



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO 51 OF 2008**

**SAMSON ONGERI ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**JUDGMENT:**

This judgment is in respect of a ruling delivered by Mrs. Wewa, RM in an inquest that was conducted following the death of **David Mageri Moguche** (deceased).

The state called several witnesses whose evidence can be summarized as hereunder:

**Elkana Nyamba, PW1**, the deceased's brother, testified that on 13<sup>th</sup> April, 2002 at about 8.00 a.m. he was at his home when he received a report that the deceased had been assaulted at Samson Ongeru Manyara's house. The report was given to PW1 by Bob Manyeri. He was told that the deceased was beaten at night. According to the report, the deceased was taken to a hospital when he was not talking. On 17<sup>th</sup> April, 2002 he was transferred to Kenyatta National Hospital and remained there until 1<sup>st</sup> June, 2002 when he died. PW1 was told by **Rachael Bonareri, PW2**, a daughter of Samson Manyara, that it was her father who assaulted the deceased. The said Rachael was said to have been the deceased's girlfriend.

**Rachael Bonareri Ongeru, PW2**, was a student at Green Valley Secondary School. She was 22 years old when she testified. She was staying with her parents. She stated that on 14<sup>th</sup> April, 2002 at 3.00 a.m. she was asleep in a house within her parent's homestead. Her parents were sleeping in another house. The two houses have a common main door. She heard noise and woke up. She heard her young brothers and sisters screaming. She saw a person who had accessed the house through the roof having fallen down. The ceiling board had been removed. The person had been beaten by members of the public. She said that her father had not assaulted the person and he went and made a report to the police. The police collected the person when he was not speaking. That person was the deceased. PW2 denied that the deceased was her boyfriend, saying that she did not know him.

The deceased's mother, **Alice Boyani Moguche, PW3**, testified that on 14<sup>th</sup> April, 2007 at 8.00 a.m. she received a report that the deceased had been assaulted at the home of Samson Ongeru.

The deceased used to work at Samson Ongeru's hotel and according to PW3, Rachael, PW2, was a girl friend of the deceased. They used to go to the deceased's home together.

PW3 went to see the deceased in the hospital and found PW2 there crying. The deceased was not able to talk.

**Pamela Ongeri, PW4**, wife of Samson Ongeri testified that on 14<sup>th</sup> April, 2002 at about 3.00 a.m. they were asleep with her husband when they heard their children screaming in a different room. They were shouting, **“thief, thief.”** She moved to the room and found the thief in the house. She screamed and people rushed to their home. PW4 said that there was no light but it was not too dark. She added that her husband went to report the incident to the police.

**Regan Matoke Ongeri, PW5**, a standard 6 pupil, testified that on the night of 14<sup>th</sup> April, 2002 he was asleep with his younger brother when he heard something scratching the ceiling board of the room where they were sleeping. Then something landed on the floor. His father, Samson Ongeri, entered the room and put on lights. His father hit the stranger who had entered the house. His father also screamed and many people went to their home and beat up the intruder. Thereafter his father went to make a report to the police.

**Tabitha Sakawa, PW6**, also stated that on the material night at about 3.00 a.m. she heard some noise from the home of Samson Ongeri. She went to his home but did not enter the house where the stranger was said to have gained access through the iron sheets. PW6 said she did not see the person.

A few other witnesses gave similar evidence as that on record but no medical evidence was tendered. No police witness testified.

**Samson Ongeri** then testified. He said that on 14<sup>th</sup> April, 2002 at about 3.00 a.m. he heard his children screaming from their bedroom. He also heard a sound of a falling object landing on the floor of the house. The children screamed **“thief, thief.”** They also said they were being beaten. Samson and his wife proceeded to his children’s room. He screamed and many people showed up. They realized that there was a stranger and on questioning him he told them he hailed from Nyamira. He said that neighbours wanted to beat up the stranger but he told them not to. Samson locked the door and went to make a report to the police. The police went and picked up the deceased and took him to Kisii District Hospital. It was realized that the person had entered the house through the roof of the verandah and had damaged the ceiling.

The learned magistrate who conducted the inquest analysed the above evidence and observed that although no post mortem report was produced regarding the cause of death, the deceased had been assaulted at the home of Samson Ongeri. She concluded that Samson Ongeri should be held liable for the death of the deceased.

The appellant was aggrieved by the decision of the aforesaid magistrate and preferred an appeal to this court. He raised 4 grounds of appeal in his petition. They are as follows:

**“1. That the learned trial magistrate erred in law  
and in fact in finding that the appellant should  
be held liable for the deceased when there was  
no medical evidence as to the cause of death.**

**2. That the learned trial magistrate erred in law  
and in fact in basing her findings on conjectures,  
suppositions and suspicious.**

**3. That the learned trial magistrate erred in law and in fact in relying on evidence which she found**

**to be contradicted.**

**4. That there is no basis in law for the finding that the Appellant be held responsible for the death of the deceased.”**

Mr. G.J.M. Masese for the appellant made brief submissions in support of the grounds of appeal. Mr. Kemo, Senior Principal prosecution Counsel also made brief submissions in support of the said finding.

I have considered all the evidence on record. There was concurrence of evidence that on the night of 14<sup>th</sup> March, 2003 at about 3.00 a.m., the appellant’s children heard some movement on the ceiling of their bedroom. Naturally they screamed and their parents woke up and rushed to the room to rescue or help their children. It appeared as though the deceased gained entry into the children’s room through the roof. It is not clear whether the deceased sustained any injuries as a result of the fall from the ceiling to the floor. But there is conflicting evidence as to whether the appellant assaulted the deceased before he screamed and caused his neighbours to rush to his home. It appears that the neighbours who responded to the distress call also beat up the deceased.

But one thing that I found rather baffling is what the deceased’s intention was in gaining entry to the children’s bedroom through the ceiling at such ungodly hour of the night. Any reasonable person would assume that such an intruder into his home is a thief, if not a killer. It was not unreasonable that in defending his children, the appellant hit the deceased. The appellant’s neighbours who went to his home on the material night also assaulted him. Whether the deceased was a friend of the appellant’s daughter or not, his decision to forcefully gain access into the appellant’s house through the roof at such an hour of the night was a terrible gamble, whatever his motive was.

The cause of the deceased’s death was not established. No medical evidence including a post mortem report was produced. Whether the deceased died as a result of injuries sustained from a fall onto the house floor or as a result of injuries inflicted upon him by the appellant and his neighbours is not clear. Such evidence ought to have been adduced.

In my view, the evidence that came out of the inquest cannot sustain a charge of murder or manslaughter against the appellant and with respect, I do not agree with the decision that was arrived at by the learned magistrate.

I therefore allow the appeal and quash the findings of the inquest.

**DATED, SIGNED AND DELIVERED AT KISII THIS 31<sup>st</sup> DAY OF MARCH, 2009.**

**D. MUSINGA**

**JUDGE.**

**31/3/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Masese for the Appellant

Mr. Kemo for the State

**COURT:** Judgment delivered in open court.

**D. MUSINGA**

**JUDGE.**