



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

Criminal Case 1 of 2000

REPUBLIC PROSECUTOR

-VERSUS

SAMMY

KIPKOECH KITUR 1ST ACCUSED

SAMUEL MELI 2ND ACCUSED

JUDGEMENT

The two accused persons **Sammy Kipkoech Kitur** (1st accused) and **Samuel Meli** (2nd accused) have been jointly 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 offence are that on the 18th day of February 1999 at Tulwet Centre in Uasin Gishu District of the Rift Valley Province, jointly murdered **John Kiptum Keiyo**.

The prosecution called 15 witnesses in support of their case. In summary the evidence of Mary Rongoei Kendagor (PW1) was that she was the mother of John Kiptum Keiyo (the deceased). On 18th February 1999 at 7.00 am, the deceased drove cattle from her home to the cattle dip. Then he sent a child called Irene to collect Kshs.60/= as cattle dip fees. When the child later reached the cattle dip, she found that the cattle were not there. So the child came back and informed her that she did not find the cattle. She went out to find out whether the cattle were at the farm of one, Helen, which was beyond the cattle dip. Later the child (Irene) came and told her that the cattle were enclosed, but one cow was missing.

She then sent her daughter Emily (PW2), to run after the missing cow, in case it had been taken to the auction. Emily found the cow with the deceased and stopped people from buying it at the auction.

In the meantime, she went and found Meli (2nd accused) at Chuliat Centre. She knew the 2nd accused as a guard of a Mr. Arap Chombe, who was an escort of the President. She requested him to go and save the cow from being auctioned. The 2nd accused and another person ran to the auction and she followed. When she reached near the auction, she found that they had already arrested and handcuffed the deceased. The two people who had handcuffed the deceased were the 1st accused and the 2nd accused.

Thereafter she saw the 1st accused and 2nd accused beating the deceased. The deceased said that he wanted to sell the cow to get money to plough the farm. She told them to stop beating the deceased as the cow was hers and John (the deceased) was also her son. They then said that they were not going to beat him and took him to the school. They beat him using a whip. They also threw him on the stones. At that of time the beating the deceased was handcuffed.

She saw Meli (2nd accused) beat the deceased and sit on him and also twist his neck. They beat him as they were taking him to Chuliat Centre. She protested when she saw the 2nd accused sit on the deceased. The 2nd accused threatened to beat her also. Some women also tried to restrain the 2nd accused from beating the deceased.

The two accused persons said that they were taking the deceased to Kapkowa Police Station. At one point on the way, the deceased was not able to move or walk any more, but they were forcing him to move on. He died at a place called "Kwa Meja".

Before the deceased died, he asked for water and she asked neighbours for water and food. She was given milk and she gave him. However, the deceased said that he was paralyzed.

The deceased died on a tractor which was assisting in transporting them. They boarded the tractor, after it became obvious that the deceased was not able to walk any more. The handcuffs were removed when the deceased could not walk any more. Both accused persons beat the deceased. She had known both the accused persons before, as they used to come and arrest people who used to drink changaa.

In cross-examination, she testified that though she might have forgotten whether she gave the Kshs.60/= for dip fees to the deceased or to Irene, she did not forget the beatings of the deceased which she witnessed. She stated that she was told by her children, and in particular Emily (PW2), that the cow had been taken to the auction. She could vividly remember the beatings of the deceased because it was something that surprised her. She said that she had recorded a statement with police and also that she had previously testified before another Judge. She further stated that when she met the 2nd accused at Chuliat Centre, the 1st accused was not there. The 1st accused joined the 2nd accused later. When she met the 2nd accused in a hotel at Chuliat Centre there were other people, but she talked to him through a window.

She also stated that, before that day, the deceased had informed her that he wanted to sell the cow. Before she went and asked 1st accused to follow the cow, she had already sent Emily(PW2) to the auction to follow the same cow. She later met the two accused persons and the deceased, coming from the auction. At that time the deceased was handcuffed, though he was still the one who was driving the cow, with the accused persons following from behind. When, she reached them, she saw the accused beat the deceased. They beat him with a whip. She did not know where that whip was. She specifically saw 2nd accused (Arap Meli) beat the deceased on the back until he fell down. Emily (PW2) appeared after the deceased was beaten and drove the cow home.

She witnessed the beatings of the deceased by the accused persons on the road to Tulwet. She had not passed the primary school on their way back, when Emily came. The 1st accused was the one who started beating the deceased, and he was joined by the 2nd accused. Both accused beat the deceased with whips and pushed him on stones and stepped on him in his private parts. She saw 2nd accused step on the deceased. The accused reached Chuliat Centre before her and passed the centre. They beat the deceased at Chuliat Centre. When she arrived at Chuliat Centre she saw the 1st accused (Kitur) sitting on the neck of the deceased. She did not know why Emily went to drive the cow while the deceased was being beaten. There were many people at Chuliat Centre – women and children as the men were at the auction.

She testified that she had told the police that the accused had asked for Kshs. 100/= each which she did not have. She asked for the money from a shopkeeper at Chuliat Centre, whose name she did not know. She borrowed some milk and gave to the deceased to drink before he died. The deceased asked for water, but the accused did not want her to give the deceased some water. The deceased died at a place which belonged to Meja. He was on a tractor which had given him a lift, as the deceased could not walk. When the tractor came, the 1st accused had already gone ahead to the police to look for transport, as the deceased could not walk. He was sent by 2nd accused. The 2nd accused is the one who asked for a lift from the tractor driver. When she protested and asked the accused to stop beating the deceased, the 2nd accused told her that they would beat her as well. The tractor driver was with another person, whom she did not know. The deceased died on the tractor and she screamed, when she realized that he had died.

At the police station, she alone went to explain to the police about what had happened. The tractor

stopped outside the gate of Burnt Forest Police Station, and the accused removed the body of the deceased and then both accused persons disappeared. She brought a police officer to where the body was. The police recorded her report in the Occurrence Book. She did not know whether the accused also reported to the police, or made a telephone call. She stated that the accused did not have shares or an interest in the cow, but she did not know why they beat the deceased.

The evidence of Emily Kebenei (PW2) was that she was a housewife and lived at Bargeiwa farm. She was a sister of the deceased. On 18th February 1999 at 6.00 am she woke up and milked cows. She took milk to the road and there she met the deceased talking to another person whom she did not know. This was about 7.00 am. The other person asked the deceased where he was taking the cow, as the cattle dip was in another direction. The deceased then went to a nearby farm of a relative. As she was waiting for the vehicle to come and take milk, she saw the deceased pass with one cow which she identified as belonging to her parents. She then went home to ask her mother whether they had allowed the deceased to sell the cow. On the way she met her mother (PW1) who had already been told about the cow by children of the deceased. Her mother was running and asked her how far the cow had reached. She told her that the cow had reached Chuliat. Her mother (PW1) told her to go fast after the cow and prevent people from buying it. Her mother (PW1) said she was proceeding to report the matter to the headman and the police.

She went to her own house and then proceeded towards the auction. When she reached Chuliat she was informed that the cow had gone ahead. She proceeded on and met the deceased with the cow when he had already passed Tulwet Primary School. She told him not to sell the cow and also told other people who wanted to buy the cow that it was not on sale. The cow, together with other cows, were driven to Tulwet auction. She sat down 12 metres away from the auction to prevent anybody from buying the cow.

After a short while, the two accused persons, whom she knew before, came and went to look for the deceased. They found him sitting down. They asked him whether he knew that he had done something wrong and he agreed. They asked him where the cow was and he showed them the cow. The 2nd accused went to take the cow while the 1st accused arrested the deceased. The two accused persons then started beating the deceased and she intervened. They then said that they would not beat him again. Thereafter they met her mother (PW1). The accused beat the deceased again after meeting her mother outside the market. Her mother got annoyed, though they promised not to beat him again, they beat him again and again.

When they reached Chuliat the two accused persons asked for Kshs. 200/= for lunch and transport. Since there was no money, she went and borrowed Kshs. 200/= from a shopkeeper and gave them the money. At the time that the two accused persons were waiting for the money, the cow went home as it knew the way. The accused asked her to follow the cow. She did that and ensured that the cow reached the home of the mother. At Chuliat Centre they met many people. Next day, a daughter of the deceased called Irene came and informed her that she heard that the deceased had been killed. She knew both the accused persons before. When the two accused came to the auction to look for the deceased, each of them had a stick.

In cross examination, she stated that James Kirwa Bor (PW5) was a son of her sister in law, and Ezekiel Kiplagat Rop (PW7) was her own child. The person who was with the deceased at the road was not her relative. When she saw the deceased at the road, he did not have the cows. He emerged with the cow later. The police came to her home to record the police statement on 20th February 1999. She went and told her mother about the cow but she was not told by other people that the deceased wanted to sell the cow. She stated that, if that was what she recorded in the police statement then it was not true. She was sent by her mother to the auction. When she arrived at the auction, the auctioneers had not yet arrived. Her mother came later and only reached near the auction. She was not familiar with distance in metres. She was less than 50 metres from the deceased at the auction. The deceased was not beaten by members of the public at the auction. She did not shout that the cow was not for auction. She only cautioned the people who came to look at the cow that it was not for sale. It was only the two accused persons who beat the deceased. They started beating him on the road near the auction.

The 2nd accused was the one who went and took the cow. She was present when the four of them met her

mother. She witnessed both accused kick the deceased in his private parts from his back. When they met her mother, her mother walked closer to the accused than herself. The accused asked for Kshs. 200/= and she went to ask for the money from a trader at Chuliat whose name she did not know at Chuliat. She was sent to ask for the money by her mother. She left the accused at Chuliat Centre and followed the cow. She gave the money (Kshs. 200/=) to the accused. She left before the accused beat the deceased at Chuliat Centre. She did not witness the deceased being given milk. She denied that she was avoiding telling the court that the deceased was beaten at the auction by members of the public for the reason that the deceased was her relative.

The evidence of Dr. Nathan Buziba(PW3) was that he was a pathologist attached to Moi Teaching & Referral Hospital.

On 23rd February 1999, he conducted post mortem examination on John Kiptum Keiyo between 11.00 am to 12.00 noon, at Moi Teaching and Referral Hospital. He observed a number of bruises on the body. There was a bruise on the right cheek and bruises on the lower chest. There were soft tissue injuries on the back of the head; but no fracture of the skull.

There was massive scarring of the lungs. The lungs were attached to the chest wall and the gutt.

He came to the conclusion that the cause of death was cardiopulmonary arrest due to blunt trauma to the chest, which aggravated an existing lung disease which was tuberculosis. In his view, the deceased could have been running when he was hit with a blunt object, which aggravated the existing chest problems, causing the death. He produced the post mortem form as exhibit No.1.

In cross-examination, he stated that the injuries on the right cheek, and the lacerations in the lower chest could not by themselves have caused the death.

The evidence of Johana arap Barno (PW4) was that he was a farmer at Keriyo farm. On 18th February 1999 at about 2.000 pm he was on a tractor with a driver called Kiprotich. When they reached a small road near Lelei's farm, they met three people – two men and one woman. One of them (2nd accused) came and stopped them. He said that he was an askari and asked for a lift because they wanted to take a thief who had refused to walk to the police station. The tractor was reversed and the woman called that man Johna and told him in Kalenjin to climb the tractor. That man climbed the tractor slowly like a man who was weak. He sat on the mud guard. The woman climbed on the tractor and sat on the opposite mud guard. The man who was said to be a thief removed his jacket and gave to the woman.

The tractor was driven for one kilometer and they met a man whom the 2nd accused said was a person he had sent. This was the 1st accused (Kitur). He also climbed on the tractor. The tractor was driven to Burnt Forest town where he alighted to go and inform his employer how the tractor had become defective. The tractor proceeded to the police station. At the time that he alighted from the tractor, the person who was said to be a thief was still sitting on the mudguard of the tractor.

He met his employer and they repaired the tractor. After about one hour, the 1st accused came and said that they should go and record a statement. He did not understand why he should record a statement. They argued and the 1st accused went away

Later the 1st accused came with other police officers from the police station. They persuaded him to go and record a statement with the police. He found the person who was said to be a thief lying outside the police station. The police told him that that man was dead. He then recorded a statement with the police.

In cross-examination, he stated that he did not witness a quarrel on the tractor. He also did not observe any injuries on the deceased.

The evidence of James Kirwa Bor (PW5) was that he was previously a farmer at Barigeiyo, but had now moved to Kiptega.

On 18th February 1999 in the morning he took cows together with Ezekiel Kiplagat to the auction. On the way John Kiptum (the deceased) approached with one cow. They were three people and three cows. Near Chuliat, Emily (PW2), a sister of the deceased came and asked the deceased why he had taken the cow. She asked the deceased to return the cow, but he refused.

Emily followed from behind. When they reached Tulwet auction, each one went on his business of auctioning the cows. The deceased was standing at a distance. Between 10.00 am and 11.00 am two administration police officers whom he knew before, came and questioned the deceased and handcuffed him. Emily was nearby. The two administration police officers were the two accused persons in court.

He did not witness the deceased being beaten at the auction. However, later John Kosgei came and informed them that the deceased had been beaten by the administration police officers.

On 19th February 1999 he went to Bargeiyo Centre and asked one Kipsang, how the deceased was. He told him that John had died. On 20th February 1999 at about 4.00 pm the police came for him and he went and recorded a statement at the home of the deceased.

In cross-examination he denied having a relationship with the deceased, Kiplagat Rop, Emily and Mary Longorei. He stated that he was related to the husband of Emily called Kebenei. The said Kebenei was his uncle. The father of Rop was a brother of his stepmother. He was aware that Emily was a sister of the deceased. He insisted that when Emily met them on the way to the auction, they were only three people. They became many people when they approached Tulwet auction. He did not see Emily arriving at the auction. However, he saw the administration police where the deceased was. The administration police officers arrived less than 10 minutes after he had reached the auction.

Emily shouted from outside the auction that no one should buy the cow. He heard the administration policemen talk to the deceased and told him that he had done a mistake, to which the deceased admitted. They handcuffed him and left with him and the cow. At that time, he was 10 metres away.

He did not see the deceased being beaten at the auction either before or after arrest. Emily left with them. It was not true that she remained behind. It was Kosgei who told him about the deceased being beaten.

The evidence of Kimaru John Kosgei (PW6) was that he lived at Bargeiwa farm in Lessos. His business was buying and selling cows, goats and chicken.

On 18th February 1999 at about 11.00 am he was proceeding to the auction at Tulwet. Near the auction he met the two accused persons, the deceased whose hands were tied with sisal ropes, together with Emily and the mother of the deceased. He knew the two accused persons before.

He enquired why the deceased was tied with a rope. The two accused persons informed him that they were taking the deceased to the police station, because he had taken his mother's cow. He proceeded to the auction which was about ½ a kilometer away. He later went to Eldoret and next day he heard from neighbours that the deceased had died. He was given the news of the death by one called Joseph Bett.

He went to the deceased's home and it was confirmed to him that the deceased had died.

On 21st February 1999 he went to the District Hospital at Eldoret and was informed that post mortem had been conducted. On the 24th February 1999, burial took place. On 27th February 1999 he recorded a statement with the police.

In cross-examination, he insisted that the deceased was tied with a rope and not handcuffed. He denied ever telling Bor that the deceased was beaten by the accused. He stated that Kirwa's home was about 1½ kilometers from his home. He recorded his statement at Tarakwa Police Station.

The evidence of Ezekiel Kiplagat Rop (PW7) was that he was a resident of Bargeiwa. The deceased was his uncle. On 18th February 1999 at 7.30 am he left home with one James Bor (a cousin) to go to the

auction at Tulwet with two cows. They met the deceased on the way with one cow. They walked together and near the auction Emily who was a sister of the deceased approached.

She told the deceased to return the cow, but he refused. They proceeded to the auction, and after a short while two administration police officers whom he knew before (the two accused persons) came and handcuffed the deceased. Then the two administration police officers left with the deceased. Emily and the cow followed them. At the auction James Bor had left him with the deceased and gone to try to buy other cows.

After the auction he left to go home, while James Bor went another way. On the way he met James Kosgei who informed him that he met the administration police officers beating the deceased on the way.

On the next day, he went to Dala and was informed that the deceased had been beaten till he died. He could remember that in 1998 the two accused persons arrested the deceased. He gave money to Christopher, a brother of the deceased, to go and give to the accused persons.

In cross-examination he stated that he did not see any of the accused persons beat the deceased. He was together with the deceased when the accused persons arrived at the auction. James Bor had gone to try to buy other cows. When the accused arrived, they only told the deceased to stretch his arms and handcuffed him. It was the 2nd accused who told the deceased to stretch his hands and also handcuffed him. The 1st accused was carrying a stick. They did not talk and took the deceased away, and Emily followed with the cow.

He denied that the cow left before them and also denied that the accused talked any other words before taking the deceased away. It was John Kosgei who told him on the way that he had seen the deceased being beaten. He would be surprised if John Kosgei testified that he never met him

He stated that in 1998, Christopher came to ask for a bribe for the two accused persons. He gave Christopher Kshs.200/=. He did not see Christopher give the two accused the money. He did not report that incident to the police. He recorded his statement with the police at the deceased's residence. He did not record anything to do with the 1998 incident.

The evidence of Christopher Kimeto (PW8) was that he was a step brother of the deceased. He was a son of the younger wife of his father, but was older than the deceased.

On 23rd February 1999 together with his sister Esther and police officers from Tarakwa Police Station, they proceeded to Moi Teaching and Referral Hospital and identified the deceased's body to the doctor for post mortem examination. He had information that in July 1998 the accused persons herein arrested the deceased on allegations of changaa brewing and beat him. He went and persuaded the two accused to release the deceased, which they did.

In cross-examination he stated that he did not record the 1998 incident in the police statement. He stated that the deceased never used to brew busaa and he did not know why the accused arrested him.

He also stated that he did not give information on the 1998 incident in court when he testified earlier before another Judge, but that now he was giving the same as additional evidence.

The evidence of Esther Chelagat (PW9) was that on 23rd February 1999 she went and identified the body of the deceased for post mortem examination.

The evidence of Nelson Kimeli Tanui (PW10) was that he was a driver of Wareng County Council.

On 18th February 1999, he went to Tulwet auction with two clerks and an auctioneer for the auctioning of livestock. It was a Thursday. At the auction, he was told that one thief had been arrested. The auctioneer was called Ronald Some. They arrived at the auction at 11.00 am. He was also told, by people he could not remember, that a thief was arrested by askaris and that he was beaten at the auction by members of the

public.

The evidence of Samuel Kibiwot Rop Kerich (PW11) was that he was a clerk with Wareng County Council.

On 18th February 1999 he went to Tulwet auction with Ronald Some, Nelson Tanui and Michael Yator. His duty was to record the cows at the auction for sale.

He heard the sellers of cows say that there was a person who had been beaten and taken away by the askaris. He understood that to mean that that person was beaten by members of the public. That kind of incident was a common occurrence at the auction.

In cross-examination he stated that he did not hear that the person was beaten by the askaris.

The evidence of Cpl. Patrick Wanyonyi (PW12) was that in February 1999 he was stationed at Tarakwa Police Station in Burnt Forest.

On 18th February 1999 he was in the Crime Branch office when the OCS Inspector Mukunji informed him that a report had been received from Sgt. Meli and PC. Kitur that they were escorting a stock theft suspect, who had collapsed at the gate of the police station.

He accompanied the OCS and the two reportees. At the gate they found the deceased lying down. He was already dead. The OCS conducted the investigation. He later heard that the deceased was taken to the mortuary. He identified the reportees as Sgt. Meli – whom he insisted was the 2nd accused and APC. Kitur as 1st accused.

In cross-examination he stated that he was not in the report office when the report was made and booked in the OB. He insisted that Sgt. Meli was the 1st accused and APC Kitur was the 2nd accused. He was not an investigating officer.

The evidence of Ronald Some (PW13) was that he was an auctioneer. On 18th February 1999 at 11.00 am he left office and reached Tulwet auction at 11.30 am. He was with Nelson Tanui the driver, clerks Kirech and Michael Yator. At the auction he heard that someone had stolen a cow and that if it were not for the askaris he would have been killed. One person gave him details that that thief had stolen his own mother's cow and was beaten on the way before reaching the auction. Nobody clarified whether the thief was beaten by the crowd or by the askaris.

In cross-examination he stated that he recorded his statement with the police at Chemalal auction at Maili Nne. The police came there to record the statement. He reiterated that he did not say to the police that the thief was beaten by the public. He was only told that if there were no askaris, the man would have been killed.

The evidence of PC. Christopher Wesonga (PW14) was that in February 1999 he was attached to Tarakwa Police Station. On 23rd February 1999 he was present at Moi Teaching and Referral Hospital mortuary accompanied by Christopher Kimeto and Esther Chelagat for the post mortem examination of the deceased. The body of the deceased was released to relatives on the same day for burial, after the post mortem examination.

In cross-examination, he stated that he participated in taking statements from both the accused persons, who stated that the deceased was beaten by members of the public when his mother raised the alarm.

The evidence of Inspector Hudson Mukunji (PW15) was that in February 1999, he was the Deputy OCS at Tarakwa Police station.

On 18th February 1999 two administration police officers – Sgt Meli and APC Kitur went to his office at about 2.00 pm and informed him that there was a complainant who reported to them that her son had

taken a cow from her home.

That when they went to the auction, they found that the man had already been beaten by members of the public. They rescued him and recovered the cow. They decided to bring him to the police station, but were not able to arrest any of his assailants.

They said that they left the culprit at the police sign post. He called Cpl. Wanyonyi and they went together with the reportees, accompanied by the deceased's mother. They found the person lying on the ground already dead. Two administration police officers told him that they brought the deceased on a tractor. The tractor driver was there and he called them to the office to record statements.

He was the first investigating officer and took statements from the deceased's mother and people who were at the auction. He visited the home of the deceased's mother. She said that it was the administration police officers who beat the deceased. He neither knew the two administration police officers nor the deceased before this incident. He found the two administration officers carrying nothing. The deceased's mother was also carrying nothing. He recorded statements under caution from the accused persons, but could not produce them because the law had been amended.

In cross-examination he stated that at the time that he was transferred from the station to Tambach Police Station in June 1999, the evidence he had gathered was not adequate to charge anybody in court. He left the file with the DCIO Eldoret. He did not know whether further investigations were conducted. He recorded statements that indicated that the deceased was beaten by members of the public. There were statements also from relatives of the deceased that he was assaulted by the accused persons.

He was not aware of newspapers reports in the Daily Nation on the failure to charge the two accused people. In any event they did not charge people because of newspaper reports.

That was the prosecution case. In their defence, each of the accused persons chose to make a sworn statement. There was also one witness who testified for the defence.

Sammy Kipkoech Kitur (1st accused) testified under oath that in 1999 he was an administration police officer attached to Chuliat Chief's Camp.

On 18th February 1999 at about 9.00 am, two women came to Chuliat where he was. The older woman asked for assistance. She said that her son had taken a cow to the cattle dip at 6 am and delayed in bringing it back. Then when she went to find out, she was told at the road that her son had taken the cow to the auction. She therefore was seeking for assistance to save the cow from being sold. The younger woman went ahead on a bicycle towards Tulwet.

They walked with the old woman up to the auction. When they reached near the auction, they saw a gathering of people who then dispersed. When they arrived at the auction, they saw the deceased sitting down.

They asked him whether he knew his mistake. He said yes. They arrested him and headed for Tarakwa Police Station. The younger woman had started going ahead with the cow. They left the older woman behind before reaching Chuliat. When they reached Chuliat, the younger woman who had the cow left them.

The older woman accompanied them to Tarakwa Police Station. About 300 metres after leaving Chuliat Centre, the deceased told them that he was tired and feeling chest pains. They let him rest for a while.

At Lingwai, the deceased said that he was feeling hungry. The old woman went and borrowed *githeri* and milk. He told her not to give him the food as it might not be good for his health. However, she gave him the food and milk and he ate and drank. They went slightly further on and the deceased asked for water.

He then told his colleague that he was going ahead to Tarakwa Police Station to look for transport to carry

the deceased. When he was about 100 metres from Tarakwa Police Station, he saw a tractor coming and the deceased and the others were on the tractor. The tractor driver told him to board the tractor, as he was in a hurry to go and repair the tractor plough.

They were dropped from the tractor at the gate of Tarakwa Police Station. They walked for a short while, and the deceased sat down near the gate. He went to report at the police station. He came out with IP Muhanji and Cpl. Wanyonyi. When they reached the gate, they found the deceased dead. The old woman was there, but later she went away to her relatives.

They then recorded statements. After recording the police statements, they went back to their place of work. In less than a week however, they together with a third administration police officer, were transferred to Eldoret. The third administration police officer was however later transferred back. They were deployed at the DC's office Eldoret and worked for 7 months.

On 18th August 1999, in the morning, a CID vehicle came and he was called and told to go and record a statement. Though he said that he had already recorded a statement, he was still told to go and record a statement. He went home and changed into civilian clothes and boarded the CID vehicle. At the CID offices in Eldoret, he was shown some papers and told that he had been given 14 days within which to look for an advocate to defend him. He was then put in the cells to await Sammy Meli who had gone home.

He remained in the cells for two weeks. Then he was taken to Dr. Kejaro for medical examination and then to court.

He denied killing the deceased and stated that he only came to know in court that the two women were the mother and sister of the deceased. He denied ever assaulting the deceased. He did not know the deceased before the day he arrested him and had no reason to kill him. He did not know why it took very long for him to be charged in court.

In cross-examination, he stated that he did not beat or tie the deceased with ropes. He denied asking for Kshs.200/= from PW1 and PW2. He stated that he found the deceased seated at the auction, already tied with a sisal rope. He did not find out whether the deceased had injuries. The deceased walked in a normal manner until somewhere on the way, when he said that he wanted to rest and held his chest. The two witnesses PW7 and PW8, were lying when they said that he arrested the deceased in 1998. He did not know why they should lie against him.

He was aware of a Daily Nation report of 26th February 1999 which talked of tension. That was the reason why they were transferred. In actual fact there was no tension. He denied that the deceased died on the tractor. He stated that the deceased died after alighting from the tractor.

The 2nd accused Samuel Meli also gave sworn testimony in his defence. He testified that in February 1999, he was an administration police officer attached to Chuliat Chief's camp.

On 18th February 1999 at 9.00 am he was in the camp at Chuliat Centre when two women came and one of them explained that she had sent her son at 6.00 am to take a cow to the cattle dip, but he had not come back. The one who said that was the older woman. She also said that she got information that her son had taken the cow to the auction. Then he together with the 1st accused (Kitur), and the old woman proceeded to Tulwet auction. The younger woman was sent on a bicycle and she went ahead. They arrived at Tulwet auction at about 10.00 am to assist the old woman recover her cow. When they arrived, they saw a crowd of people gathered around the deceased. When the crowd saw them, they dispersed. Then Kitur asked the deceased whether he knew his mistake, and he said yes. They then arrested him and took him towards Tarakwa Police Station. He was together with the deceased and Kitur. The younger woman came with the bicycle and the cow and joined them. The old woman was behind.

The distance from Tulwet auction to Tarakwa Police Station was about 18 kilometres. They went up to Chuliat Centre, and from there the younger woman took the cow home. About 200 metres beyond Chuliat

Centre, the deceased said that he was feeling pains. He said that he wanted to rest. They allowed him to rest, and then proceeded on with him.

They went up to an area called Lingwai. The deceased was now walking and then sitting down. So he sent Kitur his co-accused to Tarakwa Police Station to ask for transport assistance. Then a tractor appeared and he asked for a lift and they boarded it. About 100 metres from Tarakwa Police Station, they met Kitur who also climbed the tractor.

They alighted at the gate of Tarakwa police station. The deceased walked for about 2 metres and sat down. Kitur went into the police station and came with IP Mukunji who interrogated the deceased. Then shortly thereafter, the deceased collapsed and died.

At that point, the old woman said that she was going to her children's place at Kapkelion. They then recorded statements with the police and went for duty.

On 26th February 1999, a Senior Superintendent of Police came and told them that because of a newspaper report, he was transferring them. They were then transferred to Eldoret District Commissioner's Office. After 7 months he asked for one week off and went home to Kapsabet. When he came back, he was informed that Kitur was in the cells.

He went to the DCIO to enquire and was informed that a councillor and a lady called Hellen came to the office with the newspaper report in the Nation of 13th May 1999, which had been written by a human rights organization. The Councillor and Hellen threatened to commence a private prosecution.

He was told by an IP Nganga to look for an advocate within 14 days. He was put in the cells and sent for medical examination at 3pm before Dr. Kejaro. Then he was charged with murder. He denied beating the deceased at the auction or on the way to Tarakwa Police station. He did not know the deceased before and had no disagreement with him. He also did not have any interest in the cow in question. He did not know why it took more than 6 months before he was arrested.

In cross-examination, he denied that he beat the deceased with a stick and stepped on his private parts. He denied the evidence of Mary Kendagor (PW1) on the issue of beating and stepping on the deceased.

He denied knowing the deceased before, and stated that they arrested him at the auction when he was already tied with a rope. They did not ask anybody whether he was the thief or who had tied him. He did not ask the old woman whether the man was the thief. However, he asked Hellen, who was not a witness in the case whether the man was a thief. He denied having arrested the deceased in 1998. He stated that he knew PW7 and PW8 who testified about the 1998 arrest. However those two witnesses lied about the 1998 arrest. He did not know why PW7, PW8, PW1 and PW2 decided to lie.

He denied that the deceased died before they reached the gate of Tarakwa Police Station. He denied asking for Kshs.200/= . He stated that they refused PW1 and PW2 to give water to the deceased because they could have poisoned him due to the disagreement about the cow.

He also testified that neither him nor his colleague (Kitur) explained to IP Mukunji that the deceased was beaten by the public. He did not notice any injuries on the deceased. In reexamination he stated that the witnesses who testified against him were all relatives of the deceased. That was the reason why they had similar evidence.

The evidence of Jonah Kiprono Too (DW3) who was called for the defence, was that, he was a farmer at Lessos. He was also a businessman who bought and sold cows and sheep.

On 18th February 1999 he went to Tulwet market between 9.30 am and 10.00 am. He then heard screams and saw people gathered about 20 metres away. He saw someone being slapped by people. That person was forced to sit down. Then some other people appeared and the crowd dispersed.

It was not uncommon for thieves to be beaten at the auction. In fact thieves were usually beaten with sticks. However, this one was only slapped. He later heard that the man who was beaten had died. He did not know the two people who came to the auction, before the crowd dispersed.

Later in 2001, a village elder called Joseph told him to record a statement. He went to Tarakwa Police station and Eldoret police Station, but the police declined to record a statement from him.

In cross-examination he stated that he did not have a certificate from the auctioneers for his livestock selling business. He stated that, though the Chief in 2003 asked people to volunteer as witnesses, he did not know why other people did not volunteer.

He was 20 metres away from the person who was beaten. The person who was beaten could or could not be the deceased. He was not sure whether the deceased was beaten by the public or by the accused persons, as he did not go near.

That was the close of the defence case.

At the close of the case, both the defence Counsel and the State Counsel made submissions.

Learned defence Counsel Mrs. Kittony, submitted that the prosecution did not establish its case. No malice aforethought was established as the accused did not know the deceased before they arrested him. Nor did they have an interest in the subject cow. Most of the prosecution witnesses who implicated the two accused persons were relatives of the deceased. There was no sufficient evidence to charge any of the accused persons in accordance with the evidence of the first investigating officer PW15.

There were also contradictions in the prosecution case. PW3, PW10, PW11 and PW13 stated that the deceased was assaulted at the auction. Other witnesses stated that he was not assaulted at the auction. The postmortem doctor stated that the deceased died of defect of the lungs, not bruises sustained.

She submitted that the defence gave sworn evidence and called a witness to confirm that the deceased was beaten by the public. She sought to rely on the case of **Kioko –vs- R. [1983] KLR 289**. She also questioned the long time it took before the accused were charged in court.

The learned State Counsel Ms. Oundo, submitted that the prosecution had proved the case against the two accused persons. She submitted that a fact could be proved by a single witness, provided that there were favourable circumstances. She referred to section 125 of the Evidence Act (Cap.80) on competent witnesses. She further submitted that there was no time limitation to bring a charge of murder. She submitted that what was to be proved was the death, cause of death and malice aforethought.

On the death, there was the evidence of Dr. Busiba. The deceased had suffered chest infection, aggravated by assault. There were also lacerations.

On the cause of death the witnesses PW1, PW2, PW3, PW8, PW9 and PW14 testified and connected the two accused persons to the assault. PW1 and PW2 were eye-witnesses. The incident took place in broad daylight, they knew the accused persons before and there was no possibility of mistaken identity.

Malice aforethought was sufficiently proved in terms of section 206 of the Penal Code.

In her view, there was common purpose in terms of section 21 of the Penal Code.

When I summed up to the assessors and asked them for their opinion, they returned a unanimous opinion of not guilty. I am not bound by the opinion of the assessors.

The two accused persons were charged with the offence of murder. Murder is the killing of a human person with malice aforethought. There are three ingredients that must be proved in order to establish the commission of an offence of murder. Firstly, it has to be proved that the deceased died. Secondly that the

accused killed the deceased. Thirdly, that the killing was with malice aforethought.

The burden is always on the prosecution to prove the ingredient of the offence against the accused beyond any reasonable doubt. The accused persons do not have to prove anything.

I will at the outset agree with learned State Counsel Ms. Oundo that a fact can be proved by a single witness, provided that the circumstances are favourable. I will also agree with the learned State Counsel that there is no time limitation for someone to be charged with an offence of murder. Now, did the deceased John Kiptum Keiyo die? There is the evidence of PW1, PW15, as well as the two accused persons themselves that the deceased lay dead on 18th February 1999 in the afternoon outside Tarakwa Police Station. There is the medical evidence of Dr. Buziba, (PW3) who conducted the post mortem examination on the deceased. He produced the post mortem report as exhibit 1. He conducted the post mortem examination on the deceased on 23rd February 1999 at Moi Teaching and Referral Hospital Eldoret. He found a number of bruises on the body. There was a bruise on the lower chest. There were soft tissue injuries on the back of the head, but no fracture of the skull. There was massive scarring of the lungs, and the lungs were attached to the chest wall and gut. He came to the conclusion that the cause of death was cardiopulmonary arrest due to blunt trauma to the chest, which aggravated an existing lung disease, which was tuberculosis. In his view, the deceased could have been running when he was hit with a blunt object, which aggravated the existing chest problems, thus causing the death.

From the above evidence, it is my finding that the prosecution has established beyond reasonable doubt that the deceased died on 18th February 1999. The prosecution also proved beyond reasonable doubt that the cause of death was cardiopulmonary arrest due to blunt trauma to the chest, which aggravated an existing lung disease, which was tuberculosis.

I now turn to the question as to whether the accused persons caused the death of the deceased. It is not in dispute that the deceased took his mother's cow to Tulwet auction on 18th February 1999. It is not in dispute that the two accused persons, who were Administration Police Officers at Chuliat Chief's Camp received a report from the deceased's mother (PW1), about the cow. It is not in dispute that the two accused persons proceeded to the auction at Tulwet and arrested the deceased. It is not in dispute that the accused took the deceased to Tarakwa Police Station, which is quite some distance away from Tulwet auction. All these happened in broad daylight.

The prosecution case is that the deceased was handcuffed by the accused persons, he was beaten at the auction by the accused persons; that each of the accused persons had a stick with which they used to beat the deceased; that the two accused persons continued beating him and at the same time promising not to beat him on the way to Chuliat Centre and at Chuliat Centre until the deceased could no longer walk. It is the prosecution's version that the accused persons also kicked the deceased, slapped him, stepped on him and even sat on him. The prosecution's version was also that the deceased, died on a tractor at Kwa Meja, before reaching Tarakwa Police Station

The defence version is that the deceased was beaten by members of the public at the auction, before the two accused persons arrested him. That the accused found the deceased already tied with sisal ropes on the hands at the auction. That the accused persons never beat the deceased. That, if the deceased died of any injuries inflicted on him, then those injuries were suffered from the beatings by the members of the public at the auction. That the deceased died outside the gate of Tarakwa Police Station after alighting from the tractor.

The evidence of the prosecution to support the beating of the deceased by the two accused persons, is the evidence of PW1 and PW2. These witnesses were the mother of the deceased and the sister of the deceased. It is the same two witnesses who went to ask for assistance from the accused persons to come and recover the cow that had been taken by the deceased to the auction. The said two witnesses also had a chance to walk with the accused persons and the deceased from the auction.

According to PW2, the deceased was arrested by the two accused persons at the auction while he was sitting down. The deceased was found sitting down. He was beaten by the accused persons at the auction.

It is not clear from the evidence of this witness why the deceased was sitting down at the time he was arrested. The witness does not state why the deceased, who had gone to the auction to sell a cow, sat down. However, prosecution witness (PW7) Ezekiel Kiplagat Rop testified that he was together with the deceased throughout at the auction. That the deceased was not beaten by anybody at the auction. That the deceased was standing at the auction when he was arrested.

Both these witnesses are relatives of the deceased. It is quite curious to me that PW7 who was with the deceased throughout could testify that the deceased was not beaten by anybody at the auction, while PW2 stated that he was beaten by the two accused persons. PW7 stated that he was informed by Kimaru Kosgei (PW6) that the deceased was beaten on the road. PW6 denied this. PW7 also stated that the deceased was handcuffed by the accused persons when they came to the auction, while PW6, who saw the deceased on the road after arrest, said he was tied with sisal ropes on the hands. All these are prosecution witnesses.

The accused persons testified in their defence that the deceased was already tied with sisal ropes on the hands when they arrested him. They said he was seated which agrees with the version of PW2. PW5 who was a prosecution witness as well as a relative of the deceased, testified that Emily (PW2) shouted from outside the auction that no one should buy the cow. Emily (PW2) denied this. That, together with the fact that PW2 herself stated that the deceased was sitting down, could mean that he was beaten by members of the public.

In my view, the above contradictions are very significant. It is possible that the deceased was beaten at the auction, following PW2's alert by shouting at the auction. PW2 stated that the deceased was sitting down when the two accused came and took him. She does not give the reason why deceased was sitting down. PW7 states that the deceased was standing when the two accused arrived. The two stories cannot be both true. No explanation has been given by the prosecution for such a contradiction, on whether the deceased was sitting or standing. No explanation has been given by the prosecution for the contradiction on the beating of the deceased at the auction. That creates doubts in my mind. The benefit of that doubt has to be given to the accused persons. It is therefore my finding that none of the accused persons beat the deceased at the auction. PW2 said that the accused persons found the deceased sitting down. The accused persons also stated that the deceased was sitting down when they arrived. That evidence agrees, and therefore is more credible. There must be a reason why the deceased was sitting down before the two accused persons arrived. I therefore, find that the deceased was sitting down when the two accused persons arrived at the auction, and that he was in fact already tied with ropes on the hands by members of the public. It is also highly probable that he was beaten by members of the public. It was for the prosecution to prove that the accused persons beat the deceased at the auction.

Obviously, if the deceased was beaten at the auction before the accused arrived, it could be blamed on PW2 due to her saying that he wanted to sell a cow for which he did not get permission from the owners. In my view, that could possibly be a reason why she wanted to transfer the blame to others, whose beating him could not be blamed on her. From the evidence of what occurred at the auction, it is possible that the deceased was beaten by members of the public before the two accused persons came and found him sitting down. The prosecution has not come out to explain why the deceased was sitting down, and why and by whom he was tied with ropes in the hands. The burden was on the prosecution to do that. The benefit of that gap or doubt has to be given to the accused, and I do so. I find that the prosecution has not proved that the deceased was beaten by the accused at the auction and has not discounted the probability that the deceased was beaten by members of the public, before he sat down.

The other beatings of the deceased by the accused are said to have occurred when the deceased and the two accused persons reached (PW1) the mother of the deceased on the road from Tulwet auction to Chuliat Centre. The beatings appear to have been unprovoked as the deceased was already tied with ropes on the hands. There is no evidence of a quarrel or an attempt by the deceased to run away or escape from the arrest. The accused persons are said to have whipped the deceased and knocked him on the ground and stepped on him. No evidence as to where the whips went was tendered by the prosecution. None of the whips was described to court or produced in evidence. No reason as to why the accused persons should have assaulted the deceased was tendered by the prosecution. PW1 stated that when she met the accused, they beat the deceased in her presence. There was no evidence of any disagreement between the deceased

and the accused persons at that point, or whether the deceased tried to escape. In the evidence PW1, PW2 was not present at the beating, and joined them later. However, PW2 stated that she was present with them when the two accused met her mother (PW1) on the road and beat the deceased. She even testified that her mother got annoyed, and the two accused persons promised not to beat the deceased any more.

How could PW2 narrate all that evidence of the beatings, when her mother (PW1) testified that she was not there at the time of the beating of the deceased. How could she give that graphic story when her mother (PW1) specifically stated that PW2 joined them after the beating. That, in my view, is also a major contradiction which the prosecution also failed to explain. The evidence of these two witnesses on the beatings on the road before reaching Chuliat Centre is, in my view, unreliable and contradictory. The benefit of that doubt has also to be given to the accused persons and I do so.

PW1 also stated that the accused left her behind and went ahead to Chuliat Centre with the deceased. She joined them there. The two accused persons then beat the deceased at Chuliat Centre after her arrival. Her evidence is that there were many people – women and children at Chuliat Centre. In fact some women even tried to restrain the accused from further beating the deceased. None of those many people was called by the prosecution to support the story of the beating of the deceased at Chuliat Centre by the accused persons. I would have expected that crucial independent evidence from people who were not related to the deceased would be brought to court by the prosecution. They were not. No reason has been given for the failure by the prosecution to call any of those witnesses. The prosecution may elect not to call a material witness but they do so at the risk of their own case. (See the case of **Ng'ang'a –vs- R. [1981] KLR 483**). In our present case, the failure of the www.kenyalaw.org Republic v Sammy Kipkoech Kitur & another [2005] eKLR 36 prosecution to call independent witnesses who witnessed the beating at Chuliat Centre raises the presumption that the evidence of those witnesses would be adverse to the prosecution case. Again, the benefit of that presumption goes to the accused persons.

PW1 testified that the deceased died on a tractor at Kwa Meja. The driver of the tractor was not called to confirm that. The two accused persons stated that the deceased died at the gate of Tarakwa Police Station. The evidence on record is that the deceased sat on one mud guard of the tractor. Surely, if he had died on the tractor at Kwa Meja, he would not continue sitting on the tractor mud guard up to the gate of the police station. In my view, he would have fallen off from the tractor mud guard once he died. There is no evidence that the deceased fell from the tractor. The evidence of PW1 on where the deceased died cannot be truthful, and I find it to be unreliable evidence.

PW1 also testified that she was the only one who went to the police station to report. IP Mukunji on the other hand testified that one of the accused persons went to report, and PW1 was also in his office. Inspector Mukunji did not have any personal interest in the case. In my view, it cannot be true as stated by PW1 that the two accused persons disappeared after the deceased died. The evidence on record clearly shows that they were at the police station until statements were recorded from them.

In conclusion, PW1 and PW2 gave a detailed account of the incidents of the beatings of the deceased. They are obviously relatives of the deceased person. I saw them testify in court and I did evaluate their evidence and demeanour. In my view, they did not appear to be wholly credible witnesses. On crucial matters of evidence, they did not give me the impression that they were telling the truth. There were also contradictions in the evidence of prosecution witnesses. There were also important witnesses who were not called. The relatives could as well be passing the buck to the accused, taking into account that the reason why the deceased died was their own complaint about the cow.

In a charge of murder, the burden never shifts from the prosecution. It is not for the accused to establish his innocence. The evidence connecting the accused with the offence has to be credible evidence. The contradictions in evidence of the prosecution witnesses leaves a lot to be desired. The benefit of those contradictions has to be given to the accused persons. The failure to call independent material witnesses also did not help the prosecution case.

The only thing that the persons accused did was to walk with the deceased from Tulwet auction up to beyond Chuliat Centre as they were taking him to Tarakwa Police Station. He was weak, injured and

ended up dying before being handed over to the regular police at Tarakwa police station. That does not establish that they caused his death of the deceased. Therefore they cannot be blamed for his death.

I have considered the prosecution and defence cases as a whole and have come to the conclusion that the prosecution has failed to discharge its burden of proving beyond reasonable doubt that the two accused persons caused the death of the deceased. They cannot therefore be guilty of murder. I therefore have to find both the accused persons not guilty and to acquit them. In this regard, I am in agreement with the opinion of the assessors. the above reasons, I find both accused persons not guilty of murder as charged and accordingly acquit them.

Dated and delivered at Eldoret this 27th day of October 2005.

George Dulu

Ag. Judge

In the Presence of: Ms. Oundo State Counsel for the state

Mr. Obudho h/b for Mrs. Kittony for the accused.