that Agneta and Anne were the bar attendants on duty at the Pub that evening and they both served the three accused persons. It is not disputed that the deceased entered the Pub that evening. There is however controversy of what exactly happened that evening.

The events of that evening did not start inside the Pub as far as the prosecution evidence shows. From the evidence of Juma and Ogesa as well as Mutiso, all residents of Eastleigh, the deceased and the 1st accused had an altercation (an argument) outside the Pub on that day. Juma and Ogesa had been with the deceased outside the Pub when the 1st accused approached them. Mutiso said that while outside the Pub he heard the deceased asking for his wallet from the 1st accused. The three witnesses knew the 1st accused as a police officer working with Diplomatic Police although they did not know his name. They all said they used to see him around Eastleigh in a Diplomatic Police Car. Agneta said the deceased entered the Pub and went to ask for his identity card from the accused persons. She said this is when the 1st and 2nd accused persons asked the deceased whether he knew who they were and both slapped him that the 1st accused pulled the deceased to sit down but the deceased wanted to leave. In the cause of that commotion the deceased's *kanzu* got caught on the table holding beers and glasses of the accused persons tilting it.

This resulted in the dropping of bottles and glasses, breaking the same and spilling the beer. Agneta's evidence on what happened after this is captured above in this judgement that the 1st accused held the deceased and all the three accused persons started kicking and punching him. When he fell down the 2nd accused lifted his leg and stepped on him on the head twice while the deceased's face was facing upwards. Agneta said Anne, the other bar attendant, ran away at this stage. Anne did not state so. She told the court that she was outside looking for change when the fight took place and when she returned she found the deceased who was bleeding being dragged outside the Pub. I observed the two women testifying. Agneta impressed me as being calm, firm and consistent while Anne looked unsure of herself. She mostly contradicted herself and her evidence on what happened did not agree with that of Agneta in certain areas. She struck me as someone who was trying to conceal most of what happened or someone who was so panicked that she did not observe well what happened. Anne's evidence in my view should be taken with a pinch of salt.

On the issue of what happened in the Pub, the accused persons have denied involvement with the 2nd accused stating that he took the deceased out to administer first aid to him because he thought that the deceased was epileptic. However, despite their denials, they all admitted in one way or another that deceased had injuries. The 1st accused said he saw the 2nd accused pulling the deceased outside the Pub while the 3rd accused said the 2nd accused dragged the deceased outside the Pub. I am surprised at the evidence of the 2nd accused person that he carried the deceased outside to administer first aid. I am wondering how one could pull or drag, as testified by his co-accused, a victim of an epileptic attack. These actions border on the aggressive!

The behaviour of the accused persons after the deceased was injured is also curious. Assuming that this court gives the accused persons the benefit of doubt and assume that they were actually acting as good and professionally trained police officers ought to behave and that they arrested the deceased for creating disturbance at the Pub, why would they attempt to book the report on the OB themselves when they were not attached to the Eastleigh Patrol Base? This court was told there was an officer on duty at the Base. Why did they not hand over the suspect to the duty officer and ask him to book the deceased after making the report on the disturbance he has created? Why would they be eager to book a seriously injured suspect without first attending to his injuries by taking him for treatment? Why did they abandon him without taking him to hospital and taking him back to the Patrol Base as instructed by IP Gichuhi? Whether they took him to a clinic or not and whether he escaped from the clinic is debatable. What remains clear from evidence is that they did not go back to the Patrol Base as instructed by IP Gichuhi to do. They went back to continue drinking!

Mutiso told the court that the deceased stood and started walking away after the 2nd accused returned to the Pub. George Okwach Ogada (PW12) told the court that the deceased went to Githunu Bar where Ogada was and that the deceased was injured. He said that shortly two people he identified as 1st and 2nd accused arrived running following the deceased and took him away. This evidence was admitted by the 3rd accused who told the court that they ran to the nearby bar in pursuit of the deceased although he said he was with the 1st accused.

I have also considered the evidence of Agneta in respect of what happened after the assault. She said that the 2nd accused remained in the bar and forced her to clean off the blood. Anne said both Agneta and her cleaned off the blood. Whether Anne took part in cleaning off the blood cannot be ascertained. After careful consideration of this evidence and the evidence of IP Gichuhi who told the court that he found the Pub disorderly with broken pieces of bottles and glasses and the floor was wet with blood and water I find that I am convinced beyond doubt that an attempt was made to wash off the blood from where the deceased had been lying in order to conceal that there had been blood on the floor.

I have painstakingly considered the evidence of the prosecution witnesses against that of the three accused persons bearing in mind the legal principle that the accused have no duty under the law to prove their innocence. I find that the three accused persons evasive. They stated that there was a commotion at the Pub but did not seem to know how it happened or who was involved. They denied involvement but

their actions after deceased was injured portray people bent on concealing their involvement.

Having discredited the evidence of Anne to the extent that it does not agree with most of what Agneta told the court and given that she claimed to have been outside until after the fight had ended, I find that I am left with the evidence of the Agneta as the only eye witness as to who assaulted the deceased. I am alive to the legal principle that evidence of a single witness can be relied on to convict an accused person provided caution be taken that it may not be safe to rely on such evidence. I have warned myself about the dangers of relying on evidence of a single witness on this issue. This danger is mostly great when the issue involves the identification of the accused. I observed Agneta testify and as indicated in this judgement I found her a credible witness. Her evidence is strengthened by the fact that there is evidence, and admission by accused persons, that the three accused persons were at the Pub, met the deceased at the Pub and got involved with him after by either taking him to the Patrol Base or by washing off his blood from the floor of the Pub.

Having considered all the evidence on both sides and the submissions by all the counsels, I find that I am not able to believe the defences of the accused persons. I find that I am convinced beyond reasonable doubt that they assaulted the deceased as testified. I was asked to find that the 3rd accused was not implicated. To the contrary, I find he was implicated. Although nothing much came out of the evidence on identification parades, I find no prejudice on the accused persons given that the issue of their presence at the Pub is not denied, the only issue being that they deny involvement. The 3rd accused was in company of the 1st and 2nd accused persons. Agneta said they all kicked and punched the deceased. There is no evidence to show that the 3rd accused did anything to stop the others. He went to the Patrol Base in company of the 1st accused to report that the accused had caused disturbance. This cannot have been true. Agneta who is said to have asked the 1st accused to arrest the deceased did not raise any complaint about deceased creating disturbance. Her evidence on that is as follows:

“I knew my boss knew the accused persons (sic). I had found him seated with them. I told him the customers he had left had fought. He said he would come but he did not come. I called police on patrol. I saw police holding a walkie-talkie enter into the bar and I followed him. He told me he was OCS of the Police Post of Eastleigh. He said the victim had been taken to the Post but he had refused to take him in due to injuries. He told me to write all things damaged and take to the post. I did not do it. I told my boss. We did not continue selling. We closed at 9.30pm.”

Njenga did not raise complaint of causing disturbance or over his damaged property. He knew who had fought as he called it. He had been told by Agneta that the people he had left in the Pub had fought. He had left the accused persons and Chepkonga. Although he told the court that he took stock of the damaged property and recorded statement with the police he did not say that he lodged any complaint or pursue a claim for compensation against anyone. The actions of the 1st and 3rd accused persons in taking the deceased to the Patrol Base and attempting to book him for an offence he had not committed; their abandoning him at the clinic, if indeed they took him to any clinic, and their failure to return and report to IP Gichuhi who had instructed them to return show that their actions were not genuine and that they were attempting to conceal their involvement in this matter. I do not believe that the 2nd accused was left at the Pub drinking as he claims. I believe the evidence by Agneta that he forced her to clean the blood from the floor. This was confirmed by IP Gichuhi who said he saw blood and water on the floor in the Pub.

I have considered the contradictions of the witnesses about who took the deceased to the Patrol Base. Some said 1st and 2nd accused took him. Others mentioned the 3rd accused as having been with them. From the evidence tendered I find it as a fact that it was the 1st and 3rd accused persons who took the deceased to the Patrol Base and 2nd accused was left trying to have the blood washed off the floor. This evidence is also confirmed by the accused persons to the extent that the 1st and 3rd accused persons left the Pub to follow deceased while 2nd accused was left behind although they denied they were trying to conceal what had happened. I find the identity of the person who assaulted the deceased causing him serious injuries that led to his death has been proved beyond reasonable doubt to be the three accused

persons.

Did the accused persons possess malice aforethought? Section 206 of the Penal Code defines malice aforethought to include intention to cause the death of or to do grievous harm to any person. I find that by their actions in slapping, kicking, punching and stepping on the deceased while he was helplessly lying on the ground, the accused persons had formed the intention to at the very least do grievous harm to the deceased. This taken together with their actions of attempting to conceal their involvement by attempting to book the deceased for an offence he had not committed, failing to take deceased for treatment or return him back to the Patrob Base and report back to IP Gichuhi as well as 2nd accused attempting to have the blood washed off, leads me to make an inference that they had formed the intention as defined under section 206 of the Penal Code.

I cannot resist giving my unsolicited advice that as police officers trained to protect life and property of the citizens of this country, the accused persons failed in their noble duty. They turned into aggressors instead of being the protectors of life and property. They acted with impunity. Whatever the deceased had done, if anything, did not call for the kind of assault he suffered as a result of which he died.

In conclusion, it is my finding, after applying my mind to the evidence and the law, that the prosecution has proved beyond reasonable doubt all the ingredients of murder. It was submitted that motive has not been proved. Motive is not one of the ingredient of murder but presence of motive may be useful to the court to inform the court in understanding why the accused acted as he/she did or what led him/her to act as he/she did. Even so, in this case, I have stated that the events of what happened inside the Pub may have been a direct consequence of what may have happened outside between the 1st accused and the deceased. I also remind myself that the deceased accidentally, as testified by Agneta, knocked off the beer bottles and glasses down. This could have enraged the three accused persons in my view. Consequently, I find each of the three accused persons guilty of murder as charged and enter conviction against each of them. Orders shall issue accordingly.

Dated, signed and delivered this 21st day of July 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Ms Onyinkwa for the 1st accused

Ms Odembo for the 2nd accused

Mr. Koech for the 3rd accused

All the three accused persons

Mr. Daniel Ngumbi court clerk