



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 55 OF 2007

REPUBLICPROSECUTOR

VERSUS

JOHN OUMA AWINO1ST ACCUSED

SAMUEL OTIENO AGOT2ND ACCUSED

J U D G M E N T

The two accused persons **JOHN OUMA AWINO** and **SAMUEL OTIENO AGOT** are jointly charged with the murder of **QUANTINE MUTUA MUSUVALI** on the 20th day of April, 2007 at Soweto village of Kayole in Nairobi. They are charged contrary to section 203 as read with section 204 of the Penal Code cap. 63 of the Laws of Kenya.

The first accused **JOHN OUMA AWINO** was arrested last and that was on the 5th day of August, 2007. He was presented to court on 21st August, 2007 under case no. Hc.cr. 55 of 2007. His co-accused **SAMUEL OTIENO AGOT** was arrested on 3rd June 2007 and presented to court on 2nd August, 2007 under case number Hc.cr. 48 of 2007. The cases were, upon application by the Prosecution, consolidated and ordered to proceed under case file no. 55/2007 and pleas taken on 11/12/2007 when the two accused persons denied the charge.

The prosecution case consists of the evidence of some ten (10) witnesses.

PW1 MARTIN MUKOYANI KHISA was the person who did the brewing of 'busaa' at Yingo Busaa Club which pub was also known as Jango Club. On 20th April, 2007 he was on duty as was usual. There was some commotion at 6 p.m. A customer called Owiti had come into the pub carrying a mobile phone in his hand. He placed it on the TV and went to the dance floor and danced. He could not find his phone once he finished dancing. He loudly asked who had taken his phone and the deceased told him that it was Samuel Otieno who had taken it and the said Owiti and the deceased left the pub to look for Samuel Otieno. The witness did not know the deceased by name. They both came back with Owiti holding his phone and repeatedly saying that he had found his phone. Other patrons told him (Owiti) to leave as he was making noise. He left through the back door of the pub. At that time Samuel Otieno entered through the front door and proceeded to where the deceased was seated and asked him where Owiti had gone. The deceased gestured to Samuel that Owiti had left through the back door whereupon Samuel went to the back door, looked out and then came back and hit the deceased with a fist on the jaw. The deceased stood up and attempted to go out through the back door but at that very time John Ouma stood at the door in front of the deceased as if to block the deceased or as if to start a fight. The deceased managed to run to the rear of the pub with Samuel Otieno following him. The deceased run into a store with Samuel Otieno chasing after him. John Ouma followed them into the store. Shortly after a girl who worked in the pub as an attendant came in and asked the witness and patrons how they could be just sitting there while someone was being killed in the store. The witness then rushed to the store. He found John Ouma

standing at the door of the store with the deceased lying down on his chest while Samuel Otieno stood at the deceased's feet. John Ouma allowed the witness into the store whereupon he (witness) asked both John Ouma and Samuel Otieno if they wanted to kill the deceased but they did not respond. The store had two rooms, one in the inner part opening into the second one, the outer one. The witness found the deceased lying in the inner room. He held the deceased's jacket and tried to raise him up. As the witness tried to bring the deceased to the outer room, Samuel Otieno snatched the deceased from the witness and dropped him back to the floor. He (Samuel) slapped the witness. Samuel Otieno then stepped hard on the deceased's head and also below the neck using his heel. The deceased did not resist. He was not talking at all. Samuel then dragged the deceased out of the store and patrons said he was dead and they started leaving the pub. The Disk Jockey one Alex Omondi then fetched water which he splashed on the deceased. The witness and Alex Omondi washed the deceased's face. Some thick stuff resembling clotted blood started coming out of the deceased's mouth. Alex Omondi told the witness to watch over the deceased as he (Alex Omondi) went to look for Samuel Otieno to go and take the deceased to hospital. He found that both John Ouma and Samuel Otieno had left the pub. They (witness and Alex Omondi) then took the deceased to the front of the pub and lay him down on a sack. Alex Omondi went to look for Samuel Otieno and the witness went to buy food. He found Alex Omondi and Samuel Otieno on his way, Alex telling Samuel to go back and take the deceased to hospital and Samuel reverting that he was going to beat Alex up. The witness proceeded on his mission. On his way back he did not find Alex and Samuel. He went back to the pub and found the deceased still lying where he had left him. The witness went and slept at the back of the pub. He was woken up the following morning by his colleague Everlyne Anyango who asked him why he was asleep with the doors of the pub open. He got up and when he went to the front of the pub where he had left the deceased he only found the deceased's key and jacket and the sack he had lain on. He gave further evidence that he had known Samuel Otieno whose nickname was Soldier and John Ouma for about two years prior to the incident of 20/4/2007. He identified them in the dock. He added that the two always started a fight in the pub whenever they went drinking.

On cross examination the witness said that his duty was to brew busaa in a room at the rear of the pub but on the material day he was seated at the pub in front at about 6 p.m. when patrons were taking busaa and dancing. He remained attentive as he was a worker at the pub. He had seen the deceased in the pub for about three times prior but did not know his name. The deceased would come into the pub and take a soda. The witness had never seen the deceased take busaa. The witness did not witness what exactly happened in the store prior to his arrival there but when he arrived there he found Ouma and Otieno in the store with the deceased lying down, Ouma at the door and Otieno in the inner room with the deceased on the floor. The deceased did not appear to have an injury but he looked unconscious, with a lot of clotted blood in his mouth which the witness wiped with a piece of cloth. The deceased could not walk. He said he was able to identify the photographs of the deceased shown to him in court because he had known (seen) the deceased previously in the pub. He identified the T-shirt on the photographs as the one worn by the deceased on the 20/4/2007. On the photos he saw an injury on the deceased's arm but said that he did not witness the entire fight and only saw Samuel Otieno hit the deceased on his head and below the neck using his heel and the earlier fist blow on his left jaw by Otieno. He said that Samuel Otieno had taken busaa at the pub before the fight. John Ouma was seen by the witness preventing patrons from entering the store where the deceased was lying down with Samuel Otieno standing next to him at his feet. Upto the time the witness went to sleep the deceased had not regained consciousness. It was Samuel Otieno to take the deceased to hospital as he was the one who had beaten him. The witness did not know how the deceased left the pub. He said that the fracas had taken about one and half hours.

JUDITH NGALI MUSUVALI was the deceased's sister. She was sleeping in her house at Kayole Patanisho on 21/04/2007 at about 7.30 a.m. when she was woken up by women talking outside her house saying that there was a young man lying outside and who looked as if he was drunk. They said that he looked like her brother. She went to where he lay and called his name but he did not respond. The witness then called a neighbour, Michael, to help her take the deceased to hospital. He lay about ten (10) minutes' walk to the witness' house. She saw injuries on the deceased; he was swollen on the face, had a bleeding wound on the back of the head and injury on the elbows. He was alive but not talking. They took him to Patanisho hospital but the hospital needed two thousand Kenya shillings which the witness did not have and so she went to Komarock to get it from her younger brother. The deceased was dead when the witness and her brother went back to the hospital. Her brother, Vincent Kiamba Musuvali went and

reported the death to the police and he went to the hospital with two officers. The body was taken to the city mortuary where she identified it for postmortem on 27/4/2007. She cried in court on being shown the photographs of her late brother for identification.

On cross examination she said that her late brother used to live in her house until he found a job and then rented a separate room. When she found him on 21/4/2007 blood was oozing from his ears. She had last seen him on 19/04/2007 at about 7.30 p.m. but he never came back for supper as he had said he would. He had on the very clothes he wore on 19/4/2007 when he found him lying near their home. She had changed his clothes at the Patanisho hospital as advised by doctors there. The witness did not know how her brother met his death.

PW 3 GEORGE MUSUVALI MUTUNE is the father of the deceased and he identified his body to the doctor for postmortem on 27/4/2007.

ALEX OMONDI OREYO was the Disk Jockey (DJ) at Jango club also known as Yingo Busaa club on 20/04/2007. At about 10 p.m. he went out to get change for a customer from a petrol pump. While there his colleague Rose Adhiambo went to him and told him to go back to the pub as someone was being beaten at the pub. He proceeded back to the pub where on arrival he found someone lying down and bleeding from the nose and mouth. He fetched some water and he and his colleague Martin Mukoyani (PW1) washed the victim and placed him somewhere to rest. The witness told PW1 to let the victim go home once he felt better. PW1 told the witness that the deceased was beaten by two men one called Samuel Agot and the other John Ouma. He knew them previously and identified them in the dock. The witness then went out and found Samuel Agot and asked him if he was the one who had beaten the deceased. Samuel became very harsh threatening to beat up the witness and so the witness went away. He later heard that the person who had been beaten had died. He had not seen the person previously. He maintained in cross examination that it was around 10 p.m. when he went to get change. Rose Adhiambo had told him that Samuel Agot was beating someone. He found the deceased in the open area at the rear of the pub and he was bleeding through the nose and mouth and looked like he needed medical attention and that is why he went to look for the person who had beaten him to take him to hospital. The witness did not see visible injuries on the deceased but he was unconscious. He thought that the deceased must have regained consciousness and went away from the pub later in the night.

PW5 was **CHRISTINE APIYO OGUTU** and it was her evidence that on 20/04/2007 she worked at Jango pub selling busaa as a waiter. A customer came into the pub at about 9 p.m. and ordered some busaa. The witness knew the customer physically but not by name. That customer and two others she knew as Soldier and Peter started quarrelling over a phone. She identified the 2nd accused herein as the one they called Soldier. Peter said Soldier had his phone but Soldier said it was the person who was beaten who had it. She left them still quarreling and went to buy a customer a cigarette. On coming back she found the deceased bleeding from the mouth and nose. She did not enquire as to what had happened. She went home. She identified the person whom she had seen in the pub quarreling with Soldier and Peter, from a photo (MFI-3) she was shown in court. She had known that person as a customer of Jango Pub. She did not witness the beating of the deceased but she found him lying down unconscious.

MICHAEL MAURA OJIENGA (PW6) was PW2's neighbour who helped her take her deceased brother to Patanisho hospital where he died on 21/4/2007 about an hour after they had taken him there. The witness noticed that the deceased, at the place they found him about 5 minutes walk from their houses – was not talking, had a big injury at the back of his neck, was bleeding from the ears and his neck was unstable. The scene where he and PW2 found the deceased was muddy and undisturbed. There was no blood there.

PW7 SIMON MWEBIA a police constable is the one who received the deceased's body at Soweto police post on 21/4/2007 and then took it to the city mortuary. On 27/4/2007 he had a scene of crime officer photograph the body and thereafter a post mortem was conducted by Dr. Ndagui.

P.C. PETER BULINGA arrested the 2nd accused herein on 3/6/2007. He was called by a friend on phone while he was on his way to work at Soweto police post and told that a murder suspect had been sighted at Jango bar Soweto taking beer. When the caller described the suspect the witness realized that he knew him. The witness then went from Zabu bar into the adjacent Jango and indeed there was his suspect. The suspect also knew the officer and so the officer called him aside so that they could talk. The officer led the way and the suspect followed behind. When the officer turned back he saw his suspect running back towards the door and he escaped. The officer pursued him and after a long chase through the estate he arrested him and led him to Soweto police post while he (suspect) struggled with the officer all the way. The officer gave evidence that he did not tell the suspect what he wanted to talk to him about but the suspect just ran off. He had known his suspect as the person who had beaten up a police officer in full uniform. The arresting officer, an Olympic boxer, had to use force to subdue the suspect who was fighting. He identified the second accused in the dock.

On 5/8/2007 this witness arrested the 1st accused herein as a suspect in respect of the same murder as per his instructions. This suspect did not resist arrest. He identified 1st accused in the dock as the person he had arrested. He described the 2nd accused as a rude, arrogant, bad person who was also a bully and an ex Kenya Army soldier; a trouble shooter. He did not know why the 2nd accused so violently resisted arrest unless he knew what he was being arrested for.

Sergeant **RAJAB JUMA** was the investigating officer in this case. He received a report of the murder on 21/04/2007 and commenced investigations. He interviewed witnesses from Jango busaa club and the information received led him to the two accused persons. The investigations team visited the two accused persons' homes but did not find them until 3/6/2007 and 5/8/2007 respectively when the 2nd and 1st accused persons were arrested. He stated that the deceased was found about 150 kms from where he had been beaten. He was badly beaten and unconscious and investigations showed that it was the two accused persons who had beaten the deceased. He did not establish how deceased moved from Jango club Pub upto the point he was found unconscious about 150 meters away. The accused persons moved out of their residence soon after the incident as the police visited those residences severally without finding them, he concluded.

DR. FRANCIS MAINA NDIAGUI was the pathologist who performed the postmortem on the deceased's body at City mortuary on 27/4/2007. He found that the deceased was a young African male of about 24 years with external injuries on the forehead and internal bleeding under the skin on both sides of the head-known as scalp haematoma. On opening the head he found massive right-sided sub-arachnoid haemorrhage – that is, bleeding under the brain coverings. He saw no other injuries. He formed the opinion that the cause of death was sub-arachnoid haemorrhage due to blunt trauma. He produced his report as P.Exhibit no. 2. He described sub-arachnoid as a very serious head injury which can be caused by a force on the head or a heavy fall or a hard kick.

Mental assessment reports in respect of the two accused persons were prepared by Dr. Kamau who found the accused persons fit to stand trial. They were put in evidence by consent of all counsel appearing. That closed the prosecution case.

The 1st **Accused** person gave sworn evidence and called no witness. His evidence was that on 20/4/2007 he worked at Karen as a rigger-electric erector. He got to Nairobi town centre at about 8 p.m. and headed to Kayole arriving there some minutes to 10 p.m. It was raining. He went to Yingo club to shelter from the rain. The club was full of patrons, some dancing others drinking. He found a seat at the rear door. He did not know who had been there. A song by Tony Nyandudo was played and the accused stood up and danced to it just around his seat as he did not want to lose the seat due to the number of patrons present. He was also drinking a beer. Then he saw customers running helter skater to the backdoor and others to the front door. In the process seats, tables and drinks dropped all over. There was commotion in the pub and he did not know what caused it. Shortly after he saw a big crowd moving towards the store. He also went towards the store and that is when he heard someone say that someone had snatched a mobile phone and hidden himself in the store. He witnessed no fighting and went home thereafter.

In cross examination he denied knowing a Samuel Otieno Agot but recalled seeing the 2nd accused in that Yingo/Jango club as a common figure. He saw him there on 20/4/2007 but did not talk to him. He did not know what caused the commotion and he was not part of it. He never found out what happened thereafter. He was later arrested on 5/8/2007.

The 2nd accused person gave unsworn evidence as follows: On 20/4/2007 he left work from Industrial Area at Morris & Company Ltd arriving home just before 7 a.m. He had worked overnight. After breakfast he slept until 12.45 p.m. when he took lunch and left with his friend Odongo Mayaka to Yingo club where they took some busaa and left for Visitors Inn Kayole where they were until 4.30 p.m. and they parted. He went home and had a change of clothes and proceeded to Mbotela for a fundraiser where he was until 8.30 p.m. He went back to Kayole arriving there at about 9.30 p.m. He went to Zebu bar where he found PW1 and PW8 with the owner of Yingo busaa club one Fredrick Owiti. At Zebu he took one pilsner beer and took away a Kane Extra, a spirit, and left for Yingo club where he found it full and his friends Odago, Omosh, Otoyo and CD 6 Peter Owiti and men whom he did not know. Christine Apiyo (PW5) was also there and she gave up her seat to this accused and he gave her Kes 100/= for busaa and cigarettes. There arose a quarrel about a phone. Odago said someone had taken a phone. A fight broke out. Odago punched one of the two men and busaa poured on the accused. Patrons ran helter skater shouting thief. He heard Everlyne saying that someone was being beaten at the store and that they should go and assist. When he went to the store he found his friends Odago, Omosh, Otoyo and CD 6 Peter Owiti beating a man. He separated them and stopped the fight. A crowd came from the rear and the accused said it was pointless to fight since the phone had been recovered. PW1 then went to the store and said it had been a bad day for Yingo as that was the second fight of the day there. He left to go home in the company of Peter Owiti and on the way he met PW1 and PW4.

He was drinking at Zebu bar on 3/6/2007 since 10 a.m. upto 2 p.m. He left when Fredrick Owiti got there with Pc Otwei. He was arrested at 6.30 p.m. from Jango club by PW8 who took away his Kes 4700/= which he never returned. He was then charged with murder. He said that his life was in the hands of the court.

Counsel appearing relied on the submissions filed earlier at the stage of no case to answer; emphasizing that, for the defence, the accused persons ought to be acquitted of the charge of murder as the same is not proved and for the prosecution that the accused persons should be found guilty as charged since the prosecutions burden of proof had been discharged.

Before the issue of whether the crime of murder was committed by the two accused persons herein is resolved, the issue that arises for prior determination is whether the deceased in this case is the person who was seen at Jango club, was allegedly beaten thereat and was left lying unconscious in the front side of the pub.

PW1's evidence was that he had seen the deceased at Jango club on at least three previous occasions. He was his customer therein. And he saw him on 20/4/2007 and explained how he saw him come into the club and where he sat. PW1 saw how the disagreement between the deceased and accused persons arose and sufficiently explained that it was because of a mobile phone belonging to one Peter Owiti that went missing and which the deceased saw 2nd accused take and walk out of the club with PW1 had opportunity to see the said Peter Owiti walk out with the deceased in pursuit of accused Two and Owiti came back joyous holding his phone. Accused Two went direct to the deceased when he walked back to the club and hit him hard on the jaw. PW1 was not sure of the colour of the clothing worn by the deceased on the material night and I find that that position was clearly explained by PW2 who stated that she had changed the deceased's clothes at the instructions of doctor. I come to the advised conclusion that PW1 clearly identified the deceased as the person beaten in his club on 20/4/2007 and it matters not that he only knew him physically and not by name. How the deceased left the Jango busaa club is an issue to be discussed later.

The **DJ (PW4)** said he saw the deceased briefly as he (DJ) washed the deceased's face and therefore he could not identify him on a later date. What I find important about PW4's evidence is the description of what he saw about the deceased – bleeding from the mouth and nose and the clotted blood he washed off

his mouth. That is consistent with the evidence of the pathologist PW10 whose findings were that the deceased had a serious head injury that led to bleeding into the brain covering technically called sub arachnoid which was caused by blunt trauma. I will revert to the injuries at an appropriate time in this judgment.

There is the evidence of **Christine Apiyo (PW4)**. She was the attendant who served the deceased with a tin of busaa on 20/4/2011. She also witnessed a quarrel between the deceased and Accused Two and one Peter Owiti that arose when deceased said that it was Accused Two who had taken Peter Owiti's phone. The witness identified the person appearing in the photo marked P Exhibit 3 as the one she served busaa on 20/4/2007. The totality of this evidence by PW1, PW5 and PW4 and PW10 as to the injuries sustained by the person at Jango club on 20/4/2007 and who was seen by PW1, 4 and 5 and the injuries found by PW10 leave no doubt in my mind whatsoever that that person at Jango club on 20/4/2007 is the one and same person who is the deceased in this case.

What then happened at Yingo .a.k.a. Jango club on 20/4/2007? PW1 said that he saw all persons relevant to this case as they went to the club. He knew the two accused persons as regular customers. He said that they always caused trouble whenever they went to that club. On the material day of 20/4/2007, he saw the owner of the mobile phone – Peter Owiti – come into the club at about 6 p.m. He took busaa and later danced and lost his phone which the deceased said was taken by Accused Two. He saw Accused Two come back into the club and missing Owiti after the latter had recovered his phone, Accused Two went straight to where deceased was sitting and hit him hard on his jaw. He saw the deceased attempt to run out of the club through the back door but was blocked by the First Accused who stood at the door of the club either to block the deceased from escaping or to start a fight. The deceased eventually managed to run out through that back door but Accused Two was hot on his heels. When the deceased entered a store at the back of the club, Accused Two followed him into that store and Accused One followed them and stood at the door of the store. Soon after a girl worker of the club went into the club and asked the patrons how they could be sitting there while someone was being killed in the store. Some patrons and PW1 went to the store. Accused One was standing at the door and from evidence he blocked every patron from entering that store where the deceased lay on the floor unconscious with Accused Two standing at the feet of the unconscious man. Accused Two told the patrons that they could not enter the store as there were properties there belonging to the owner of the club and they could steal them. This is an awkward situation looked at from a clear perspective-for, what then were the two accused persons doing in the owner's store where his properties were, seeing as one sees, that these two were employees of the owner of Jango club? However Accused Two did let PW1, himself an employee of Jango club to enter the store. It is what PW1 saw once he entered that store that is of crucial importance. He found a man lying down unconscious. The girl colleague who called him had told him that someone was being killed in that very store. PW1, upon seeing the unconscious man asked the two accused persons why they were killing the man but he got no answer. When then PW1 tried to help the man out by lifting him, Accused One grabbed him from PW1, dropped him hard on the floor, kicked him hard on the back of his head and below his neck with his heels. He had already slapped the witness on his face. Accused Two then dragged the unconscious man out of the store and when patrons saw him they said he was already dead and started leaving.

When PW1 first saw the deceased seated at the inside of Jango club he was well enjoying his evening. That was a completely different picture of the deceased as he was found in the store where the deceased lay unconscious, not talking and not resisting the kicks on his head. It is true that the witness (PW1) did not witness prior happenings before he got to the store. What he saw once he arrived there is enough to create criminal behaviour on the part of the two accused persons. If the two accused persons whom PW1 found in the store with the unconscious man had nothing to do with his then state, why was Accused One, blocking entry by patrons to the store and why did Accused Two hit an un-resisting man so viciously? These two were earlier seen, for Accused One, blocking deceased from running out of the Jango club and for Accused Two chasing him into the store and when the man was next found, in the very presence of these two accused persons, he was unconscious. It will always be remembered that it was the unconscious man whom I have no doubt whatsoever that he is the deceased in this case, who pointed out to the owner of the missing phone one Peter Owiti, that it was the Accused Two who had taken it. Accused Two cannot have been happy about being reported as a phone thief and no wonder he came

right back and hit the reporter, the deceased herein, and then followed him into the store where he beat him unconscious. It is true the only beating witnessed by PW1 was when he arrived at the store but at that time the deceased was already unconscious. What happened prior to PW1's arrival at the store must be surmised from the circumstances prevailing at the time. This is both direct evidence (what PW1 saw after he arrived at the store) and circumstantial (what must have happened before he got there). The direct evidence was not challenged at all, defence hiding under the guise that the man beaten in that store was not the dead man in our case. That was a defence blander as that part of evidence remains uncontested leading to the conclusion that the deceased is one and the same man in the store as the man later collected from the road. The circumstantial evidence is of no lesser importance than the direct one. It is the evidence that leads to the conclusion that it was the accused persons to the exclusion of others who caused the death of the accused. Circumstantial evidence is good evidence as in the following words:-

“circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

as found in the case of ***REPUBLIC –VS- TAYLOR WEAVER AND DONOVAN [1928]2 Cr. App. R. 20.***

All evidence that led to the effect that it was the two accused persons who beat up the deceased in that store is hard clear and uncontroverted and I believe it. The defence case is at best escapist and evasive. The two accused persons admit to having been at the scene, irrespective of their times of arrival there, as they admit to having been present when they heard some commotion. Their assertions that they did not take part in the commotion is completely destroyed by the prosecution evidence of PW1 and PW4 and to a large extent their own admission of their presence at the scene. PW4 went after Accused Two to ask him to go back and pick his victim to take him to hospital. Why was Accused Two threatening to beat up PW4? A guilty mind, that is what I find. There is no doubt created that it was the two accused persons herein who beat up the deceased herein in the inner store of Jango club leading him to sustain serious head injuries that he later succumbed to. It is of course true that the only beating of the deceased that PW1 witnessed was when accused two grabbed the deceased from the grip of PW1, dropped him back on the floor and hit him/kicked him hard on his head and neck. Even at that time the deceased was not resisting the beating, he was not talking, he had been rendered unconscious by the acts of beating by the accused persons.

Accused One was not actually seen beating the deceased. So then what role did he play in the causation of the crime? When Accused Two chased after the deceased from Jango club and into the store where the deceased sought refuge, Accused Two followed Accused One into that store where the deceased was beaten. Accused One had initially attempted to block the deceased from running to safety from inside the Jango club. But when he managed to sneak out the Accused Two followed him and was once again found blocking the door to the store from inside of which the deceased was beaten unconscious. These acts of the First Accused were as criminal as those of the Second Accused who was caught/seen red-handed hitting the deceased on the jaw, head and neck which led to his later death. My finding is that these two accused persons acted in concert in inflicting the fatal injuries on the deceased, the Second Accused in actually beating the deceased and the first in blocking any escape of the deceased, if he was in any state to escape and in blocking patrons from coming to his rescue, and finally the second accused declining to take his victim for medical assistance. My finding is that the accused persons acted with a common intention in the commission of a crime. I borrow strength from section 20 of the Penal Code which provides

“20(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence; and in the last mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.”

The drafter of that law had Accused One in mind in 20 (b) and 20 (c) above for, it is my finding that, Accused One blocked the door to the store thereby enabling Accused Two to inflict fatal injuries to the deceased. By virtue of the above provision of the law the two accused persons are guilty in equal measure. That is strengthened by the provisions of section 20 (3) Penal Code cap. 63 of Laws of Kenya in the following words:-

“20 (3) Any person who procures another to do or omits to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

By dint of the above provisions Accused One and Accused Two, I find, are guilty of committing the same offence and are liable to a similar penalty.

Further **section 21** of the same **Penal Code cap. 63 Laws of Kenya** binds these two accused persons together in the following words:-

“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.”

That then settles the fate of the two accused persons in the commission of the offence herein. They are equally guilty in like measure in the different roles that they played and which led to the death of the deceased herein.

There was the issue of how the deceased left the Jango club since he had lost consciousness, to be later found by some path leading to or near his sister's (PW2) house. When PW4 was leaving Jango club after duty he told PW1 that the deceased would go home when he felt better-read regained consciousness. There was no evidence led that the deceased did not indeed regain a measure of consciousness to attempt to retrace his movement to his sister's (PW2) house for help. I find that it is instructive that he was found lying on the path to his sister's (PW2) house and in all probability he was headed there when his injuries sustained earlier at Jango club took the better of him. It is not totally unknown for fairly injured persons who have lost consciousness to regain it and more particularly in the cold of the wee hours of the night. I am persuaded by all the evidence adduced and the circumstances of this case that the deceased regained a measure of consciousness, left Jango club in an attempt to seek help at his sister's house and headed the directive of her house only to fail to reach that house.

Another issue that calls for consideration as to the accused persons' culpability is their disappearance from their known residences since the commission of the offence until their arrest two months later in the case of the second accused and four months later in the case of the first accused. The evidence of PW9 Rajab Juma the investigating officer herein as to the police search for the accused persons with a view to arresting them was not contested in cross examination and the conclusion to be derived is that the accused persons hid from the law for such time as they thought their deeds had been forgotten or ignored only for them to be rudely awoken by the late arrests. And why was Accused Two resisting arrest from the arresting officer PW8 Pc Wilson Peter Bulinga? Why would an innocent person run away from law enforcers? The only reason can be that Accused Two knew that the hour of reckoning with what he had done on 20/04/2007 had come and wrongly thought he could once again escape as he had done since that 20/04/2007 until 5/8/2007. Due to the boxing prowess of PW8 the Accused Two was not lucky.

Having dealt with those preliminary issues I find this now an opportune time to consider whether the offence of murder that the two accused persons face was indeed committed.

Section 203 of the **Penal Code cap. 63 Laws of Kenya** provides as follows:-

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

The burden of proving that the accused persons acted with malice aforethought and caused the death of the deceased herein always rests with the prosecution. For the prosecution to secure a conviction they must show that the death of the deceased herein was caused by the accused persons and that they were possessed of motive or intention, the necessary malice aforethought. I have already assessed the evidence led and come to the conclusion that it was the two accused persons herein who caused the death of the deceased. That is strengthened and enhanced by the evidence of PW10 the pathologist who found the cause of death to be bleeding into the brain membranes which injury is consistent with what PW1 saw inflicted by Accused Two on the deceased while Accused One blocked the door to the store where the deceased was beaten.

In the case of **ABOUD ROGO MOHAMMED & 3 OTHERS –VS REPUBLIC Cr. Case no. 91 of 2003 [2005] eKLR pages 7 – 8**

the following finding was made in establishing what constitutes a crime.

“It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution has proved beyond any reasonable doubt both:-

(a) That he had caused a certain event or that responsibility is to be attributed to him for the existence of certain state of affairs which is forbidden by criminal law; and

(b) That he had a definite state of mind in relation to the causing of the event or the existence of the state of affairs.

The event of the state of affairs is called actus reus and the state of mind the mens rea of the crime. Much more often the actus reus requires proof of an act or an omission (conduct). Usually it must be proved that the conduct had a particular result.

In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought. This is a technical term and it has a technical meaning quite different from the ordinary meaning of the presence or absence of malice aforethought which determines whether an unlawful killing is murder or manslaughter. Murder is unlawful killing with malice aforethought.”

And malice aforethought is defined in **section 206** of the **Penal Code cap. 63 Laws of Kenya**.

Section “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 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.

(c) an intention to commit a felony

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

It appears clear therefore from the above that malice aforethought could present itself as express or it could be implied. Express malice aforethought is proved by a clear intention to kill whereas implied malice aforethought is proved by evidence of intention to cause grievous bodily harm. In our case the motive is clearly established. The deceased told Owiti that it was Accused Two who had taken his mobile phone. Accused Two came in and hit the deceased on his jaw after Owiti had recovered his mobile phone. He (Accused Two) clearly intended to punish him (deceased) for telling on him to Owiti, the owner of the missing mobile phone. He (Accused Two) chased deceased into the store where PW1 saw Accused Two beat the deceased hard on his head and neck, while Accused One stood guard at the door to prevent any help for deceased.

I have come to the inescapable conclusion that the two accused persons were possessed of the necessary malice aforethought and with it committed the grievous harm on the deceased which led to his ultimate death.

The total sum of the prosecution and defence evidence leads to the only plausible and available conclusion that the defence evidence is evasive, unbelievable and inconclusive. I refuse to subscribe to their view that they were present at Jango club on 20/4/2007, heard some commotion but did not take part in it. The available truth is that PW1 saw them commit the offence they now stand charged with.

It is my final finding that the two accused persons are guilty of the murder of **QUANTINE MUTISA MUSUVALI** as I make the further finding that the prosecution has discharged its burden of proof and proved its case against these two accused persons beyond any reasonable doubt. Accordingly I hereby find the two accused persons guilty of murder and hereby convict them under the provisions of section 203 of the Penal code cap. 63 of the Laws of Kenya.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2011.

**P.M. MWILU
JUDGE**