



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO.38 OF 2010**

**LESIIT, J**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**CHERUYOT SEREM.....1<sup>ST</sup> ACCUSED**

**PATRICK KAMAU.....2<sup>ND</sup> ACCUSED**

**JUDGMENT.**

1. The accused persons Cheruiyot Serem, hereinafter the 1<sup>st</sup> accused and Patrick Kamau the 2<sup>nd</sup> accused are facing one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 26<sup>th</sup> day of September, 2009 at Kiirua Market, Meru District within Meru County, jointly with others not before the court murdered Edwin Micheni Miriti.
2. The case was heard in part by Apondi, J. who heard the evidence of the first four witnesses. The defence opted to have the case proceed from where the preceding judge left.
3. The prosecution called eleven witnesses. The facts of the prosecution case are that on 26<sup>th</sup> September, 2009 a Police Officer by the name P.C. Warugongo entered the bar where PW2 was selling beer. He asked PW2 for the cell phone number of P.C. Kipsang, which PW2 gave him. Warugongo left with the two women. P.C. Kipsang later went to PW2 who told him that Warugongo was looking for him. Kipsang also left. The OCS and CPL Kamau went to the bar. Twenty minutes later Warugongo and Kipsang accompanied by the two women returned to PW2's bar and reported that they were going on duty. Thirty minutes later, a shaken Warugongo returned and told CPL Kamau and the OCS that the deceased had declined to go to the Police Station and that they had beaten him.
4. PW2 followed the OCS and Kamau as they went out after Warugongo to where the deceased was standing. PW2 saw Warugongo trip the deceased whose hands were tied. The deceased fell down. She then saw the deceased kick Kamau. At that point the OCS told the Officers to take the deceased to the Police Station, and that Warugongo and Kipsang took him away. The deceased was found dead in Kiirua Police Station, hanging on a lanyard string. The 1<sup>st</sup> accused Cheruyot Serem and CPL Kamau, the 2<sup>nd</sup> accused were eventually arrested and charged with this offence.
5. According to the doctor Maingi, PW8 who carried out the Post Mortem, the deceased had several abrasions on the forehead, the right shoulder laterally, sub-conjunctiva hemorrhage of the right eye; bruised left sternum, an impression on the neck and a sting around the neck. Internally the deceased had both lungs collapsed. There was extensive right side scalp bleeding as a result of the

fracture of the scalp. Under the same fracture was subdural bleeding, with blood accumulation in the region. As a result of the examination, the doctor formed the opinion that the cause of death was subdural hemorrhage due to blunt force trauma. The doctor found no post mortem evidence to support death by hanging. He concluded that the string was put there to distract attention but did not cause death.

6. The accused were both placed on their defence and each gave a sworn statement. They did not call any witness. The 1<sup>st</sup> accused stated that he reported on duty at 4 pm with a colleague P.C. Robert Kipsang. He was in the Cells Sentry whereas PC Kipsang was in Report Office. He acknowledges PC Kipsang got a call from PC Warugongo for back up in arresting a suspect. The 1<sup>st</sup> accused together with PC Warugongo searched the suspect in a separate cell because he was drunk and violent. Afterwards at around 5.10 pm when serving the evening meal he found the suspect had hanged himself using a jacket lace. He informed the OCS.
7. The 2<sup>nd</sup> accused stated that on the said date he went to Kiirua Market approximately 0.5 kilometers from the station. He met the OCS Charles Manyata and proceeded to Silent Pub for soda. While there, P.C. Kipsang came and informed them that he had arrested one suspect by name Edwin Micheni who was resisting to be taken to a Kiirua Police Station. They moved to where the suspect was behind the pub. OCS instructed P.C. Kipsang to take a taxi and gave him 100/- to pay for the taxi. P.C. Kipsang and P.C. Warugongo escorted the suspect to the Police Station. He was left at the pub together with the OCS. The 2<sup>nd</sup> accused stated that later PC Karue informed them that the suspect had committed suicide and they proceeded to the Police Station together with the OCS to confirm the report.
8. The accused persons face a charge of murder contrary to section 203 of the Penal Code as

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

9. The circumstances which constitute malice aforethought are described under section 206 of the Penal Code. The relevant parts of the section to this case are section 206 (a) and (b) which provide as follows:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**

**(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;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;”**

10. The prosecution burden lies with the prosecution to prove the charge against the accused persons beyond any reasonable doubt. The prosecution has to prove that the accused persons did an act which caused the deceased an injury as a result of which he died. It must also be proved that at the time the accused persons did the act which caused death, they had formed the intention to either cause death or grievous body harm to the deceased.
11. The accused are charged jointly with others not before the court. The prosecution must adduce evidence to establish that the accused, whether together or with others not in court formed a common intention to cause death or grievous harm to the deceased. Section 21 of the Penal Code defines common intention in the following terms:

**21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.**

12. There are issues which are not in dispute. There is no dispute that the deceased was arrested and taken to Kiirua Police Station. There is no dispute that the 1<sup>st</sup> accused was the cells Sentry on duty at the Station when the deceased was locked up in the cells. There is no dispute that the deceased was found dead in the women cells where he was confined by the 1<sup>st</sup> accused.
13. There were two eye witnesses to this incident who testified for the prosecution in this case, PW2 and 10. According to PW2, PC Warugongo was in the company of two women when he sought the cell phone number of PC Kipsang from PW2. She duly gave it to him. The next time that PW2 saw Kipsang and Warugongo together, they were with the two women Warugongo was accompanying earlier. They duly reported to the OCS Kiirua Police Station and CPL Kamau, both their seniors that they were going on duty. PW2 saw them again having arrested the deceased, and reporting to the same senior Officers that their arrestee was resisting to be taken to the Police Station.
14. The evidence of PW10 was to the effect that he saw four Police Officers, identified as the 1<sup>st</sup> and 2<sup>nd</sup> accused, PC Kipsang and PC Warugongo hitting the deceased with bare hands on the stomach and face, and kicking him for ten minutes before the OCS went to the scene and told them to take the deceased to the Police Station. PW10 saw Kipsang and the 1<sup>st</sup> accused take the deceased away.
15. There are material variations between the evidence of PW2 and 10. Regarding those involved in arresting the deceased, PW2 testified that it was Warugongo and that he sought the cell phone number of Kipsang from her so that he may assist him. Indeed PW2 saw both Officers together and heard them tell their boss that they were off to perform some work. PW2 saw the two Officers together again, 30 minutes after they left together, having arrested the deceased. PW2 was clear that the 2<sup>nd</sup> accused was throughout in the company of the OCS seated in her bar. Even when the deceased was brought outside the bar by Warugongo and Kipsang, and 2<sup>nd</sup> accused and the OCS went outside to see him, she saw 2<sup>nd</sup> accused restrain himself from hitting back at the deceased even after the deceased kicked him. At no time did PW2 say that she saw the 1<sup>st</sup> accused at the scene where she first saw the deceased under arrest.
16. PW10 on the other hand was categorical that both accused persons, together with Kipsang and Warugongo jointly assaulted the deceased by kicks and hit him with bare hands. PW10 testified that the attack against the deceased by the four officers took place outside PW2's bar. He said it took ten minutes.
17. Even if I am to accept PW10's evidence, a serious problem occurs in trying to reconcile his evidence with the rest of the evidence. PW7 who investigated the case found that the 1<sup>st</sup> accused was on duty at the Kiirua Police Station as Cells Sentry and that he was the one who received the deceased from PC Kipsang at the station. He formed the opinion that the 1<sup>st</sup> accused was negligent for accepting the deceased as he must have been injured when he received him as he died in the cells. For that reason the evidence of PW10 that the 1<sup>st</sup> accused was among those who assaulted the deceased at Kiirua shopping Centre cannot be reconciled with PW7's evidence.
18. Furthermore the investigating officer's evidence is in tandem with the 1<sup>st</sup> accused defence that he was on duty at the station and that PC Warugongo called PC Kipsang on phone to go and assist him effect an arrest. The Station was left being manned by the 1<sup>st</sup> accused. PW10 was lying when he said he saw the 1<sup>st</sup> accused at the scene assaulting the deceased.
19. The other irreconcilable piece of evidence in PW10's testimony was his evidence that the 2<sup>nd</sup> accused also participated in assaulting the deceased. PW2 stated that the 2<sup>nd</sup> accused was in her bar with the OCS when Warugongo trembling reported to both officers that the deceased had resisted being taken to the Police Station and that they had beaten him. According to PW2 apart from Warugongo who tripped and fell the deceased, no beatings of the deceased took place in the presence of, or by the 2<sup>nd</sup> accused and or the OCS. It was her evidence that the deceased had already been beaten by the time the OCS and the 2<sup>nd</sup> accused went out to the deceased. To that end PW10's evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused were present and participated in assaulting the deceased contradicts PW2's evidence and the accused defence.
20. At what time could the 2<sup>nd</sup> accused have assaulted the deceased while at the same time he was seen in the company of the OCS inside a Pub? At what stage could the 1<sup>st</sup> accused and Kipsang have been together on the material night when at the same time he was manning the Report Office

- alone until Kipsang returned? Given that the OCS was at the scene where deceased was after arrest, it is highly improbable that he could have acquiesced the Station Cells Sentry and the Report Office Personnel to both abandon the Station simultaneously. PW7's conclusion that the 1<sup>st</sup> accused never left the Station is the more likely correct position. I find the inconsistency between the evidence of PW10 and that of PW2 and the rest of the evidence goes to the very core of the prosecution case.
21. PW2's evidence regarding those who escorted the deceased to the Police Station is not in tandem with PW10's evidence on the same. PW2 stated that it was Warugongo and Kipsang who took him away while PW10 said it was the 1<sup>st</sup> accused and Kipsang who went away with him. That is another glaring contradiction in the prosecution case. The contradiction is material and goes to the very root of the prosecution case.
  22. Regarding the injuries found on the deceased and the evidence of assault by PW10 and PW2, the doctor found a serious head injury which included a fracture of the scalp with bleeding into the scalp region on the right side of the head. The cause of death in the doctor's opinion was brain compression due to increased intracranial pressure due to sub-dural hemorrhage due to blunt force trauma to the head. That injury is consistent with the fall that PW2 witnessed when Warugongo tripped the deceased. The abrasions noted on the face and forehead of the deceased were consistent with assault as described by PW10. These latter injuries could not have caused death.
  23. Having carefully considered the evidence adduced by the prosecution in this case I find that the evidence of the key witnesses as to how the deceased was injured was inconsistent and could not be reconcilable. The variations in their evidence were so material as to go to the very substance of the case and lead to the conclusion that the two key witnesses were not talking of the same incident. Someone was not telling the truth. That person was PW10 for the reasons I have demonstrated including the fact his evidence does not make logical sense.
  24. The learned counsel for the accused persons Mr. Omari urged the court to consider that there was no element of common intention proved. I agree with the defence counsel that given the evidence before the court, no element of a common intention was established in this case.
  25. As to whether the 1<sup>st</sup> accused is culpable for any criminal offence, it was the evidence of PW7 the investigating officer that the 1<sup>st</sup> accused was negligent in accepting the deceased to the cells only for him to die same day. The injuries the deceased had on his body at the time he was taken to the Police Station have not been described by any prosecution witness. What we have is the scanty evidence of PW2 and 10, which is inconsistent with each other, and the post mortem findings. The burden lay with the prosecution to show the physical state of the deceased at the time the 1<sup>st</sup> accused received him.
  26. The 1<sup>st</sup> accused claims that the deceased was violent and that because of that, he kept him in a separate cell. That happened to be the women cell at the station. He stated that the deceased was found hanging from a lanyard string at supper time. I do not believe the 1<sup>st</sup> accused explanation is correct. The deceased did not die of hanging. The doctor's specific finding was that the lanyard string was an attempt at cover up put on deceased neck by a third party. The position in which the deceased was found hanging on that string was hilarious. The legs were on the ground. The string was so loose no impressions were made on the neck. The string was telling a lie and that lie was proved when the post mortem was carried out.
  27. Is this evidence enough to make finding of murder? That evidence does not support murder as there would be no evidence to establish that the 1<sup>st</sup> accused planned to either cause death or grievous harm to the deceased. The 1<sup>st</sup> accused received a seriously injured man. The doctor's evidence was that the injuries on the deceased were not visible. That means the prosecution has not proved that the 1<sup>st</sup> accused must have seen the injuries on the deceased especially the one on the scalp which caused death.
  28. What the 1<sup>st</sup> accused cannot deny is that he had the key to the cells where the deceased was locked up. It must be him who opened the door either to put the deceased on the lanyard string, or to give access to the cells to the person who suspended the deceased on the said string. The fact the 1<sup>st</sup> accused gave the theory of deceased having committed suicide as his defence, was obviously in bad taste. Having said so, without any evidence to show beyond any reasonable doubt that the 1<sup>st</sup> accused was criminally involved in the death of the deceased there would be no offence for which

he can be found culpable.

29. I wish to mention one more thing about this case. It is obvious that the police took too long to investigate and charge anyone. The most serious issue however is the fact that many witnesses were left out. For instance the sister in law of the deceased, Alice who caused the deceased arrest in the first instance. Her statement was taken and the defence referred to it especially during the evidence of the investigating officer. It was used then to demonstrate that what the investigating officer believed was said by that potential witness was not in her statement. There was also the investigating officer of the Station where the deceased was found dead. The evidence of PW2 shows clearly he had knowledge of deceased arrest and gave orders regarding his escort to the station. There was also the friend of Alice. Alice and her friend had especially important evidence as they were the ones who identified the deceased to those who arrested him. They witnessed everything. They had crucial evidence.
30. In **Bukenya vs Uganda** (1972), LUTTA Ag. Vice President of the Eastern African Court of Appeal held:

**“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**...Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”.**

31. I find that the prosecution did not avail all the witnesses necessary to establish the truth in this case. It was necessary for the prosecution to call sufficient evidence to establish its case. The requirement is for the prosecution to call adequate evidence to support its case and that the prosecution failed to do. The court is in the circumstances justified to make an adverse inference that the reason the vital witnesses were left out was because if their evidence was adduced, it could have tended to be adverse to the prosecution case.
32. I have said enough in this case. The investigations were below par. Vital witnesses were left out. Some suspects were not charged like Warugongo and Kipsang. Allegations one of them is deceased was not proved to required standard. The evidence before the court was irreconcilably inconsistent as to make it of no probative value.
33. Having carefully considered the evidence adduced by the prosecution in this case and the accused defence, I find that the prosecution has failed to prove its case against both accused on the required standard of beyond any reasonable doubt. I give the accused persons the benefit of doubt and acquit both of them under section 306 of the CPC.

**DATED SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF JUNE, 2014.**

**J. LESIIT**

**JUDGE**