



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

**Criminal Appeal 214 of 2009**

SAMWEL MWANGI MIANO.....1<sup>ST</sup> APPELLANT

DAVID GOGO GATHIAKA.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**(An Appeal from original conviction and sentence in Nakuru  
C.M.CR.C.NO.1587/2008 by Hon J. N. Onyiego, Principal  
Magistrate, dated 10<sup>th</sup> July, 2009)**

**JUDGMENT**

The 1<sup>st</sup> appellant, a police officer was initially charged in the High Court jointly with the 2<sup>nd</sup> appellant with murder which was subsequently withdrawn and the two charged in the court below with **manslaughter** contrary to **section 202** as read with **section 205** of the **Penal Code**.

After their trial, the learned trial magistrate found them guilty and upon conviction, sentenced them to served seven years imprisonment. They were aggrieved and brought two separate appeals which were consolidated before the hearing of the appeal. The 1<sup>st</sup> appellant has challenged their conviction and sentence on the

following grounds

- i) that there was no eye witness who saw them with the deceased
- ii) that the evidence of P.W.1 was unreliable
- iii) that no motive was proved
- iv) that the defence of the 1<sup>st</sup> appellant was ejected without reasons
- v) that judgment was delivered in chambers at 6p.m. in the absence of defence counsel.

The 2<sup>nd</sup> appellant's grounds are mere mitigating factors.

Arguing the appeal on their behalf, counsel for the appellants submitted that the conviction was unsafe. That there was no evidence of beating and further that P.W.11 did not give reasons why the deceased was being beaten. Learned counsel for the respondent opposed the appeal arguing that there was overwhelming evidence against the appellants. That P.W.11 witnessed the appellants beating the deceased; that P.W.1 also saw the appellants with the deceased person who they had handcuffed.

Before I consider these arguments, it is imperative that I re-evaluate the evidence in order to arrive at my own independent conclusion. The 1<sup>st</sup> appellant, as I have stated is a police officer. He was stationed at Eburu Police Patrol

Base where there were only two police officers, the appellant and another officer, **P.W.10 P.C. John Muthoka (P.C. Muthoka)**. The 2<sup>nd</sup> appellant was a kiosk owner at Mogen Trading Centre and a friend to the 1<sup>st</sup> appellant.

On 1<sup>st</sup> August, 2007, the deceased and the two appellants were at a bar owned by **P.W.2, Peter Gikonyo Mwangi (Mwangi)**. According to Mwangi, there were about thirty customers in the bar. He noticed, though, that the deceased was too drunk when he got to the bar but left before the bar was closed at 11p.m. Mwangi confirmed that the deceased left alone and appeared normal, apart from his drunken state. Another person who saw the deceased on that fateful night was **P.W.11 Joyce Wamaitha Ngotho (Joyce)**. In her evidence, the appellant came to the bar at 10p.m. At 10.30p.m. Joyce went to her house which is located within the precincts of the bar. While in her house, a neighbour also called Joyce like her informed her that a person was being assaulted outside the bar. Upon going to the scene, she found the two appellants beating the deceased who fell down. The appellants ordered the deceased to rise up and go. They left and Joyce retired to her house.

The same night at about 12 midnight, **P.W.1 Benson Njenga Karanja (Karanja)** heard a person calling out his name near his gate. He went out in response. He recognized the deceased who was handcuffed and the two appellants – all the three being well-known to him. Seeing the 1<sup>st</sup> appellant and noting that the deceased was handcuffed, Karanja assumed that the deceased had stolen and was under arrest. The following morning, Karanja found the deceased on the same spot he had seen him with the appellants the previous night. This time, however, he did not have handcuffs and was lifeless.

**P.C. Muthoka** confirmed that the Police Patrol Base had only one borrowed handcuff which was with the 1<sup>st</sup> appellant on the evening in question. That in the morning of the day the body of the deceased was found, the appellants were together and appeared very drunk. The matter was reported to the police and investigations commenced. Exhibits, a pair of long trousers, a pair of socks, a jacket, gum boots and handcuffs were recovered from the appellant and submitted to the Government chemist together with blood samples from the appellants and the deceased. The analysis revealed that the deceased was of blood group A, the 1<sup>st</sup> appellant, blood group O and the 2<sup>nd</sup> appellant blood group A (like the deceased).

In his unsworn evidence, the 1<sup>st</sup> appellant confirmed that he was in the company of the 2<sup>nd</sup> appellant on the fateful day; that they went to Karanja's bar. That from the bar and as they walked to the Police Patrol Base, they came across a man standing next to some office. The man was not able to answer questions put to him by the 1<sup>st</sup> appellant. The owner of the plot was called. They notice that person was bleeding from the head. The man was sitting in a pool of water as it was raining. In the process of removing him out of the water, the blood on his body got into contact with the 1<sup>st</sup> appellant's clothes. Apart from the injury on the man, 1<sup>st</sup> appellant also noted that he was too drunk and could not walk.

The 2<sup>nd</sup> appellant's testimony was under oath and more or less on the same footing as that of the 1<sup>st</sup> appellant. But he added that the person in question was drunk and abusive. That he called the 1<sup>st</sup> appellant a dog. That the 1<sup>st</sup> appellant handcuffed him but when the owner of the plot identified the man, the 1<sup>st</sup> appellant removed the handcuffs and the appellants left. They requested the owner of the plot to take care of the man. The owner of the plot in view of the totality of the evidence can only be Karanja while the injured man, the deceased.

I have considered this evidence and submissions by counsel for the appellants and the respondent. The only question is whether the appellant's unlawfully caused the death of the deceased. I am persuaded by the evidence of Joyce that the appellants attacked the deceased outside the bar. She heard the deceased crying out for help.

**Dr. Macharia Ndegwa (P.W.5)** confirmed that the cause of death was massive bleeding in the brain caused by a blunt object. That very night, the deceased called Karanja for help. Karanja saw him handcuffed and under the guard of the

appellants. The following morning, the deceased was dead on the same spot without handcuffs and the appellants were nowhere. Mwangi the bar owner confirmed that the deceased appeared normal when he was at the bar.

On the Government analyst report, the 1<sup>st</sup> appellant admitted that his clothes collected blood from the deceased when he was helping him out of the pool of water. Secondly, the 2<sup>nd</sup> appellant has the same blood group as the deceased. Nothing turns on the report. But on the evidence of Joyce, Karanja, Dr. Ndegwa and all the surrounding circumstances, including the appellants' own defence, I come to the conclusion that the appellants inflicted the fatal injuries on the deceased. Indeed in terms of **section 111** of the **Evidence Act**, having been the last persons to be seen with the deceased, they failed to create reasonable doubts as to their innocence.

However, there is also evidence that the appellants were very drunk and it is not clear from the evidence what wrong the deceased did to deserve the assault. Motive, unless otherwise expressly declared in criminal responsibility is immaterial. There is no evidence that the judgment was delivered at 6.30p.m. No prejudice was occasioned to the appellants if their counsel was not in attendance at this tail-end of their trial. They mitigated quite successfully. The assault was unlawful and hence the death arising therefrom.

I find no merit in the defence which I hereby reject. The appeal is dismissed as it also lacks merit. The sentence of seven years is within the law and not excessive.

**Dated, Signed and Delivered at Nakuru this 30<sup>th</sup> day of April, 201 0.**

**W. OUKO**  
**JUDGE**