



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE 1 OF 2003

IBRAHIM KIBIAMA SISIWA 1ST ACCUSED

EDWARD KIPNGETICH KOECH 2ND ACCUSED

-VERSUS-

REPUBLIC PROSECUTOR

JUDGEMENT

The two accused persons Ibrahim Kibiama Sisiwa (whom I shall also refer to as 1st accused) and Edward Kipngetch Koech (whom I shall also refer to as 2nd accused) have been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63). The particulars of the charge are that on the 9th day of October 2001 at Nandi Hills Township in Nandi District of the Rift Valley Province, with others not before court murdered Noor Mwangi (the deceased).

The prosecution called 11 witnesses in support of its case. In summary the evidence of Jackline Wanjiru Chege (PW1), who is also described as Shiro, is that on 9th October 2001 at about 9.30 pm she was at her place of work at Kapchorwa Wines and Spirits bar in Nandi Hills town. She was a pool

attendant and there were a few customers in the bar. Some of the customers in the bar were Kibiama (1st accused), Koech (2nd accused) and two turn-boys. She was drinking with them some canned beer, but she did not get drunk.

A young man with whom she used to work together, that is, Noor Mwangi (the deceased) came and sat near her. He was already drunk when he came to the bar. He sat down and did not say anything. The owner of the bar (Toroitich) who was (PW6) asked Noor Mwangi (the deceased) whether he should be served with drinks. He did not respond and the owner of the bar told him to go to bed.

Then 1st accused dragged Noor Mwangi (the deceased) outside to the road and started beating him.

The other people who were with the 1st accused remained in the bar. Then Toroitich (PW6) who was the owner of the bar asked her to go away as he intended to close the business. When she went out of the bar, she saw Noor Mwangi (the deceased) lying down while the 1st accused was beating him with fists. The other people in the bar followed her outside. She did not get involved in the matter and left and went to sleep. Before she left to go to sleep a person called Mureithi (PW4) went and tried to separate the 1st accused and Noor Mwangi (the deceased) He was fought by Kibiama (1st accused).

The next morning, she met a brother of the Noor Mwangi (the deceased) called Rajab (PW2). He asked her to tell him what had happened to his brother Noor Mwangi (the deceased), the previous night, as his brother was now in hospital. He told her that she was required to record a statement with the police which she recorded on 10th October 2001. She recorded a second statement with the police after Noor Mwangi (the deceased) died.

She was able to see and recognize the 1st accused beating the deceased at night, because there was electricity light outside the bar (Kapchorwa Wines and Spirits bar). The place was open. She witnessed the beating from a distance of about 5 metres away. She did not hear any screams and did not see any other person beating the deceased.

In cross-examination she stated that by that day of the incident, she had worked at the bar for three weeks. She was employed after the deceased Noor Mwangi (the deceased) was employed. The deceased was a pool attendant. The deceased was not her lover nor was Koech (2nd accused). She had only taken two cans of beer on that day. She was not saying lies nor was she contradicting what she had said in the police statement and also before Justice Omondi Tunya. She did not see the deceased at the bar 9 days after the assault, as she was on maternity leave. She stated that the 1st accused slapped the deceased in the bar, before dragging him outside.

The evidence of Rajab Kibet Keitani (PW2) was that he was the brother of Noor Mwangi (the deceased). On 9th October 2001 at about 10.45 pm he came from a walk and passed near Kunjo bar at Nandi Hills town. He met Otieno Odinga and Patrick Ochieng who informed him that his brother Noor Mwangi (the deceased) was not well. Noor Mwangi (the deceased) was with them. Together they supported him and took him home to bed. At that time Noor Mwangi (the deceased) was not able to talk. They told him that they had picked Noor Mwangi (the deceased) from Kapchorwa Wines and Spirits bar.

When they laid him on a bed at home, he noticed that the shirt of Noor Mwangi (the deceased) was torn and he was bleeding. He then proceeded to Kapchorwa Wines and Spirits bar where he met the bar owner Joseph Toroitich (PW6) standing outside the door of the bar. There were also five youngsters standing near the vehicle of the 1st accused. He knew one of them as a turn-boy, but did not know him by name.

He enquired from Joseph Toroitich (PW6) as to what had happened to Noor Mwangi (the deceased). He said that he did not know. He then went home and found that Noor Mwangi (the deceased) was bleeding from the ears. Then he woke up a neighbour called Maina Njoroje and together they took Noor Mwangi (the deceased) to Nandi Hills District Hospital. They found a nurse who attended to him but he was not talking. They remained at the hospital until morning. At about 6.30 am on 10th October 2001 Noor Mwangi (the deceased) gained consciousness. He told him that he could remember that it was Kibiama (1st accused) and his people who assaulted him. This was before the father of Noor Mwangi (the deceased) was informed about the incident. He then went and informed his father, who later went to the hospital.

He took breakfast from home to the hospital for Noor Mwangi (the deceased). He met his father at the hospital, but at that time Noor Mwangi (the deceased) was sleeping. He went again to Kapchorwa Wines and Spirits bar to try and get some details. At the bar he met Mureithi (PW4)

who told him that Noor Mwangi (the deceased) was beaten the previous night by Kibiama (1st accused). He informed him that Kibiama (1st accused) even beat him (Mureithi) when he tried to separate them. Mureithi (PW4) also informed him that PW1 (Jackline Wanjiru) was present during the assault.

He went his way but later met a cousin of Kibiama (1st accused) called Mustafa. He told Mustafa that Kibiama (1st accused) had assaulted Noor Mwangi (the deceased). The said cousin of Kibiama (1st accused) got surprised. They went together to see Noor Mwangi (the deceased) in hospital. He went again to Kapchorwa Wines and Spirits bar to look for Jackline Wanjiru (PW1). When she came, she explained to him that Noor Mwangi (the deceased) had come to the bar and sat near the pool machine without talking. Then there was a commotion between the 1st accused and Noor Mwangi (the deceased) and, in the process, the 1st accused slapped Noor Mwangi (the deceased) and dragged him out of the bar.

He went away to look for Edward (2nd accused). When he met Edward (2nd accused) he told him that he witnessed Kibiama (1st accused) slap Noor Mwangi (the deceased). Edward (2nd accused) also informed him that the cause of the fight was that Kibiama (1st accused) alleged that Noor Mwangi (the deceased) wanted to steal his vehicle keys. He later gave this information to his father.

He could remember that on 6th October 2001 Kibiama (1st accused) had slapped Noor Mwangi (the deceased) under the same pretext of vehicle keys, though Noor Mwangi (the deceased) did not have the vehicle keys which were with a conductor of Kibiama (1st accused).

He took care of Noor Mwangi (the deceased) in hospital up to 16th October 2001 when he was transferred to the Eldoret Memorial Hospital. Then on 20th October 2001 the deceased was transferred to Eldoret hospital and was admitted in the intensive care unit (ICU) for two weeks. He was then transferred to the male ward where he died on 22nd November 2001.

He looked for Edward Koech (2nd accused) because when he went to Kapchorwa Wines and Spirits bar on the night that Noor Mwangi (the deceased) was assaulted, he saw him on the road near the bar though they did not talk.

In cross-examination this witness admitted that he was in court when Jackline Wanjiru (PW1) gave evidence. He was also outside the court room when Joseph Toroitich (PW6) gave evidence before Justice Omondi Tunya and heard what he said. Though he recorded a statement with the police, he agreed that that statement was recorded after he heard the witnesses testify in court. He also heard his father (PW3) testify before Justice Omondi Tunya.

He stated that there was no time that Noor Mwangi (the deceased) was discharged from hospital. He testified that Noor Mwangi (the deceased) recorded a statement with the police at the police station in the presence of the doctor on 15th October 2001.

The evidence of Noor Mwangi Karaya (PW3) was that he was the father of Noor Mwangi (the deceased). He worked as a laundry man. On 10th October 2001 at 7.00 am, he was at his place of work pressing clothes, when his son Rajab (PW2) came and informed him that the deceased had been beaten and was in hospital. He closed his business and went to the hospital. He asked the deceased Noor Mwangi what had happened. The deceased told him that he had been beaten by Kibiama (1st accused), Edward Koech (2nd accused) and turn-boys of Kibiama (1st accused), for a reason he did not know.

He saw blood oozing from the ear of the deceased. The doctor advised that he should be taken for ear nose and throat (ENT) examination to establish where the blood was coming from. Rajab Kibet (PW2) took the deceased in a hired vehicle for ENT examination on 12th October 2001. He was given medicine and taken back to Nandi Hills Hospital. However, he started complaining of

severe headache and they took him for head scanning examination at Nandi Hills Hospital.

Edward (2nd accused) came to his place of work on 10th October 2001 and informed him that Kibiama (1st accused) assaulted the deceased Noor Mwangi and hit him on the head. On getting the information that his son Noor Mwangi (the deceased) was assaulted, he made a report to the police. The police told him that it was for the injured person to make the report. Therefore he went and got a vehicle and took the deceased Noor Mwangi to the police station to record a statement. The deceased could not walk, but made the statement. Kibiama (1st accused) was arrested but later released. The deceased Noor Mwangi was later transferred to Moi Memorial hospital where a neuro surgeon said that he had a clot in the head and operated on him. At that time, the deceased was in a coma. After the operation, the deceased did not gain consciousness and was transferred to Eldoret Hospital for intensive care. He was on life support machine for one week and did not improve. He was removed from the life support machine and put on bed rest in the same hospital. He was treated until 22nd November 2001 when he died during the night. He reported the death to the OCPD and then Kibiama (1st accused) was arrested. However, Edward (2nd accused) escaped.

He testified that the deceased repeated the names of the people who assaulted him twice. In both instances he mentioned Kibiama (1st accused) and Edward (2nd accused). He knew both of them for about 30 years. Edward (2nd accused) was arrested afterwards, which was after a period of one year. He did not know the names of Kibiama (1st accused's) turn-boys who were involved in the assault. They were sacked by Kibiama (1st accused) and did not come home.

In cross-examination he stated that the deceased was not discharged from hospital at any time after admission. He was only released for him to take the deceased to the police station to record a statement. He stated that he was not the one who took the deceased to go and record a statement with the police. He did not know that after 9th October 2001, his children went and fought. He knew that the deceased used to take alcohol. On 9th October 2001 the deceased left home after supper. He did not know that the deceased went to play pool after being released from the hospital. He did not have exhibits in court to prove the deceased's attendances in hospital. He knew Edward (2nd accused) for 10 years as a farm manager at Nandi Hills. He did not know that Edward (2nd accused) was a security officer. Edward (2nd accused) had indicated that he was willing to be a witness, however, he later disappeared from his house. He denied framing Edward (2nd accused) because he refused to be a witness.

The evidence of Stephen Mureithi (PW4) was that on 9th October 2001 at 10.30 pm he was at Kapchorwa Wines and Spirits bar in Nandi Hills town. In the bar there were many people including Kibiama (1st accused), Koech (2nd accused), Jackline Wanjiru (PW1) and Noor Mwangi (the deceased) together with others he did not know. He had known the people whose names he mentioned before.

He was sitting on a form drinking Amario's Sherry. As he was drinking Noor Mwangi (the deceased) and Kibiama (1st accused) started quarreling and he intervened. Then Noor Mwangi (the deceased) left the bar. Noor Mwangi (the deceased) was a bit drunk. When Noor Mwangi (the deceased) left the bar, Kibiama (1st accused) sat down and continued to take alcohol. After a while Noor Mwangi (the deceased) came back with his shirt tied to the waist. Two people whom he did not know pulled Noor Mwangi (the deceased) out of the bar. Those two people did not appear to be together with Kibiama (1st accused).

He followed those two people outside and saw Noor Mwangi (the deceased) lying down. Those two people also hit him and he went home without coming into the bar again. While at home, he heard that Noor Mwangi (the deceased) was in hospital. He visited Noor Mwangi (the deceased) at Nandi District hospital.

He could not remember whether there was moonlight during that night. The two accused persons did not come out of the bar to where Noor Mwangi (the deceased) was lying outside the bar. He did not know whether the two people who pulled Noor Mwangi (the deceased) outside the bar had any relationship with any of the two accused persons.

He met Noor Mwangi (the deceased) again after that incident. He saw him walking in town. He however did not go again to the bar and did not know whether Noor Mwangi (the deceased) went to the bar again to play pool.

The evidence of Virginia Wanjiru (PW5) was that she was the wife of the owner of Kapchorwa Wines & Spirits bar, which is currently called Friends Corner bar.

On 9th October 2001 at about 11.00 p.m. she took the radio from the bar to the house which was nearby. She heard screams and came out to see what was happening. Outside the bar, there was security light from an electric bulb. She found two young men beating Mureithi (PW4). They were beating him with fists. At that place, Kibiama (1st accused), Edward (2nd accused), Jackline Wanjiru (PW1) and Toroitich (PW6) were present, but standing. She tried to tell the two young men who were beating Mureithi (PW4) to stop, but they pushed her away. She was pregnant and Toroitich (PW6), her husband cautioned her. The deceased Noor Mwangi (the deceased) was lying on the ground at a distance alone. Then Mureithi (PW4) ran away.

She was told later by her husband that the two young men who beat Mureithi (PW4) were Kibiama (1st accused)'s turn-boys. In the bar, before she took the radio to the house, Kibiama (1st accused), Edward (2nd accused) and Jackline Wanjiru (PW1) took alcohol. Noor Mwangi (the deceased) was also in the bar. Kibiama (1st accused) (1st accused) was sitting together with the two people who beat Mureithi (PW4). Jackline Wanjiru (PW1) was sitting on the other side of the counter with Koech (2nd accused) (2nd accused). Noor Mwangi (the deceased) was sitting on a bench alone.

At the bar, on that day, there was a watchman who was on duty. On the next day 10th October 2001 she heard that Noor Mwangi (the deceased) was in hospital. After two to three days she saw him again at the bar, when he came to play pool game.

The watchman at the bar was outside, when she left to go to the house to take the radio there. However, when she came out from the house on hearing screams, the watchman was not outside the bar. That day, Edward the (2nd accused), bought Noor Mwangi (the deceased) a drink during the day.

The evidence of Joseph Kipkemoi Toroitich (PW6) was that he was the owner of Kapchorwa Wines and Spirits bar, Nandi Hills town, which was later named Friends Corner bar. On the night of 9th October 2001 he was selling drinks at the bar assisted by his wife Virginia (PW5). The waiter Jackline Wanjiru (PW1) got drunk early.

There were a number of people in the bar. On the left of the counter were sitting two young men who were drinking. He used to see them earlier at Nandi Hills town bus stage. He did not know them by names, but was informed later by members of the public that those two young men were turn-boys of Kibiama (1st accused). On the right hand of the counter were sitting Koech (2nd accused) and Jackline Wanjiru (PW1). There was also a Mr. Rono who was playing pool game. Mureithi (PW4) was seated on a bench. Kibiama (1st accused) was also present in the bar.

At about 11.00 p.m. his wife Virginia (PW5), took the radio to their house which was about 30 metres away. At that time Noor Mwangi (the deceased) came into the bar. He said that he wanted to play pool with the winner of the pool game between Rono and Kibiama (1st accused). Rono won the game but refused to play because he was late. Kibiama (1st accused) and Noor Mwangi (the deceased) did not play and they exchanged harsh words. Mureithi (PW4) told them to stop

quarreling.

He went to collect beer glasses from the open part of the bar. When he came into the bar he found the two young men pushing Noor Mwangi (the deceased) out of the bar. They pushed him roughly. Mureithi (PW4) and Kibiama (1st accused) (1st accused) followed them outside. Mureithi (PW4) went out first and Kibiama (1st accused) (1st accused) followed later.

He went to the counter and as he was depositing the beer glasses he heard shouts from outside the bar in Swahili – “don’t kill a son of other people”. He got surprised. When he went outside, he saw Noor Mwangi (the deceased) lying on the ground. He touched him and asked him what was wrong. Noor Mwangi (the deceased) said he was alright, but was drunk.

There was a garage about 9 metres away where Mureithi (PW4) was being beaten by the two young men together with Kibiama (1st accused). He went and asked them why they were beating Mureithi (PW4) and Kibiama (1st accused) argued for a while and stopped beating Mureithi (PW4). However, the two young men continued beating Mureithi (PW4). His wife came shortly thereafter and tried to intervene. He witnessed this through the security light. There was also some moonlight.

People came to the scene of the fight and Mureithi (PW4) ran away. Noor Mwangi (the deceased) was taken away home by two young men. He believed that the two young men who beat Mureithi (PW4) boarded Kibiama (1st accused’s) matatu together with Kibiama (1st accused) and went away.

He had employed a watchman at the bar called Shatsima, who was on duty that day. When the fight was going on, he was present. That watchman did not record a statement with the police, though he worked for him for another month after that day. He also used to see him in Nandi Hills town.

During the fight Koech (2nd accused) and Jackline Wanjiru (PW1) were in the bar. However, he saw them outside after the fight. He had employed both the deceased Noor Mwangi (the deceased) and Jackline Wanjiru (PW1) at his bar. The deceased and Jackline Wanjiru (PW1) had a cordial working relationship. He did not know the relationship between Jackline Wanjiru (PW1) and Koech (2nd accused) though on that day they started drinking at 10.00 am.

He saw Noor Mwangi (the deceased) again about two days after the day of the fight. Noor Mwangi (the deceased) appeared to be fine. He came to the bar to play pool game.

In cross-examination, he stated that he could not remember the actual members of the public who told him that those two young men were turn-boys of Kibiama (1st accused). He did not witness anybody beat the deceased.

The evidence of Prof. S. Kozlova (PW7) was that she was a doctor and the head of Faculty of Health Science (Forensic Medicine) at Moi University.

On 28th November 2001 she conducted a post mortem examination on Noor Mwangi (the deceased). She found the cause of death to be due to blunt trauma of the head and chest. There was haemorrhage in the brain tissue and laceration of the brain. The deceased also had several fractures of the ribs, that is the 6th, 7th and 8th ribs. He had bronchus pneumonia. There was part healing of some injuries, therefore it tied up with the time of the alleged assault. The injuries were about one to two months old as at the date of the post mortem examination. With the injuries suffered in the brain, the accused could not survive. However, the injuries were such that, after they were suffered one could possibly become conscious and walk for a while, before succumbing to them. She produced the post mortem form as exhibit No.4. She could not state for certain whether it was possible for the deceased to have recorded a police statement on 15th October 2001 after

sustaining the injuries.

The evidence of PW8 Geoffrey Kipkemboi Mutai was that on 9th October 2001 at about 11.00 pm he was at Kunjo bar with Noor Mwangi (the deceased). Kunjo bar was in Nandi Hills town. He was taking alcohol (Amarios) together with Noor Mwangi (the deceased). Edward Koech (2nd accused) and Wanjiru (PW1) came in. Ciro (PW1) came to their table and hugged Noor Mwangi (the deceased). This did not please the 2nd accused who approached Noor Mwangi (the deceased) Mwangi for a fight. He however, restrained them. Later Ciro (PW1) and Edward left the bar. Then some two friends of Noor Mwangi (the deceased) called Katumo and Simon came in and then they left the bar together with Noor Mwangi (the deceased).

He finished his drink alone and went home. On the next day that is 10th October 2001 he met Mureithi (PW4) who informed him that he had been beaten the previous night together with Noor Mwangi (the deceased). He said that as he was drunk he could not remember the identities of the people who beat him.

He went to Nandi District Hospital the same day 10th October 2001 to see Noor Mwangi (the deceased). He was asleep and they did not talk. On 12th October 2001 Noor Mwangi (the deceased) was at home. He complained of a headache. He went with Noor Mwangi (the deceased) to the police and recorded a statement at Nandi Hills police station. He had known both Edward (2nd accused) and Ciro (PW1) before. Mureithi (PW4) had told him that they were beaten near Friends Corner bar, which used to be called Kapchorwa bar.

In cross-examination he stated that he recorded a statement with the police on 12th October 2001. After recording the statement Noor Mwangi (the deceased) went home. He was not aware that Noor Mwangi (the deceased) and his brothers fought anytime as from 12th October 2001. He denied being bribed to come to court and testify.

In cross-examination he stated that though he saw Koech (2nd accused) in the bar, he did not know him by name.

The evidence of Dr. Geoffrey Kirwa Arap Kirongo (PW9) was that he was a specialist neuro surgeon and a lecturer at Moi University and had taught and practiced since 2001. He was attached to Moi Referral and Teaching Hospital, which was the teaching hospital at Moi University.

He treated Noor Mwangi (the deceased) at Uasin Gishu Memorial Hospital on 16th October 2001 after being consulted by that hospital. He found the patient in the male ward. He was fully conscious and complained of headache. He reviewed the CT scan that had already been taken. He examined the head and noticed some swelling at the back. There were no bruises on the face and the neurological state was normal. The CT scan however showed clots over the left side of the brain. It also showed some primary brain damage on the left parietal lobe. Primary damage meant damage that was sustained at the time of assault. Neurosurgeons could do nothing about primary damage, but could prevent secondary damage to the brain.

He planned to manage the patient by giving him pain killers and observation. He did not consider that the small blood clots on the brain needed urgent attention, as they could resolve spontaneously.

On the 19th October 2001 he was informed that the pressure of the patient in the brain was raised. They attempted a fresh CT scan that night but were not successful. They obtained the scan first thing in the morning. In the morning the patient was unconscious. The CT scan was done urgently at Eldoret Hospital. It showed that blood had liquefied and increased in volume in the brain. They immediately took the patient to the theatre and evacuated blood clots. However, he did not reverse well.

The patient was then put in an ICU for assisted ventilation. He did not come out of the coma. He however became able to breath on his own and was removed from ICU, but died after two weeks.

He produced several exhibits showing the record of examination and treatment of the deceased. Exhibit 2 was a letter dated 24th October 2001. The P3 form dated 6th November 2001 was produced as exhibit 3. The injuries were classified as grievous harm. The various scans were produced as exhibits.

The scan of 17th October 2001 was produced as exhibit 4(a). It showed a small subdural haematoma and primary brain damage. In his opinion that type of injury must have been caused by a heavy blow, because at 19 years of age the brain was full in the skull. If it was caused by a fall, it must have been a fall from a height.

The CT scan of 20th October 2001 was produced as exhibit 4(b). It showed that the blood clot had liquefied and led him to evacuate the blood.

The scan of 24th October 2001 showed that actual clots had been removed. However, on various parts of the brain it showed brain parts which had died off. It was produced as exhibit 4(c).

The CT scan dated 12th November 2001 was produced as exhibit 4(d). It showed no signs of clots, but showed signs of dead brain tissue. He only examined the head and not the other parts of the body. In his view, with the head injuries sustained, it was possible for the deceased to have walked after sustaining the said injuries.

He was aware of another P3 form that was filled by a Dr. Chumba earlier. That doctor could have been one of the primary doctors.

In cross-examination he stated that he was not informed that the deceased had taken alcohol. He reiterated that a mere fall by the deceased would not have caused the type of brain injury that he found, unless the deceased was running fast, or he fell from a flight. On 16th October 2001 the deceased was conscious and could go to the toilet. He stated that it was possible that the injury in the brain could have been caused by a fist blow.

The evidence of PW10 PC. Hilary Kimutai was that he was a police officer. On 28th November 2001 he witnessed the postmortem on the late Noor Mwangi (the deceased) carried out by Dr. Kozlova. It was at Eldoret Hospital and he was in the company of the parents and friends of the deceased. He saw fractures on the ribs when the body of the deceased was opened.

The evidence of PC. Okoth Oluta (PW11) was that he was the co-investigating officer with the late Cpl. Muhanji. On 10th October 2001 he was attached to Nandi Hills police station. He saw a report in the occurrence book about Noor Mwangi (the deceased), which was minuted to his attention by the late Cpl. Muhanji. It was an assault report. He proceeded to Nandi Hills District Hospital where they found the deceased admitted. They could not speak to the deceased, so they left a message that he should go to the police station once he was discharged from hospital.

He later got a report from the late Cpl. Muhanji that the deceased had recorded a statement and a P3 form had been issued. From the statement the deceased stated that he had been assaulted by Kibiama (1st accused), Koech (2nd accused) and others whom he could not identify. On 16th October 2001 himself, Cpl. Muhanji and PC. Ileri arrested Kibiama (1st accused). The said Kibiama (1st accused) was later released by the OCS. He did not manage to arrest Koech (2nd accused) though he went to his home. From information received, Koech (2nd accused) had ran away. When the deceased later died, he arrested Kibiama (1st accused) again for murder. Koech (2nd accused) was later arrested at Voi.

The statement of the deceased was recorded by Cpl. Muhanji on 15th October 2001. He was familiar with the handwriting and signature of Cpl. Muhanji who had since died. He produced the statement, which was read in court, as exhibit 5.

The deceased was initially issued with a P3 form completed by Dr. Chumba. The doctor was at Nairobi and could not come to court without undue delay. Therefore, the P3 form was produced as exhibit 6 by this witness in accordance with section 77 of the Evidence Act (Cap.80). According to the P3 form, Dr. Chumba found injuries in the head, but not any other part of the body.

He was the co-investigating officer but recorded his statement on 4th January 2004. Initially only Cpl. Muhanji had recorded a statement, as was the practice. He was not in the list of witnesses per the list of witnesses in the information that was signed by the Attorney-General. That was the prosecution case.

The two accused in their defences elected to give sworn testimonies and called no witnesses. Ibrahim Kibiama Sisiwa (1st accused) testified under oath that he was a businessman at Nandi Hills town. He knew Noor Mwangi (the deceased) as well as the father of the deceased. He used to operate a matatu business with a driver. He did not have a turn-boy or conductor for the matatu as alleged by some witnesses.

On 9th October 2001 at 8.00 pm he went to Kapchorwa Wines and Spirits bar with one, Yusuf Bor his friend. Before entering the bar he met people standing at the door. They were about 6 people. In the bar there were other people. He did not know the people that were standing outside the bar. One of those people, complained that one of them was interfering with a woman who was with them. They tried to involve him but he refused.

He went inside the bar with Bor, sat down and ordered a drink. Then those people who were outside came into the bar, stood near the pool table and started shouting. As the woman who was controlling the pool table appeared to be drunk and unable to control them, the owner of the bar came and told them to stop fighting and closed the pool table. The woman who was controlling the pool table was PW1.

Then one of the pool players went and pleaded with the bar owner who opened the pool table. However, those people did not appear to play, and they shortly walked out.

A person called Chemosi came and the 1st accused played pool with him. Also Rono came and played pool with the 1st accused as he had won the game against Chemosi. As they were playing pool the group that had made noise earlier came inside the bar. Shortly thereafter Noor Mwangi (the deceased) followed them into the bar. They sat on the counter and Noor Mwangi (the deceased) sat on a bench. When Rono left after the pool game, the 1st accused went and sat at the counter and continued to take his drink.

The owner of the bar known as Toroitich (PW6) asked Noor Mwangi (the deceased) whether he wanted to take a drink. He did not respond. Then the group which was sitting with PW1 Jackline Wanjiru said that Noor Mwangi (the deceased) was the young man who had followed them from the other bar and they did not know why. Then Noor Mwangi (the deceased) moved from where he was sitting and went to sit near where PW1 was sitting. Before he reached there, he was pushed outside by that group and as he was drunk and could not support himself, he fell down outside the bar.

A customer in the bar, whom he later came to know as Mureithi (PW4) rose and went as if to assist. The owner of the bar, on hearing the noise, came and told them not to fight. At that time PW1 was at the counter. On seeing the scuffle the 1st accused followed outside. He saw the owner of the bar stop those people from fighting. At that time Noor Mwangi (the deceased), was lying down near the door of the bar. Then the owner of the bar came into the bar and said that

everybody should finish their drinks and go. It was about 11.00 pm. The 1st accused went inside and finished his drink and moved to Kunjo bar. The 1st accused met a friend there and had a drink for about 50 minutes, before going home.

He denied assaulting or quarreling with the deceased. He did not see the deceased again. On 16th October 2001 he came from his matatu work at Kisumu. At 9.00 pm police came and told him that he was required by the OCS. They escorted him to the police station. He was put in the cells and later charged with assaulting Noor Mwangi (the deceased), with others not before court. He denied the charge and was released on bond. Later, after the deceased died, he was re-arrested and charged with murder.

In cross-examination he denied knowing Koech (2nd accused), before he met him in custody. He could not confirm whether Koech (2nd accused) was at Kapchorwa Wines and Spirits bar on 9th October 2001. He had no disagreement with any member of the family of the deceased. He admitted that he had lost vehicle keys and asked for them in the bar in the presence of Noor Mwangi (the deceased), but denied that he quarreled or asked for the keys from the deceased. He did not know why PW6 stated that he quarreled with Noor Mwangi (the deceased). PW6 must have been lying. He did not know why Noor Mwangi (the deceased) also recorded a statement that he assaulted him. He denied having turn-boys or sacking them after the incident. He stated that he did not know that Koech (2nd accused) went and reported to the father of the deceased that he had assaulted the deceased. Though he knew Noor Mwangi (the deceased) and his father very well, he did not go to inform Noor Mwangi Karaya the deceased's father about the assault, and that failure to report was not surprising. He did not go to visit Noor Mwangi (the deceased) in hospital as he did not know that Noor Mwangi (the deceased) was hospitalized. He did not call Bor, Chemosi and Rono as witnesses because they were not present during the alleged incident.

The sworn defence of Edward Koech (2nd accused) was that on 9th October 2001 at 7.00 pm he was at Kapchorwa Wines and Spirits bar at Nandi Hills town taking drinks. He was sitting alone. Kibiama (1st accused) was also there, but they did not sit together, Mureithi (PW4) Toroitich (PW6) Virginia Wanjiru (PW5) and pool attendant Ciro (PW1) were also present.

Noor Mwangi (the deceased) came into the bar after 9.00 pm. He knew Noor Mwangi (the deceased) and his family well. In fact Noor Mwangi (the deceased) was like his younger brother. Noor Mwangi (the deceased) came into the bar alone and sat on a bench next to the wall. Mureithi (PW4) was also sitting on the same bench. Shortly thereafter, five people came from outside and went to the counter. They started quarreling among themselves. Noor Mwangi (the deceased) walked outside and shortly came back the bar alone. He proceeded to the counter where the five people were. In the meantime Mureithi (PW4) left the bench and came and sat with Koech (2nd accused). Then the five people and Noor Mwangi (the deceased) started quarreling and then moved out. Ciro (PW1) followed them and Mureithi (PW4) followed. Toroitich (PW6) also followed them.

Koech (2nd accused) walked out later. When he went out he saw Mureithi (PW4) about 200 metres from Kapchorwa Wines and Spirits bar with Toroitich (PW6) and two other people whom he did not know. The deceased was not present. The owner of the bar Toroitich (PW6) said that he wanted to close the bar, and he came out and went to sleep.

On 10th October 2001 he was informed by a friend that Noor Mwangi (the deceased) was in hospital after being beaten at night by some people. He visited him in hospital the same day but found him asleep. On 11th October 2001 he met Noor Mwangi (the deceased) at Kapchorwa Wines and Spirits bar. On 18th October 2001 he went to the Nairobi headquarters of his company Setrite International, whose branch at Nandi Hills was called Alora Flowers. He returned to Nandi Hills on 6th November 2001 to hand over as he had got a job with Kenya Pipeline Company Limited. He then joined Kenya Pipeline Company Limited and was sent on training from December 2001 to March 2002.

He was posted to Mombasa and later in May 2002 he was posted to Maungu in Voi. He worked until 27th September 2002 when he was arrested by CID officers from Nairobi. He did not record a statement with the police, but was charged with the offence of murder in November 2002.

He denied being involved in the death of the deceased. The deceased must have been lying by associating him with deceased's assault. He knew the 1st accused as a person who worked at a petrol station. They did not sit together at Kapchorwa Wines and Spirit bar on 9th October 2001. He denied committing the offence.

In cross-examination he denied being a lover of Ciro (PW1). He stated that he used to come for work at Nandi Hills from time to time for one or two days. He did not know that Kibiama (1st accused) had a matatu business. He reiterated that he saw the people walk out with the deceased and not pushing him as stated by the 1st accused. He did not see Kibiama (1st accused) quarrel with the deceased. He stated that the father of Noor Mwangi (the deceased) lied when he testified that he Koech (2nd accused) told him that Kibiama (1st accused) assaulted Noor Mwangi (the deceased). He stated that if PW1, PW4 and PW8 stated that he assaulted the deceased, they were lying. He denied trying to escape from arrest.

Both the accused persons were charged with the offence of murder. Murder is the killing a human person with malice aforethought. When I summed up and directed the assessors for their opinion, they gave a unanimous opinion that Kibiama (1st accused) is guilty of the offence as charged and Koech (2nd accused) is not guilty.

The burden is always on the prosecution to prove the case against each accused person beyond any reasonable doubt. In a charge for murder, the prosecution has to prove that the deceased died. It has also to prove that each of the accused persons caused that death. It has also to prove that there was malice aforethought.

Now, did the prosecution prove that Noor Mwangi (the deceased) died. In this regard there is the evidence PW3 Noor Mwangi Karaya his father as well the evidence of Dr. Kozlova (PW7) who conducted the post mortem examination of the deceased. The post mortem established that Noor Mwangi died and also established the cause of death. I am of the view that the prosecution has proved that the deceased Noor Mwangi died on 22nd November 2001. The prosecution also proved beyond reasonable doubt that the cause of death was due to blunt trauma to the head and chest with subdural haemorrhage, with contusion and laceration of the brain.

Did the accused or any of them cause the death of the deceased? There is the evidence of the prosecution witnesses at Kapchorwa Wines and Spirits bar in Nandi Hills town that both accused persons were in that bar on the night of 9th October 2001. The deceased also came into the bar. There is evidence that 1st accused had a quarrel with the deceased in the bar – that was evidence of PW4, PW1 and PW6. There is evidence from Ciro (PW1) that 1st accused slapped the deceased in the bar and pulled him out of the bar. There is evidence that 1st accused and two other persons attacked Mureithi (PW4), while the deceased was lying down outside the bar. There is evidence also that the two persons were the ones who pulled out the deceased from the bar. This was the evidence of PW4.

People in the bar were obviously taking alcohol. No one testified to seeing any of the two accused persons or any other person beat the deceased outside the bar, except PW1 who said that she saw 1st accused beating the deceased with fists outside the bar. There is evidence that the 2nd accused quarreled with the deceased at Kunjo bar that night, though there was no physical fight. This was the evidence of PW8 Geoffrey Mutai. There was the evidence of a dying declaration by the deceased, who is said to have stated that he was attacked by Kibiama (1st accused), Edward (2nd accused) and two other people. Before that dying declaration was made, and when the deceased was lying down on 9th October 2001, the owner of the bar (PW6) asked him what was wrong, and he did not mention that, he was beaten by anybody.

There is evidence that two people took the deceased home that night. None of them was called to testify as to who had beat the deceased, or whether he told them who had assaulted him. There is evidence that there was a watchman on duty at Kapchorwa Wines & Spirits that day. He was not called to testify and no reason for that failure was given.

From the evidence on record, I find that there was no injury that could have been caused to the deceased in the bar that caused his death. The fatal injuries must have been caused outside the bar. In my view, that watchman had the duty to keep security at the bar and he would most probably be the first person to have intervened in any scuffle outside Kapchorwa Wines and Spirits bar. The failure to call him as a witness or to give an explanation for the failure leaves a lot to be desired. The dying declaration was made after discussions and after the brother of the deceased (PW2) appeared to have made his own investigations about who assaulted the deceased. In my view, that dying declaration cannot be regarded as independent evidence devoid of any possible influence. Curiously, the brother of the deceased (PW2), who appears to be a star witness, was not initially listed as a witness. He also admitted that he listened to the evidence of other witnesses in court before he recorded a statement with the police and later testified in court. His evidence therefore cannot be relied upon.

In my view, the injuries suffered by the deceased, which caused his death were quite serious. The doctor Geoffrey Kironga (PW9) testified that the injuries to the brain for a boy of 19 years must have been caused by a fall from a height. There were allegations that the deceased fought with his brothers after the assault at the bar. No evidence was tendered and therefore I discount that allegation. There is evidence that the deceased went to the bar after being discharged from hospital. The father and brother of the deceased gave evidence that the deceased only came out of hospital to record a statement with the police. To me, whether the deceased went to the bar after the injury or not is neither here nor there. The evidence of Dr. Kozlova (PW7) and Dr. Kironga (PW9) is that, with the injuries detected in the brain, one could get conscious for sometime and walk before succumbing to the injuries.

There was an allegation that the 2nd accused Edward ran away after the incident, after talking to the father of the deceased and offering to testify as a witness. No tangible evidence was produced to show that the 2nd accused moved to Mombasa or Voi in an attempt to escape arrest.

The accused gave their defences denying killing or assaulting the deceased. I have considered their defences as well the prosecution case.

In my view, the prosecution has not proved its case against the 2nd accused. As I have said earlier, the dying declaration was made after there were informal investigations by other persons and the possibility of discussions on the same with the deceased. The only evidence connecting the 2nd accused with the offence is the incident at Kunjo bar, in which he is said to have displayed anger on the deceased, but there was no fight. I find that the prosecution has not proved its case against the 2nd accused for the offence of murder, or any offence at all. I therefore find him not guilty and acquit him.

The prosecution has also not proved a case of murder against the 1st accused. I am aware that the assessors have returned a unanimous verdict of guilty on the 1st accused. However, on the evidence on record, I have to respectfully differ with the opinion of the assessors. There is no evidence that the first accused inflicted the serious blows or caused the fall from a height that could have caused the brain injury resulting in the death of the deceased. He is said to have slapped the deceased in the bar, after a quarrel. The person who said that she saw him hit the deceased with fists outside (PW1) was said by other witnesses to have been in the bar, when the scuffle took place outside the bar. The other two people who were said to have dragged the deceased outside the bar were not charged in court, nor were they called as witnesses to state who assaulted the deceased outside the bar. The watchman, Shatsima was also not called to testify. In my opinion, the fatal injuries on the deceased were actually inflicted outside the bar, where he was later found lying on the ground. The

prosecution has however failed to prove, as to who caused those injuries or who assaulted the deceased outside the bar. It has not established that the 1st accused assaulted the deceased outside the bar and caused those fatal injuries.

However, from the evidence on record, I find that the first accused did quarrel and assault the deceased in the bar by slapping him. On this I rely on the evidence of Stephen Mureithi (PW4) and Toroitich (PW6) the owner of the bar and Jackline Wanjiru (PW1) who was also in the bar. The accused, of course, denied this. However, I find the evidence of Toroitich (PW6) on the quarrel and that of Jackline Wanjiry (PW1) on the slapping of the deceased in the bar by the 1st accused to be truthful. Consequently, I find the first accused guilty of the offence of simple assault contrary to section 250 of the Penal Code, which is a minor and cognate offence to murder and convict him accordingly.

In the result therefore, I find the first accused, Ibrahim Kibiama Sisiwa (1st accused) guilty of the offence of assault contrary to section 250 of the Penal Code and convict him accordingly. I find that the 2nd accused Edward Kipgetich Koech is not guilty as charged and I acquit him accordingly.

Dated and delivered at Eldoret this 22nd day of September 2005.

George Dulu

Ag. Judge

In the Presence of: