



1. Criminal Law
2. Murder

**I: Information**

*Murder contrary to Section 203 as read with Section 204 of the Penal Code.*

**II: Particulars of offence**

*On the night of 8<sup>th</sup> and 9<sup>th</sup> October, 2008 at Makora Tea Plantation in Sotik District of the Rift Valley Province jointly with others not before court murdered. (Wesley Kipkoech Mutai) (Count I)  
(Vincent Kipkemoi Rop) (Count II)*

**III: Suspects**

**HCR. 37/08**

- a) Edwin Nyambige Nyandika
- b) Charles Mamboleo Onyando  
Informed accused 23<sup>rd</sup> October, 2008  
Plea 10<sup>th</sup> November, 2008 – not guilty.

**HCR. 45/08**

- a) Evans Machoka
- b) Erick Mogaka  
Informed accused 19<sup>th</sup> November, 2008  
Plea 1<sup>st</sup> December, 2008 – not guilty.

**IV: Procedure**

- i) Consolidation of Hcr. 37/08 and 45/08  
On 8<sup>th</sup> December, 2008
- ii) Hearing 16<sup>th</sup> July, 2009, 15<sup>th</sup> July, 2009, 20<sup>th</sup> July, 2009, 25<sup>th</sup> July, 2009, 31<sup>st</sup> July, 2009, 17<sup>th</sup> September, 2009 and 6<sup>th</sup> October, 2009.

**V: Facts**

- i) PW2 – Owner of motor vehicle KAZ 038  
Hired deceased No. 1 (Wesley Mutai) as a driver to be picking his children from school.
- ii) Deceased No. 1 failed on 8<sup>th</sup> October, 2008 to do so.
- iii) Made report to deceased father (PW3); then to police 9<sup>th</sup> October, 2008.
- iv) Received information of deceased No. 1 and another demise.
- v) PW3 father attended post mortem and identified son. PW6 police No. 81819 P.C. John Ondiek witnessed post mortem.
- vi) PW8 tea worker 8<sup>th</sup> October, 2008 at 8.00p.m approached by accused No. 1 to assist get a vehicle out of mud.
- vii) PW8 mobilized up to nine people went to where vehicle at stream was. Removed vehicle. Paid Kshs. 1,000/= to share.
- viii) Saw accused 1 and 2.
- ix) Bodies of two deceased found at stream on another day.
- x) PW8 noticed activity at scene. Taken by police 8, 9, 12 and 13.
- xi) Accused No. 1 is arrested at the Nyamira Law Courts attending for Traffic Court Case?.
- xii) Confesses before magistrate PW18 on 17<sup>th</sup> October, 2008 (2<sup>nd</sup> confession by Accused No. 3 before PW10)
- xiii) Police act on information received. Accused No. 2 arrested.
- xiv) Identification parade conducted 21<sup>st</sup> October, 2008. Accused No. 1 and Accused No. 2 identified by PW8 and 2 others.
- xv) Corroboration

**A) Watchmen**

- a) PW1. Petrol station watchmen. Accused and others came to ask for petrol
- b) Credit given of 700/=
- c) Receipt issued.
- d) Noticed had a lot of mud on shoes.
- e) Left mobile phone as security (handed to police)

**B) Passenger**

- a) PW4 – Businessmen – no vehicle, with others boarded the vehicle in question.
- b) Dropped far – rang PW5 police PC 809048 persuaded they be dropped near
- c) PW5 part of investigation team later.

**C) Scene of crime**

- a) PW7 OCS Sotik police station visited scene where bodies found.  
Drew sketch map.

- b) Rope around deceased neck.  
PW14 took photographs of deceased (see D below)

**C) Death**

- a) PW11 medical doctor  
Post mortem of two deceased. 13<sup>th</sup> October, 2008 at 2.00p.m
- b) Acid on eyes and face.
- c) Shock, secondary to heamorrhage.

**D) Scenes of crime.**

- a) PW14 took photographs of body

**E) Identification parade**

PW15 - accused No. 1

PW16 – accused No. 2

**VI) Defence**

**A) Accused No. 1**

- i) Denied offence.
- ii) Allegation of torture for confession later withdrawn
- iii) Identification parade – persons knew him.

**B) Accused No. 2**

- i) Alibi evidence was in his neighbours house.
- ii) Neighbour – DW5 a preacher confirms this same between 11.00p.m to 6.00a.m not with accused No. 2.
- iii) Unable to know accused No. 2 Children’s names.
- iv) Identification parade – false. Persons in same cell as he.

**C) Accused No. 3**

- i) Lived with parents
- ii) Police swoop
- iii) Kshs. 2,000/= and cell Motorola taken from him.

**D) Accused No. 4**

- i) Arrested
- ii) Cell phone taken

3. **Submission by advocate for accused.**

- i) Not sufficient evidence for conviction.
- ii) The witness locked the same cell as the accused before parade.
- iii) Evidence not in support of offence and not to be relied on.

4. **Submission by state**

- i) Evidence sufficient
- ii) Evidence be upheld.

5. **Held**

- i) Circumstantial evidence and corroborated evidence to the confession of accused 1 and 3 proof that accused 1, 2, 3 found guilty.
- ii) Accused No. 4 found not guilty

6. **Case Law**

7. **Advocate**

P. Kiprop state counsel instructed by the Attorney General for the state – present  
G.M. Maengwe advocate instructed by the firm of M/S G.M. Maengwe & Co. advocates  
for the accused – present

REPUBLIC .....PROSECUTOR

VERSUS

EDWIN NYAMBIGE NYANDIKA .....1<sup>ST</sup> ACCUSED

CHARLES MAMBOLEO ONYANDO .....2<sup>ND</sup> ACCUSED

EVANS MACHOKA ..... 3<sup>RD</sup> ACCUSED

ERICK MOGAKA ..... 4<sup>TH</sup> ACCUSED

## JUDGMENT

### I: Procedure

1. In this criminal murder case, there are a total of four accused persons. They were originally charged in two separate files for the offence facing them.

2. The information before court being:-

***Murder contrary to Section 203 as read with section 204 of the Penal Code.***

The Particulars of offence

***On the night of 8<sup>th</sup> and 9<sup>th</sup> October, 2008 at Makina Tea Plantation in Sotik District of the Rift Valley province jointly with others not before court murdered Wesley Kipkoech Mutai. This was in Count I. In Count two the deceased murdered was Vincent Kipkorir Rop.***

3. This information was presented to court in High Court Criminal case court file 37/08 on 23<sup>rd</sup> October, 2008 against Edwin Nyambige Nyandika.

4. The plea of not guilty was taken on 10<sup>th</sup> November, 2008.

5. Meanwhile a second file being High Court criminal court file 45/08 was opened whereby Evans Machoka and Eric Mogaka were preferred the very same information. Their information was dated 19<sup>th</sup> November, 2008. A plea was taken on 1<sup>st</sup> December, 2008 where both entered a plea of not guilty to the two counts before court.

6. On the 8<sup>th</sup> December, 2008 the state applied for the two files to be

consolidated. There being no objection from the defence the application was granted. HCr. Case 37/08 and Hcr. Case 45/08 were duly consolidated. The accused persons were referred to as follows, for purposes of record and trail:-

**Accused**

1. Edwin Nyambige Nyandika ..... accused No. 1
  2. Charles Mamboleo Onyando ..... accused No. 2
  3. Evans Machoka ..... accused No. 3
  4. Erick Mogaka .....accused No. 4
7. The interpretation of the language used was Kiswahili, Kipsigis (*for witnesses*) and English. All four accused were fluent in the Kiswahili language.
8. All four accused were represented by M/S G.M.  
Maengwe & Co. advocates whilst the State Counsel represented the Attorney General through P. Kiprop state counsel.
9. The trial was heard on 16<sup>th</sup> July, 2009, 15<sup>th</sup> July, 2009, 20<sup>th</sup>  
July, 2009, 25<sup>th</sup> July, 2009, 31<sup>st</sup> July, 2009, 17<sup>th</sup> July, 2009  
and 6<sup>th</sup> October, 2009.

**II: Facts**

10. It is the prosecution case, from the 18<sup>th</sup> witnesses called, that the four accused persons caused the death of the two deceased persons.
11. In brief, deceased No. 1 Wesley Kipkeoch Mutai, a young man in his 20's, was employed as a motor vehicle driver by PW2 John Rotich. The vehicle registration number being KAZ 038Q. It was the task of deceased

- No.1 to collect John Rotich's children from his house in the morning and drop them to school, then return them back home in the evening. Mr. John Rotich is a teacher by profession. On the material day of 8<sup>th</sup> October, 2008 his children were not collected from school. He made alternative arrangements for them. On no receiving any further information, he contacted deceased No.1's father and then the police.
12. PW3 Francis Kimutai Bii confirmed that indeed he had received information of his son missing and later he was informed of the recovery of the body that was taken to the mortuary.
  13. To date PW2 has never recovered his vehicle. He surrendered the log book to the Insurance company for settlement.
  14. The genesis of this case began when PW8, a tea plantation worker who was on the 8<sup>th</sup> October, 2008 in his house at night cooking. He was in the company of another when he responded to a knock at the door. The young man asked for assistance. That a vehicle he had with others had gotten stuck in the mud and sought assistance from him. The reasons being that both of them came from the same tribe, namely Kisii. He agreed to reward him.
  15. PW8 mobilized a total of six men including himself. He had a torch and they all went to where the vehicle was at the bottom of a stream. They pushed and got the vehicle out. A total sum of Kshs. 1,000/= was paid to them to share amongst themselves.
  16. Out of those whom he recognized that night was accused No. 1 and 2. He also recognized accused No. 3 who had been outside the vehicle

(white in colour, a saloon) with others. There were three of them accused 1, 2 and 3 whilst PW8 and others were six. Between the nine of them they were able to push the vehicle out of the mud.

17. The prosecution called PW9 Anthony Gekonge, PW12 George Morara who both confirmed as being part of a six man group called to assist in releasing a vehicle from the mud where it had gotten stuck. They assisted in pushing the vehicle out.

18. The three witnesses were informed that the vehicle belonged to one Chacha, a clerk. (*this person was never traced*).

19. The following day or thereabouts after they received information that two bodies had been recovered near where they had pushed the vehicle. It seems that they volunteered no information until the 15<sup>th</sup> October, 2009 to 16<sup>th</sup> October, 2008 when the police took them to write their statements.

20. On 21<sup>st</sup> October, 2008 or thereabouts they underwent identification parade for accused No. 1 and 2 whom they identified as those they helped to push the vehicle out of the mud.

21. The defence opposed the identification parade identifications on the grounds that prior to it being conducted, the witnesses were locked up in the cells together with one of them that is accused No. 2.

22. From the information received, PW7 the Chief Inspector Herbert Machasio (NO. 230064) concluded that the two deceased body had been killed elsewhere and dumped. A search team had been mounted and on

arrival to the scene, the said officer in charge Sotik Police Station drew a sketch map and noted the tyre marks at the scene. One of the deceased had a rope around his neck which he produced to Court as evidence.

23. From further information received, accused No. 1 Edwin Nyambige Nyandika was to attend the courts at Nyamira for another matter, when PW15 Inspector Onyocho the Deputy Criminal Investigating Officer (*DCIO*) formerly of Bureti (*as he then was*) caused the arrest of accused NO. 1. By now PW15 had received a report that two deceased were missing. By 9<sup>th</sup> October, 2008 the bodies of the two deceased were recovered.

24. The arrest was made on 13<sup>th</sup> October, 2008. On information received he proceeded to Rongo where a mobile phone was recovered.

25. The background of the mobile phone was filled in by PW1 Robert Miyoge Omwenga. This witness was a security guard at a petrol station in Rongo known as “*OILIBYA*”. On the material night of 8<sup>th</sup> October, 2008, he was on duty. At night there normally were two attendants working with the petrol.

26. At 1.00a.m a white vehicle came to the station. They filled the vehicle with Kshs. 200/=. The occupants of the vehicle were three. He became interested in them as they spoke in his language Kisii. The other attendants were not able to understand the language. Their story was that they were heading for Kihanga where their father had been beaten. They asked if they could fuel the vehicle on credit for 1,000/=. PW1 said it was not possible. They offered to leave a mobile phone behind. PW1 said he would assist them with Kshs. 700/= worth of petrol. They agreed to

this. The Kshs. 200/= earlier paid was returned to them. A further Kshs. 500/= worth of petrol was placed in the vehicle. As a precaution, PW1 assured a receipt for Kshs. 700/=. He issued a second receipt for his records then, he took possession of the mobile phone. He was reassured the moneys would be returned and paid for by 10.00a.m that following morning.

27. The receipt issued was serial No. 1020 Ext 2(a) and its copy serial No. 2108 Ext 2(b) both receipts dated 8<sup>th</sup> October, 2008 was identified by him in Court.

28. The cell phone Ext. 1 was identified in Court as the one given to him by accused NO. 1. He recognized the occupants of the vehicle as accused No. 1, 2 and 3. In cross-examination by the advocate for the accused he noticed the accused's shoes were muddy as was the vehicle.

29. On 10<sup>th</sup> October, 2008 the witness heard from the same persons who had left the phone. They said that they had had a problem and were not able to return. The vehicle they had had been stolen. On 13<sup>th</sup> October, 2008 at 3.00p.m he received information that the owner of the vehicle had come to the petrol station. He met with persons who asked if he could identified the one who gave him the phone. He did and identified accused No. 1 in the vehicle. He handed over the receipt and phone that he had.

30. On 17<sup>th</sup> October, 2008 the accused No. 1 was taken before the magistrate (PW18) in Bureti and not Sotik. The reasons being that members of public were becoming agitated about the matter with intention to harm him.

31. PW8 the magistrate recorded information in which the said accused No. 1 outlined how they had hired the vehicle and what occurred thereafter. From the said statements, the police were able to trace not only PW1 but PW4.
32. Richard Ochieng Mokaye is a businessman who ran a “*hotel*”. He recalls the 8<sup>th</sup> October, 2008 he had gone visiting in the Kisii area. On his way back home to Kitare village, there was a shortage of public vehicles. He was able to get the vehicle in question together with three others as they travelled, they paid Kshs. 100/= as fare. The driver then said they get out of the vehicle as they required to attend to a sick person. They spoke in the Kisii language vernacular. The two began to argue and insisted that they leave the vehicle. PW4 then called PW5 P.C Epupe Erapu Kiswn No. 809048 a police officer attached to the Makomani police station. He was able to talk to the driver and persuaded him to then drop the passengers nearer their destination. This was done. PW4 came to learn later that the vehicle had been stolen. PW5 was assigned duties to trace the stolen vehicle. He was one of those who found the bodies.
33. The police constable P.C John Ondiek No. 81819 attached to the police station crime branch accompanied PW3, the father to the deceased and other relatives not before court for post mortem procedure.
34. This was conducted by PW11 Dr. Ben Kiplangat Korir. He holds his degrees of Medicine and Surgery from the University of Nairobi.
- a) **Post mortem**
- i) Ref. 801219/08
- Deceased Wesley Kipkeoch

35. The post mortem was conducted at the District Hospital on the 13<sup>th</sup> October, 2008 at 2.00p.m. The deceased wore white vest black T. Shirt and a green sweater. A male adult in early 20's height 5 feet 7 inches.

36. Body well preserved.

- i) *Left lateral side exposed head of femur pelvic region.*
- ii) *Soft tissue from region taken away.*
- iii) *Laceration on the scrotum but testes present.*
- iv) *Laceration on the abdomen.*
- v) *Laceration on neck region with rope around the neck probably used to strangle deceased.*
- vi) *Laceration on face and eyes.*
- vii) *Left forearm. Wound on medical aspect and skin missing.*
- viii) *Cause of death cardiorespiratory failure due to strangulation.*

ii) **Ref. 801219/08**

Deceased Vincent Kipkemoi Rop

37. Post mortem also conducted at the District Hospital on the 13<sup>th</sup> October, 2008 at about 2.00p.m.

38. Body well preserved

- i) *Degloving injury left side of face and skull bone exposed extending to the chin. Teeth exposed.*
- ii) *Both eye sockets exposed.*
- iii) *Pallor to the sole of feet and palm.*
- iv) *Injuries to face appeared like burns.*
- v) *Blisters on abdomen and both thighs/  
Cause of death – Shock secondary to hemorrhage from injury sustained on face.*

39. The doctor produced both postmortem reports in evidence as exhibit P6 and P7 respectively.
40. The theory that the bodies were killed elsewhere and dumped at the stream near the tea plantation according to PW17 seems to corroborate the doctor's evidence.
41. Apart from this evidence, the prosecution called PW14. David Kiagu Kigi No. 77197 acting inspector of police. This witness is the officer in charge of scenes of crime in Kericho. On 13<sup>th</sup> October, 2008 at 1.50p.m he went to the District Hospital at Kapkatet where he was shown two bodies in the mortuary. He took photographs of these bodies which photographs he produced in evidence to court. He took different aspects of the body including the head, a total of eleven photos. He prepared a certificate inclusive of his report that he produced as evidence to Court.
42. The evidence so far by the prosecution has proved that the two deceased died. That their deaths, from the injuries sustained, was met in circumstances that was not consistent with natural death but murder.
43. There are other witness still to mention including a second confession statement which will be dealt with later below.

### **III: Investigation**

44. Earlier below the evidence of PW15 was mentioned. He was the one who caused the arrest of accused No. 1. The accused No. 2 was arrested and thereafter the phone recovered at Rongo area.
45. Members of public arrested accused No. 3 Evans Machoka whom

they rearrested and in turn were led by the public to the 4<sup>th</sup> accused.

46. He instructed that an identification parade be made. He caused confession to be done. He denied taking moneys and cell phones with “MPESA” moneys from the accused.

**i) Identification Parade**

47. PW16 Inspector Alponce Muhoka No. 232468 from Konoin police post Bureti Division informed this court how he had been instructed to conduct an identification parade for accused No. 1 and No. 2. This he did with two separate parades.

48. The first was for Edwin Mandika. The proposed witnesses were:

- i) Robert Miyonge Omwenga*
- ii) George N. Morara*
- iii) Charles Momanyi*
- iv) Anthony Gekonge (PW9)*
- v) Samwel Karani (PW8)*
- vi) Joase Biti*

49. A list of members of public was provided. The accused No. 1 was able to be identified by Robert Muiyonge Omenga, Charles Momanyi, Anthony Gekonye PW9 and Samwel Karani PW8.

50. Accused No. 1’s response was that his work was that of matatu – a public service vehicle. That the witnesses may have identified him due to his business – as a driver of a matatu. He did not know PW9 and did not know how he identified him.

51. As to the accused No. 2, he was identified amongst a set of the same members of public. This means that the physical identification of accused No. 2 was challenged by him not because of this but because the witnesses to identify him were placed in the same cell at the police station as himself on 16<sup>th</sup> October, 2008 and released the following day.

**ii) Confession**

52. Kenya's method of confession has evolved from the Indian Laws on confession. Both in India and Kenya, confessions was permitted to be made before a police officers unless they held the rank of an inspector due to the incidents of torture. Kenya's allegation of torture appears to be so strong that its laws has gone further and now requires that all confessions be made before an Hon. Magistrate. Most certainly this is a sign of the distrust of police officers and the breakdown of the criminal justice system. It therefore means that magistrates now become witnesses in subordinate courts and the High Court, a situation that is undesirable.

53. The two magistrates appeared to court to give evidence. I warn myself in considering the two confessions without the same being corroborated, which it has been so done in some instances. I noted at the time the statement were read to court, none of the two authors, accused No. 1 and No. 3 nor the other accused No. 2 and 4, nor through their advocates challenged these statements. If they did, a trial within a trial would have been conducted. When the defence hearing was heard, an attempt to challenge these statements was raised but abandoned. More on this below.

a) **Confession ---- accused No. 1**

54. Edwin Nyabinge Nyandika gave his confession on 17<sup>th</sup> October, 2008. When he informed the magistrate that Charles Mamboleo, accused No. 2 had approached him for employment of some work for him, accused No. 1. They both went to hire a vehicle but this was declined because Charles Mamboleo, being a taxi driver himself had his own vehicle. He found a vehicle – a third vehicle which agreed to be hired for Kshs. 5,000/= for fuel. They proceeded in this vehicle to a place called Chepilat.

At the stage they found passengers, including one Chacha. Moneys was collected from other passengers in the vehicle. One of the passengers called the police. Chacha had a rope in his hands. The passengers were taken to their destination and or nearby and then they returned back with the vehicle. The driver was led through a different route. They, the driver became worried. Charles took the rope and put it around the neck of the driver. The other conductor attempted to leave. Chacha held the conductor and went away. He returned to say that he had finished the conductor. The driver was strangled and died. Charles and Chacha threw both bodies into the bush. Charles knew the people in the estate. Their vehicle had gotten stuck in the mud. Chacha in the meantime took liquid acid found in the vehicle and poured on the eyes of the two deceased. He proceeded to cut the private parts of the driver. The people then came when they had been called to assist. They pushed the vehicle out of the mud where it had been stuck. They then drove off and gave a lift to a lady going to the Awendo area. At Rongo area the vehicle had stopped to take fuel. Chacha said he had a patient and wanted fuel. The vehicle was fueled and a phone was left behind as security. The lady alighted at

Awendo. The accused No.1 was then booked into a guest house and was given Kshs. 2,000/=. The following day, he was given an additional Kshs. 10,000/=. It was explained to him that Kshs. 80,000/= was proceeds from the sale of the motor vehicle. Some time later, accused No. 1 had gone to court to attend to one of his court case. He was arrested. He stated further that he was shocked at the killings.

**b) Confession ..... accused No. 3**

55. Evans Machoka Bernard, accused No. 3 stated that accused No.1 was the one who had come to take him out. He first knew accused No. 1 in the year 2006/2007. They had gone to attend a burial and accused No. 1 obtained some assistance from him. In January, 2007, the accused No. 1 worked as a conductor. Soon he had his own vehicle. One day accused No. 1 visited him with four other persons. They took him out where he was bought beer. There was a disagreement. He was then with one other person called Eriko (*accused No. 4*). They then left in a vehicle. There was, he recalls, Kshs. 200/= paid for fuel. There language spoken he understood to be Kisii. A mobile phone was given out by Edwin. Edwin then came with a man having dreadlocks. Edwin took them to a shop to buy clothes. He then gave him (accused No. 3) Kshs. 8,500/=. “*Eriko*” had told him not to question the sum of such money. He then bought the phone. He thereafter that incident left to go to his aunts’ burial. He returned home after a few days but “*GSU*” men came with the Chief to arrest him. His mother informed him of the death of two persons and a stolen vehicle.

**IV: Defence**

56. The four accused persons were placed on their defence. Accused No. 1, 2 and 3 opted to give a sworn statement. While accused No. 4 gave an

unsworn statement. Accused No. 2 called a witness DW5 who gave evidence, later.

**i) Accused No. 1**

57. Accused No. 1 challenged his statement made under confession before the Hon. Magistrate stating that he gave it by force. He then raised the issue on torture. This court adjourned to allow the advocate for the accused to give submission on this point. The advocate for the accused No. 1 returned on another day to court and after adjournment that he wished to proceed with the trial and not take up the point. He notified this court that in law he was NOT permitted to raise the challenge of the statements during the defence hearing. The state counsel conceded and the accused proceeded with his evidence.

58. In further evidence accused No. 1 stated he was required to attend the subordinate courts on a Traffic Case involving his vehicle. When he attended court on 8<sup>th</sup> October, 2008, he was asked to return by his advocate, on 13<sup>th</sup> October, 2008. He therefore was able to account for the days. According to the evidence he was at home on 10<sup>th</sup> October, 2008, on 11<sup>th</sup> October, 2008 and 13<sup>th</sup> October, 2008. On 13<sup>th</sup> October, 2008 he went to court and was arrested. He was blind folded and placed in the cells. He then narrated how the police took him finally to the magistrate. A parade was also conducted but he suspected the witnesses were ready to identify him. The beatings inflicted upon him was when he was recording his statement.

**ii) Accused No. 2**

59. Charles Mamboleo stated he was a taxi driver. He gave a lengthy

account of his movements on 8<sup>th</sup> October, 2008. He had a vehicle registration KAY 019X that he drove as an employee. He recalls on returning home, he found the children with the neighbours. The wife had rushed to hospital for her sick mother. He narrated how he worked and how thereafter he went to the neighbour till 11.00p.m. He put the children to sleep in his house. He then left at 6.00a.m when he was arrested. At his arrest he was placed in the same cell as those who were to identify him. He had Kshs. 20,000/= in his cell phone as “MPESA” a money banking system, which the police took away from him. He personally did not know accused No. 1, 3 and 4. He denied the offence before court.

60. He called DW5 his neighbour to confirm this. DW5 narrated evidence to explain the whereabouts of the accused No.2 from 6.00p.m to 11.00p.m. That the accused No. 2 was with him, his wife and children who belonged to accused No. 2. They were awaiting accused No. 2's wife. When she failed to come accused No. 2 took his sleepy children to sleep in his house. They were one boy and one girl.

61. Accused No. 2 was relying on alibi evidence. That he was not present at the scene of the crime.

### **iii) Accused No. 3**

62. Evans Machoka Ibrahim (*not Bernard*) swore under the Islamic faith although he admitted his father's name was Bernard in cross-examination.

63. He recalls the 8<sup>th</sup> October, 2008 and the 9<sup>th</sup> October, 2008, he had

been working as a carpenter. He narrated his whereabouts and gave account of it for 10<sup>th</sup> October, 2008, 11<sup>th</sup> October, 2008 and 12<sup>th</sup> October, 2008. He was arrested in November, 2008. He had a cell phone a Motorola that had been taken by the police.

64. He further admitted he had no identity card. He also admitted had been arrested for drinking offence. He mentions nothing of his confession.

**iv) Accused No. 4**

65. Erick Mogaka stated in his unsworn statement how he was picked up in his house by two persons. He was taken to the police and his cell phone confiscated.

66. He was not identified during any parade and was given papers to sign. He was later brought to court.

**v) Submissions**

**A) Advocate for accused 1-4**

67. In the submission presented by the advocate for accused NO. 1-4, he stated that all the four accused, having been charged with Murder, they had nothing nor evidence proved against them.

68. He questioned PW1's the security petrol station personnel's evidence as to the identity of accused No. 1. He also questioned the receipts exhibit P2 (a) P2 (b) that had been put in evidence.

69. As the accused No. 2 was detained with the witnesses, the evidence of PW8 and PW9 – those who were called to push the vehicle out of the

mud was questioned.

70. When the confession had been taken for accused No. 3 the magistrate was wrong in not confirming that accused No. 3 had no identity card before taking the confession.

71. As there was no direct evidence implicating accused 1-4, they should all be acquitted of the charge before them.

### **B) Advocate for the state**

72. In reply the state counsel informed the court that there was sufficient evidence against accused 1, 2 and 3. He did not mention accused No. 4. He upheld the identity of accused 1 and 2. He upheld the confessing made of accused 1 and 3.

### **V) Opinion**

73. It is the opinion of this court that where a confession is given, the law requires that the said confession be corroborated. The only link between Erick Mogaka alias Eriko and this case is the confession made by accused No. 3. The confession by accused No. 3 Evans Machoka states that accused No. 4, one Erik alias Eriko was with him when he went out to a drinking spree with his friend accused No.1. There was no other evidence corroborating this apart from the confession statement. I find it unsafe to find him guilty and convict of the offence before court. I accordingly find accused No. 4 not guilty.

74. The evidence against accused No. 1, 2 and 3 has been established and corroborated linking the three of them to the charge before Court.

75. The key persons in this case are PW1 who recalls seeing the accused with very muddy shoes and vehicle asking for petrol on credit, which credit was given to them in lieu over a phone.

76. PW8, the tea worker whom help who sought from to push the vehicle from the mud did identified the three accused. Accused No. 3 had been standing by the vehicle.

77. The police were led to this witness and others through the information given by accused No.1. I am convinced that PW8 evidence is reliable in evidence.

78. I would mention that accused No. 2 raised the element of an alibi evidence. This was that on the material day of 8<sup>th</sup> October, 2008 he had been with DW5 his witness on the said evening. DW5, a pastor who had been detained at the G.K. Prisons for reasons not disclosed to court and had been brought to court by a production order, stated he knew the accused NO. 2 well and for at least three years. They had lived as neighbours for two months only. On the material day of 8<sup>th</sup> October, 2008 the witness had been in his house with his wife and children. That the wife of accused NO. 2 had left two children with them and went to go to deal with an emergency situation at a hospital. Accused No. 2, the father of the two children came and waited for his wife up to 11.00p.m. He left them to put his children to sleep. It was therefore confirmed by this witnesses that between 11.00p.m and 6.00a.m he was not with the accused No. 2 but he assumed he was in the house.

79. What was important to note is that the witnesses were unable to know

the names of the accused No. 2's children. He nonetheless said he called them by a pet name.

80. I have weighted the evidence of this witness but found the evidence by the State to out weight the alibi evidence given by accused No. 2.

81. Identification parade against accused No. 2 must be taken with caution. There is sufficient evidence that accused No. 1 was positively identified and on the said evidence on record I find the state has proved its case.

82. As to accused No. 2, he alleged person to the identification parade he had spent sometime in the same cell as the witnesses who were asked to identify him. The witnesses in cross-examination (*PW8, 9, 12*) moreso PW12 stated that it was time they spent the night at the police station. They did so as the time was up and they needed to have accommodation.

83. I would give a benefit of a doubt to the evidence on identification parade to accused No. 2.

84. It is accused No. 1 who gave a confession. According to the said accused No. 1 it was given under duress. The evidence, on the other hand disclosed that there was no duress. It was given to a magistrate of the rank of the Senior Resident Magistrate, in a language he understood. It was as a result of the information that he gave to the police prior to the confession being recorded that the bodies were recovered. It was as a result of the same information that the witnesses PW8, 9 and 12 were traced and described as those who assisted in pushing the vehicle out of the mud.

85. In the same confession by accused No. 1, there was evidence that one Chacha removed the private parts of deceased No. 1. Where the doctor (PW11) found amongst other injuries to the body “*Laceration on the scrotin but testes present*”. He also found soft tissue taken away from “*the lateral side exposed head of femur pelves region*”.

86. This evidence corroborates the confession by accused No. 1.

87. Another medical evidence is that of both eyes sockets exposed, the teeth, the skull on the left side of the face extending to the chin of deceased No. 2. Deceased No. 2 had laceration on face and eyes.

88. This evidence corroborates accused No. 1’s evidence that acid had been poured on the face/eyes of the two deceased persons.

89. Accused No. 3 obtained Kshs. 8,500/= from accused No. 1 to spend. This he readily admits. It was through his confession he gave that he was in the presence of one Chacha who had a rope. He described him as one with dreadlocks with another. He narrated the evidence of the purchase of petrol and a mobile phone being left behind. From the evidence and confession before court, accused No. 3 did participate, aided and abetted in the commission of offence.

90. The advocate on record should not have defended accused No. 2.

## **VI: In summary**

91. I find accused No. 1, 2 and 3 guilty on the information before court on

two counts of Murder contrary to  
**Section 204** of the Penal Code.

**Section 203** as read with

92. That all three are accordingly convicted *(accused*  
*No. 1, 2 and 3).*

93. That accused No. 4 herein having no evidence before Court duly  
corroborated to prove the offence against him. I find him not guilty He is  
acquitted, set at liberty unless otherwise lawfully held.

**DATED** this 22<sup>nd</sup> day of October, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocate**

P. Kiprop state counsel instructed by the Attorney General for the state – present  
G.M. Maengwe advocate instructed by the firm of M/S G.M. Maengwe & Co. advocates  
for the accused – present