



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO.28 OF 2002**

**REPUBLIC ..... PROSECUTOR**

**-VERSUS-**

**WILLY KIPRUTO NGETICH ..... 1ST ACCUSED**

**DAVID KIBITOK CHEPKWONY ..... 2ND ACCUSED**

**JUDGEMENT**

The two accused Willy Kipruto Ngetich (1st accused) and David Kibitok Chepkwony (2nd accused) have been charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63). The particulars of the offence are that on the 20th day of February 2001 at Ngonyek farm in Trans Nzoia District of the Rift Valley Province jointly with others not before the court, murdered James Kipkosgei Kemei. They were initially charged jointly with Zacharia Keino Sang (3rd accused) and Mathias Tanai (4th accused). At the close of the prosecution case, I found that the prosecution did not establish a case against both Zacharia Keino Sang and Mathias Tanai, and in terms of section 306 (1) of the Criminal Procedure Code (Cap.75) I found them not guilty and acquitted them.

The prosecution called 15 witnesses. Some of the witnesses referred to the 2nd accused as Naftali. When the two accused Willy Kipruto Ngetich (1st accused) and David Kibitok Chepkwony (2nd accused) were put on their defences, they gave sworn evidence in their defences. They also called the two previous co-accused, who had been found not guilty, as their defence witnesses.

According to the evidence on record Esther Magut (PW1) was the mother of the deceased James Kemei, and stayed at Ngonyek Farm. On 19th February 2001 at 8.00 am the 1st accused, who was an age mate of the deceased, came home at Ngonyek farm and called the deceased to go with him. The deceased refused to go. The 1st accused then went away, but came back on 20th February 2001 at about 3.00 pm and asked the deceased to go with him. The deceased accompanied the 1st accused and they went together to a destination which she did not know. On the next day (21st February 2001) she was informed by the deceased's father (PW2) that the deceased was dead in a far away river which was called river Kimosa or Sabwani. The river was near the home of the 1st accused.

The evidence of Philip Kipkemei Magut (PW2) was that he was the father of the deceased. On 21st February 2001 at about 8.30 am, he was informed by one Wilson Murei that his son the deceased was dead and that the body was at the river. He then went to the river, whose name he could not remember, and found the deceased lying with his legs partly in the river water. He went to Kitale and came back with the police and took the body to Mount Elgon hospital mortuary. On 23rd February 2001, he witnessed the post mortem examination of the deceased at Mount Elgon Hospital Mortuary.

Jane Nasambu (PW3) testified that she was a small businesswoman who sold vegetables at Machungwa

farm in Kitale. On 20th February 2001 at about 6.30 pm she was at home when three people came. The three people were Willy (1st accused), Naftali (2nd accused) and the deceased. She knew the deceased but not by name. The 2nd accused asked her for “sira” which was chang’aa. She sold him a mug of chang’aa for Kshs.40/=. She went back into the house and the three visitors sat on a platform outside the house. Shortly thereafter the visitors left. She did not hear them quarrel or disagree. The next day, 21st February 2001 at 8.00 am, she went to the river with other people and saw the body of the deceased in the river. The deceased was her chang’aa customer, but not a regular one. In the river the legs of the deceased were partly in the water. The body was on the opposite side of the river near a makeshift bridge. It was dry season and the river water was not much. She went near up to about 3 metres away from the body. She did not see roots of trees where the deceased was lying.

The evidence of Joseph Loyapan Ekidor (PW4) is that he lives at Machungwa farm in Kitale and did jua kali business. On 20th February 2001 at 5.00 pm he was at home when one called Oduor (PW5) came and asked for Naftali (2nd accused). At about 7.30 pm Naftali (2nd accused) and Willy (1st accused) came and Naftali (2nd accused) bought cigarettes from his kiosk. Zacharia (initially 3rd accused) later came and asked for Naftali (2nd accused). He knew the deceased, who was not with them. The next morning, 21st February 2001, Oduor called from outside and informed him that the body of the deceased was in the river. He testified that the 1st accused, 2nd accused and Zachariah told him that they were together with the deceased the previous night. He saw the body of the deceased in the river with the lower part of the legs in the water. His house was about 300 away paces from the place where the body of the deceased was lying. The body was on the opposite side of the river. The legs were partly in the water. There were some shrubs near the body but he did not observe if the body was trapped by roots of trees.

The evidence of Paul Oduor Onger (PW5) was that in 2001 he was a village elder at Machungwa farm. On 20th February 2001 at about 7.00 pm he tried to get Naftali (2nd accused) who owed him some money. He met Willy (1st accused) and asked him about the whereabouts of Naftali (2nd accused). Shortly thereafter the 2nd accused came with two children of a neighbour by the name Mwalimu Ramadhan. On 21st February 2001a neighbour called him from outside the house at 6.00 am. The neighbour said that as he was digging he saw people go to the river and then ran away. He proceeded to the river with that neighbour and they saw the body of James (the deceased) on the side of the water. When he went to the river he met the 2nd accused and the 1st accused who informed him that they had been with the deceased the previous day. The two accused appeared 10 minutes after he went to the river. They stayed about 100 metres away, and he knew them before. He went and reported to the Chief and was told to find out as to who was last seen with the deceased before his death.

The evidence of Anne Chemutai Kemei (PW6) was that she was the wife of the deceased and stayed at Kaplamai. On 19th February 2001 at 8.00 am the 1st accused came home and asked for water to drink. Then he went his way. On 20th February 2001 at 5.00 pm the 1st accused came again with a bicycle. He called the deceased and they went away together towards Machungwa trading centre. The next morning (21st February 2001) elders came and informed her that her husband was dead. The 1st accused was a friend of the deceased. She knew a watch, which belonged to the 1st accused, which she identified in court. The watch was found near the scene where the deceased’s body was found lying in the river by the police. She could not however, identify any special marks on the watch. She recorded two statements to the police. The first statement on 9th August 2001, and the second on 25th September 2003. The 1st accused and the deceased did not quarrel, as far as she knew.

The evidence of Felix Kipchirchir (PW7) a young man of about 12 years old was that on 20th February 2001 at 7 pm he went to sell milk at Machungwa. As he was going back home he met 3 people in a field. One of those people told him “get lost”. He met the deceased before he met those three people. It was near Sabwani river. He did not recognize the man who told him to get lost. The evidence of Mary Iminza (PW8), who was a girl of between 12 and 14 years, was that on 20th February 2001, she went to sell fish in the evening at Machungwa. Three people, whom she did not know, came and bought fish for Kshs.40/= and proceeded to the river.

The evidence of James Kiberenge (PW9) was that on 21st February 2001 he went to the farm to plant crops such as “sukuma wiki”. His farm was at Machungwa. At about 10.00 am he heard screams and saw

people running towards the bridge at the river. He also proceeded there and, before he reached the bridge, one called Mukasa, informed him that James (the deceased) was dead. He did not know the deceased well. He went and saw the body of the deceased from afar. He did not go close to observe if the deceased suffered injuries. The shoulder and the rest of the body of the deceased was in the water. The legs were held in the roots of trees. The evidence of Lilian Wafula Wanyonyi (PW10) was that on 20th February 2001 at 7.30 pm her brother-in-law Naftali (2nd accused) went to her home at Machungwa and took her child to the shop and bought the child some bread. The child came back home but the 2nd accused did not come back. The next day, 21st February 2001, she heard that a body of a person had been found in the river. She also heard that the 2nd accused had earlier on been in the company of the deceased.

The evidence of Wilson Koskei Kibunei (PW11) was that he resided at Ngonyek farm. On 21st February 2001 one Peter Too informed him that a body of a person had been seen at Sabwani river. They went together and saw the body of James lying on the side of the river with the legs partly in the water. On 23rd February 2001 he identified the deceased's body to the post mortem doctor at Mount Elgon hospital for post mortem examination.

Dr. Nancy Kegode (PW12) was the post mortem doctor. On 23rd February 2001 at 3.30 pm she performed a post mortem examination at Mount Elgon hospital, on the body of James Kemei, the deceased. She found blood around the nostrils, a deep strangulation line on the upper neck and cyanosis of the skin and organs of the cardio vascular system. She formed the opinion that the cause of death was asphyxia due to strangulation by rope. She filled the post mortem form and produced it in court as exhibit 2. She also produced as exhibits, P3 forms in respect of each of the two accused persons that were filled by Dr. Kogutu. She produced them under the provisions of section 33 of the Evidence Act (Cap.80).

John Kiprugut Misoi (PW13) was a cousin of the deceased. He testified that on 19th February 2001 at 7.00 am the 1st accused came home at Ngonyek farm to the house of the deceased. He took the deceased aside and talked to the deceased and went away. He also asked for water to drink from the deceased's wife which he was given. On 20th February 2001 after 3pm the 1st accused came again. He called for a younger brother of the deceased called Steve from outside the fence. They talked and Steve went back to the house to rest. Then the 1st accused asked for the deceased. The deceased had been sent somewhere by his father. When he came back he met the 1st accused and they went away together while he followed them from behind up to a football field. When the deceased and the 1st accused reached a kiosk of one called David, the 2nd accused who was called Naftali or David joined them. One called Martin met the three men at the kiosk and then left them there. The three men loaded a bag of maize from the kiosk onto a bicycle and went towards Machungwa. The bicycle belonged to the 2nd accused. On 21st February 2001 he received a report that the deceased was dead. He went to the scene and saw the body.

PC Japhet Nyongesa (PW14) stated in evidence that he was one of the investigating officers in the case. In 2001 he was stationed at Cherangani Police Station. On 21st February 2001 he received a report of a drowning at Sabwani river from an Assistant Chief called Francis Moroko together with members of the public. He booked the report in the OB and proceeded to the scene in the private vehicle in which the Assistant Chief came. At the scene he found that the body had already been retrieved from the river by police from Kitale Police station. The body was covered with a blanket and he could only see the legs. On 23rd February 2001 he accompanied the father of the deceased for post mortem examination at Mt. Elgon hospital. The post mortem doctor ruled out drowning as the cause of death. The doctor showed him a deep injury in the head.

Initially he investigated the case with CI Chemonge, his OCS at Cherangani Police Station. On 27th February 2001 the two accused persons were brought to the station by Kenya Police Reserve who had arrested them on instructions of CI Chemonge. On 12th March 2001 Cpl. Wanyama from Kitale Police Station took the two accused persons and the watch, which he had been given by CI Chemonge, to Kitale Police Station. He did not know whether the watch was identified by the deceased's wife (PW6) on 25th September 2003.

The evidence of Cpl. Tom Wanyama (PW15) was that on 8th March 2001 he was instructed from Kitale police station to proceed to Cherangani Police Station to team up with PC Nyongesa in the investigations.

He found that PC Nyongesa had arrested three suspects. He took over the investigations from PC Nyongesa who handed over the three suspects and a watch. He did not know whose watch it was and how it was recovered. PC Nyongesa also took him to the scene. He drew a further sketch plan from the one that had already been drawn by PC Nyongesa, though the further sketch plan did not bear a date or an indication as to who drew it. He heard that the deceased's wife had identified the watch after he was transferred to Lodwar. That was the prosecution evidence.

Each of the two accused persons gave sworn evidence. They also called two defence witnesses, who had initially been charged with them, but subsequently acquitted on no case to answer.

The 1st accused in his sworn statement of defence stated that he was a farmer at Ngenyek farm. He knew that he had been charged with the murder of James Kemei whom he knew as a friend. They were friends since 1973 when they were unmarried. The deceased married earlier than him. Their homes were about 3km apart.

On 20th February 2001 at 5pm he left his home and went to the road. He stood there and a friend of his David Chepkwony (the 2nd accused) came and joined him and they proceeded to Machungwa farm, which was about 2km away to take liquor. On the way they saw James Kemei the deceased following them from behind. They reduced speed and he caught up with them and they proceeded to Machungwa farm together. They first went to Mukinde's homestead where there were many people taking alcohol. The three of them sat together and ordered for drinks of chang'aa which they drank from the same mug. They stayed there for an hour and then the three of them proceeded to the house of Nasambu (PW3) where they bought one mug of "sira" chang'aa. The three of them were now drunk and they left after about 40 minutes. They parted with the deceased who went ahead towards his home as there were many foot paths. The deceased left him and the 2nd accused behind. The two stood for about 20 minutes then they followed the same path at about 6pm. The two of them however then went to the house of the sister-in-law of the 2nd accused called Lillian Nafula (PW10). He stood outside the house while the 2nd accused entered the house. It was at this time that Paul Oduor (PW5) came and asked him where the 2nd accused was and he told him that he was in the house. When the 2nd accused came out of the house he discussed with Oduor (PW5) about work in a farm and they agreed that they would meet the next day. Oduor (PW5) then went his way. Then he went with the 2nd accused who bought cigarettes and bread from the kiosk of Ekidor (PW4). The 2nd accused gave the loaf of bread to a girl. This was about 7.30 pm. They parted with the girl and then Zacharia Sang came. They stayed for a while then the three of them left and proceeded home. They crossed the river. After crossing the bridge they met Mathias Tanai and Elvas Kiprop. They walked together for a while then they met the main junction of the foot paths. At the junction Zachariah Sang took the right hand path and Mathias Tanai took the middle path. He continued walking with the 2nd accused and Elvas Kiprop. Further on, Elvas Kiprop and the 2nd accused went their way home and he proceeded to his home. That was about 8.00 pm. He was served with food and he slept. The next morning his wife came from the dairy and informed him that someone was in the water. He went there and found many people. He saw the body from a distance. The body was retrieved from where it was by the family of the deceased. After two weeks he went to the police station. There was an inquest before he was charged with this offence. He denied having gone to the home of the deceased on 19th February 2001 and 20th February 2001. His contention was that that was a story created by the family of the deceased. He denied being the owner of the watch that was identified in court by the wife of the deceased. He stated that all through his life, he had never disagreed with the deceased or the deceased's family. The 2nd accused in his sworn defence stated that he was a farmer at Ngonyek farm. He knew the deceased for about 7 years. On 20th February 2001 he left his home at about 3.00 pm and went to the road. He met the 1st accused and shortly thereafter the deceased appeared. The three of them proceeded together to Machungwa farm for a drink. They crossed the river Sabwami and went to Mukinde's home where he bought alcohol which they took together. The three were there for one hour and then they left together and went to Jane Nasambu's (PW3) home as her chang'aa was tougher than that at Mukinde's. There he also bought the drink and they were there for half an hour. He asked the 1st accused to go with him to his sister in-law's place. The sister-in-law was called Lillian (PW10). The deceased went his way from Nasambu's (PW3) residence. When he and the 1st accused reached Lillian's house he asked Lillian about a sick child. Lillian said that the child was not in bad condition. So he took an older child of Lillian called Maureen from the house and they joined the 1st accused at the gate who was now with Paul Oduor

(PW5). Oduor (PW5) asked for his money as he had worked on his farm, but he told him that they should discuss the issue the next morning. Oduor (PW5) then left and he together with the 1st accused and Maureen went to Ekidor's (PW4) kiosk where he bought cigarettes and bread. He gave the bread to the child and she left. Shortly thereafter Zachariah Sang came with his brother Murei and asked him for a bicycle. He told them that the bicycle was at home and that they should come the next day.

Then the four of them left Ekidor's (PW4) shop and went and crossed the river. They crossed over the bridge. After crossing the river they met Mathias Tanai and Elvas Kiprop. . They greeted these two people. It was at the main road and Zacharia Sang and his brother-in-law Murei left them and went their way. Then Tanai went on his way to his home. He went home and was served with food and slept.

The next day Zacharia Sang and Mureii came looking for the bicycle. He gave them the bicycle. Murei went with the bicycle but Zachariah Sang remained behind for a while. Then a man called Solomon came and told them that people had gathered at the river and that someone was in the river. He went and looked and saw that it was James. He saw that the body had a root rope round the neck. The body was held by the root and had to be pulled to come out. He further testified that when the deceased left them the previous evening he was drunk. The bridge was made of three wooden logs. The total width of the bridge was 1½ metres. The width of the river was about 5 metres. The logs forming the bridge had spaces in between. From the level of the bridge to the level of the water was about 4 to 5 metres. The river was deep and the water could carry away somebody. He did not have a bicycle when he met the deceased, as he had already taken the bicycle and maize to his mother. He had not quarreled with the deceased or the deceased's family. He denied killing the deceased.

The evidence of Zachariah Keino Sang (PW3) was that he was initially a co-accused with the two accused persons. He knew the deceased as well as the two accused persons. On 20th February 2001 at about 5pm together with his brother-in-law Murei he went to look for David Chepkwony (2nd accused), who had borrowed a bicycle from them to transport maize. The bicycle belonged to Murei. They went to look for the 2nd accused because it had reached evening and he had not returned the bicycle. They found the 2nd accused at the kiosk of one called Ekidor (PW4) The 2nd accused told them that the bicycle was at home so they left together to go home. They were four people. When they crossed the bridge of river Sabwani they met Mathias Tanai and Kiprop. The place had cross-paths and Willy (1st accused), the 2nd accused and Elvas Kiprop took the left junction. Mathias took the middle road. He himself and his brother-in-law Murei took the right hand road. The 1st and 2nd accused were moderately drunk at that time. He did not see the deceased with them and could not know whether he was with them before he met them.

In the morning he went to the 2nd accused's home with his brother-in-law. His brother-in-law Murei took the bicycle and went away. He remained with the 2nd accused and after a short while afterwards someone came and told them that there was someone in the river. They went there and shortly police came and removed the body. The head of the body was trapped by roots. The bridge was made of logs of timber and had spaces between them through which someone could fall into the river. Some people, including the 2nd accused's father had drowned in that river.

The evidence of Mathias Tanai (PW4) was that he was initially the 4th accused in the case. He knew both the accused persons as well as the deceased and their families, from 1973. On 20th February 2001 in the morning, he went to National Cereals Produce and Board (NCPB) Moi's Bridge to pursue sale of his maize. At 5pm he left to go to Maili Saba which was a place between Kitale and Moi's Bridge. He alighted from the transport vehicle and walked towards home. At about 7pm at Machungwa, he met Elvas Kiprop. They crossed the bridge of river Sabwami together. On the other side at a junction, they met Willy Ngetich the 1st accused, David the 2nd accused, Zachariah Sang and Murei. They greeted each other and parted ways. He took the middle path, while the 1st accused, the 2nd accused and Elvas took the left hand side path.

The next day he went again to the NCPB Moi's Bridge. At about 2pm he went to Maili Saba. That was where he learnt that the deceased had died. He did not see the deceased on 20th February 2001. He knew the young man Felix (PW7) who gave evidence in court, but he did not meet Felix (PW7) on 20th February 2001.

Both accused persons and their two witnesses gave sworn evidence and were cross-examined at length by the learned State Counsel for the prosecution. At the close of the case for the prosecution and the defence, the learned counsel for the defence and the prosecution made submissions. The contention of the learned counsel for the defence was that the prosecution had not proved its case against the accused persons beyond any reasonable doubt. On the other hand the learned State Counsel submitted that the prosecution had proved its case beyond reasonable doubt.

It is clear from the evidence on record that the case is based on circumstantial evidence. No one witnessed any of the two accused killing the deceased. However, there is no dispute that the deceased died on the night of 20th/21st February 2001. He was alive in the evening on 20th February 2001. He was found dead in river Sabwami in the morning of 21st February 2001. In a case depending exclusively on circumstantial evidence the court must, before deciding on conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt – (see Ibrahim Chacha Mwita –vs- Republic, Kisumu Criminal Appeal No.86 of 2004 – unreported), which followed the reasoning in the case of Simon Musoke –vs- R. [1958] EA 715. From the evidence on record it is clear that Wilson Kemei died. His body was found in the river Sabwani in the morning of 21st February 2001. The postmortem doctor (PW12) found that the cause of death was asphyxia due to strangulation by a rope. In the evening of 20th February 2001 the deceased was together with both accused persons drinking chang'aa firstly at Mukinde's residence and later at Jane Nasambu's (PW3) residence. Witnesses as well as both accused persons state as much. The case is based exclusively on circumstantial evidence because no one testified that he or she witnessed the accused or any of them killing the deceased.

In summary, the evidence for the prosecution was that the 1st accused went and talked to the deceased on 19th February 2001 at the deceased's home at Ngenyek farm. It was in the morning at about 8.00 am. He asked the deceased to go with him but the deceased refused. This was the evidence of three prosecution witnesses including the deceased's wife. These were (PW1) Esther Magut who was the mother of the deceased, (PW6) Anne Kimei who was the wife of the deceased and (PW13) John Misoi a cousin of the deceased. According to the deceased's wife the deceased was a close friend of the 1st accused. The 1st accused was in fact the first person to eat the deceased wife's food when they got married. On 19th February 2001 when the deceased refused to go out, the 1st accused went away. He however, came back on the next day late in the afternoon and again talked to the deceased. This time they went away together towards Machungwa. According to (PW13) John Misoi the 1st accused and the deceased went to a nearby kiosk. On the way they met the 2nd accused. At the kiosk they met the kiosk owner who was called David. Another person called Martin also met them at the kiosk and later left them there. The three, the 1st accused, the 2nd accused and the deceased together carried away a bag of maize from the kiosk on a bicycle towards Machungwa. Both the accused persons deny this story and claim that they met the deceased on the road before proceeding to Machungwa for a drink.

However, there is evidence that both the accused were with the deceased that evening of 20th February 2001 taking alcohol at Machungwa. (PW3) Nasambu testified to this. Both accused persons confirm this in their defence. They went to her home at about 6.30 pm and the 2nd accused bought "sira" or chang'aa then they left. Immediately thereafter at about 7.30 pm the 2nd accused went to the home of his sister-in-law called Lillian Nafula who was PW10. He enquired about a sick child and then took one of the children to a kiosk to buy her some bread. At around that time (PW5) Paul Oduor was looking for the 2nd accused. He met the 1st accused outside the home of (PW10) Lillian Nafula, who told him that the 2nd accused had gone to buy fish. Shortly thereafter the 2nd accused came with two children. They talked about the debt that the 2nd accused owed Oduor (PW5). The deceased was not there at that time. Then Oduor (PW5) left. They later went to the kiosk of (PW4) John Ekidor. The 2nd accused bought cigarettes and bread. Earlier, around 7.00 pm (PW7) Felix Kipchirchir a young man went to sell milk at Machungwa. He met the deceased. He then met some other three people with one of them telling him to get lost. He did not recognize the three people, including the one who told him to get lost.

That was the evidence as far as the companionship between the two accused and the deceased is concerned in the evening of 20th February 2001. The next day the deceased's body was found in the river. The post mortem carried out by (PW12) Dr. Nancy Kegode showed that the deceased died of

asphyxia due to strangulation by a rope.

Now, is there adequate evidence to establish that the two accused persons killed the deceased? The evidence, including the sworn testimony of the two accused persons was that the two accused persons were the last people to be seen with the deceased alive. They were last seen at (PW3) Nasambu's house together. It was about 6.30 pm. They left immediately thereafter. The next place that both accused persons were seen, was at the home of (PW10) Lilian Nafula. It was about 7.30 pm. The deceased was not with them. His body was found in the river Sabwami the next morning. The defence of the accused persons was that they were with the deceased at Nasambu's (PW3) house. They stated that he went on his way and they stood on the road for about 20 minutes, and then went to the house of (PW10) Lilian Nafula who was the sister-in-law of the 2nd accused. A young man called Felix (PW7) stated that he met the deceased at about 7.00 pm. He also shortly thereafter met three other people one, of whom told him to get lost. He did not recognize any of them. He did not state that the deceased was with anybody else, when he saw him. He did not state that any of those people were doing anything unusual.

This is a case based on circumstantial evidence. Considering the evidence on record, is there evidence pointing irresistibly to the two accused as the people who killed the deceased? In my view the evidence that the deceased was together with the two accused persons, and that they were the last persons seen with the him alive, creates strong suspicion. However, suspicion however strong, is not enough to found a conviction on circumstantial evidence. The Court of Appeal in the case of Kariuki Karanja –vs- R. 1986 KLR 190 at page 193 held as follows – “Secondly circumstantial evidence, to sustain a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence, an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable explanation than that of guilt. The burden of proving facts which justify drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts.”

It follows from the above that the prosecution must bring out in evidence the facts and circumstances that would point irresistibly to the accused as the people who killed the deceased. The prosecution in our particular case, has not brought out any evidence of a quarrel or grudge between the families. No evidence of any quarrel or grudge between any of the accused person and the deceased. There is no evidence that the accused were seen together with the deceased after Nasambu's (PW3) house. In fact, the evidence of Felix (PW7) was that he saw the deceased alone and recognized him at around 7.00 pm. There is also no evidence to connect any of the accused persons with the strangulation of the deceased by rope. There is no evidence to connect any of them with the dumping the deceased's body in the river. There could be a possibility that somebody else or some other people killed the deceased and dumped him in the river.

Additionally, the police officers from Kitale police station who were said to have recovered the body never came to testify. One of the Investigating Officers Cpl. Nyongesa stated that the deceased had an injury on the head, which contradicted the doctor's report. There was also a watch which was mentioned as belonging to the first accused, but all those who were called to testify did not appear to know where the watch came from. The wife of the deceased stated that she recorded a second statement with the police on the watch in September 2003. Cpl. Nyongesa said that the watch was handed over to him on 20th March 2001 without any information as to where and by whom it was found. This made the police evidence highly unreliable. No single exhibit was produced and no single incident was shown that connects any of the accused persons to the death of the deceased. It is unfortunate that the deceased died the way he died. However, to found a conviction, there has to be sufficient evidence as required by law. The prosecution in this case has not discharged its burden of proving that the accused killed the deceased, beyond reasonable doubt. They have fallen short of what is required to establish a case against an accused person based on circumstantial evidence. I therefore find that the prosecution has not proved its case against any of the accused persons. For the above reasons I have no option but to find that the prosecution has not proved the case against the accused beyond reasonable doubt. Consequently, I find both accused persons not guilty of the offence as charged and acquit them accordingly.

**Dated and Delivered at Kitale this 13th Day of May 2005**

**George Dulu**

**Ag. Judge**

**In the Presence of: Mrs. Mutuku for State**

**Mr. Barongo for both accused.**