



REPUBLIC OF KENYA

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

**Criminal Case 3 of 2000**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**BONIFACE NGANGA MAILU ..... ACCUSED**

**Coram: J. W. Mwera J.**

**F. Mulwa Advocate for Accused**

**Orinda State Counsel for the State**

**C.C. Muli**

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**JUDGEMENT**

The accused herein faced the charge brought under S. 203 as read with S. 204 Penal Code in that on 6.4.98 at Watema Chiefsoffice, Makueni he murdered one Nyamai Kilonzo.

On 13.3.2000 a plea of not guilty was entered in this matter. An initial trial was considered a mistrial on account of one assessor being disqualified and a fresh hearing got under way on 30.1.2001., 2

The prosecution called fourteen (14) witnesses while the accused himself plus three (3) witnesses were heard in defence.

On 8.4.98 three assistant chiefs John Maweu (P.W.1) David Mulinge Yumbya (P.W.2) and David Mwinzi Nzomba (P.W.6) accompanied the accused on a raid of homes in Nguluni sub location which were known for brewing and selling illicit brews.

These three assistant chiefs told the court that they first raided the home of Masaku Kasongo (P.W.3); the team found some illicit brew and Kasongo was arrested. Maweu (P.W.1) was told by the accused to begin the trip back to his offices at Watema. The intention, the court heard had been to take the suspects to Kola Police Post which lay in the same direction with the chief's office. But as it shall be seen, after the accused and the rest of the team arrested Nyamai (the deceased), it was in the evening and raining, they went to the accused's office.

The evidence of P.W.1, 2 and 6 which only differed in the bits that the court will allude to in due course, was that at the chiefs office

Masaku was remanded in one house, usually used by Administration Police for residence while the deceased was to be kept in another.

It looks like the deceased was considered a habitual illicit brewseller who had in the past not heeded the accused's warnings at all. P.W.1 told the court that before the deceased was taken to his cell while in the chief's office the accused asked him why he defied his directives not to continue with the brew trade. That the deceased answered that he did so to support himself, whereupon the accused set on him with a whip and beat him thoroughly all over the body. That the assistant chiefs tried to stop the chief from this assault but that he persisted in it. That he kicked the deceased in his private parts also. That after that the accused directed P.W.2 and 6, to lock up the deceased for the night. That he told them that he had whipped Nyamai to show them how to deal with suspects. P.W.1 told the court that the deceased was tied all the while he was assaulted. That after all this, the accused told the assistant chiefs to go home. P.W.1 was directed to return the following morning to get the two suspects (Nyamai and Masaku) from their temporary cells. That Yumbya (P.W.2) would then take over the suspects, walk them to a place called Kitandi, from whence Nzomba P.W.6, would escort them to Nunguni (also called Kilome court)

That when P.W.1 opened for the two suspects Masaku, who had been ill the day before and had been vomiting, said that he was in a fair shape. As for the deceased, he complained that he had been much hurt by the accused's whippings.

That on 8.4.98 P.W.1 with others including the accused attended a District Commissioner's meeting at Kilome. It ended at about 4.30 p.m. The District Commissioner gave the assistant chiefs going the way of P.W.1 a lift in his landrover. That on the way past the local court when it was getting to 6.30 p.m. one January Muthembwa (P.W.8) waved the District Commissioner's landrover down. When the team in it came down the accused described Muthembwa (P.W.8) with rest of the group, which had come to listen to the cases of Nyamai and Masaku, as drunkards. That Nyamai (the deceased) lay some 15 meters away. That P.W.8 was drunk. Those in the District Commissioner's landrover did not look over Nyamai. Instead they got back into the motor vehicle and the District

In cross-examined the court heard that once when the post of the chief fell vacant, P.W.1 who was an assistant chief acted in it. He did not have long before retirement; the post was advertised and the accused got it. It was no big deal to P.W.1. He reported that the chief (accused) assaulted Nyamai in his office in the presence of all the three assistant chiefs stated above. This witness who did not accompany the suspects from Kisunguni (Watema) to Kitandi on the way to Kilome Police Station did not know if Nyamai was given a P.3 form there. That besides Muthembwa who waved down the District Commissioner's landrover, there was also Masaku (P.W.3), his brother Kyalo (P.W.7) and a few more others. That Nyamai lay down in his red jacket. That Masaku Kasongo then explained to those in the District Commissioner's land rover that they were asking for transport to Kitandi. That he did not say who was sick and of what.

Yumbya's (P.W.2) testimony added that he was actually with the accused when they raided Nyamai's home. The illicit brew was found there and Nyamai was arrested and tied with a string. His evidence was that he witnessed the accused assaulting the deceased in the former's office. That the two suspects were locked up and the following morning P.W.2 escorted them to Kitandi. He first took them via a local market Masaku complained of a chest problem. The relatives of the two suspects came to see them. Nyamai did not complain of any health problem. Then P.W.2 handed them to P.W.2. He too had attended the Kilome District Commissioner's meeting. He was also given a lift by the District Commissioner. On the way at a place called Ithemboni the team came across Nyamai lying by the roadside. There also were Muthembwa, Kyalo, Masaku and one Boniface Mutuku. When the District Commissioner's land rover stopped Kyalo Kasongo told those inside that January Muthembwa (P.W.8) who had fallen down was unwell and he needed transport. That the accused told the District Commissioner that all these people were drunkards who had been arrested with illicit brews. They drove off. On his part P.W.2 noticed Nyamai in his yellow shirt and black trousers. This witness was of the view that Nyamai was lying down because he was drunk. On 12.4.98, P.W.2 learnt of Nyamai's death. That later the accused told him that he was proceeding to Kilome police Station to record a statement about the deceased. In cross-examination P.W.2 said that when the accused assaulted Nyamai at the former's office, they were alarmed.

So they pleaded with him not to do that. He repeated that when he walked the two suspects, Masaku and Nyamai to Kitandi, so that they would be escorted to Kilome Police Station, only Masaku complained of ill health and thus their progress was slow. That where the District Commissioner's landrover stopped after Muthembwa's group waved it down, he himself was lying down and there were attempts to raise him. Kyalo Kasongo said that he was sick. That when P.W.2 later heard that Nyamai died where they left him at Ithemboni he, P.W.2 was surprised because, he did not think of anything that would cause Nyamai's death.

Masaku (P.W.3) similarly testified about the arrest on 6.4.98 and being taken to the accused's office. He himself was locked up first leaving Nyamai behind. That he heard the accused asking the deceased why he did not heed his (the chiefs directives) not to brew illicit liquors. That Nyamai then screamed and P.W.3 suspected that he was being beaten. That the deceased screamed again and again and from his next door cell, P.W.3 heard it all. Then the deceased was locked up.

That when P.W.1 (Maweu) came the morning Nyamai complained that he had slept with his hands tied and without food. The suspects were untied and walked by P.W.2 to the local market. P.W.1 bought cigarettes for the deceased. They carried their liquor containers and walked to Kitandi. From there they proceeded to Kilome Police Station under escort of P.W.6. That the two boarded a motor vehicle over this trip because Nyamai was unable to move. That he had a swollen chest, head and hands. He could not even eat when they stopped at Kitandi. They were not beaten on the way to Kilome Police station. The following day the two suspects were taken to a local court. While P.W.3 admitted his charge of possessing illicit brew and he was fined, Nyamai denied and was given bond. They left the court in company of people like Mutuku Mulandi, January Muthembwa and Alex Kyalo Kasongo to go home. They stopped at a local market to drink and P.W.3 was not certain whether the deceased also drank. That P.W.3 left the bar at about 5 p.m. drunk and did not know when/how Nyamai left. That the next day, the deceased's daughter informed P.W.3 that Nyamai had died by the roadside. However P.W.3 told that girl that he had not seen Nyamai when they parted the previous day. P.W.3 who did not visit the scene of death by the roadside, also said that he did not see the assault weapon the accused used but on the evening he had been locked away leaving the accused holding a whip.

In cross examination P.W.3 who testified that their "cells" were close to the accused's office, did not witness the accused beating Nyamai. He denied that his bad chest slowed down, the foot trip from Kasunguni market to Kitandi. That this was caused by Nyamai's condition. This evidence seems to say something different from what Yumbya (P.W.2) said. He told the court that there was nothing wrong with Nyamai but that Masaku's chest problem retarded their walking progress. That Nyamai did not complain of his injuries at Kilome Police Station but that a police officer there did. P.W.3, after the court appearance and getting drunk at the nearby bar, he left alone and could not remember if anybody accompanied him. He could not tell if the deceased fought with somebody on the way home.

David Nzomba (P.W.6) was the other assistant chief who took part in the arrest of Masaku (P.W.3) and the deceased Nyamai. He testified that the accused assaulted Nyamai at his office and the latter screamed begging to be left alone. The assistant chiefs present intervened on his behalf.

When on 7.4.98 P.W.6 received the two suspects for the trip from Kitandi to Kilome, they came late because Nyamai was feeling unwell. He could not drink milk either. That at Kilome Police Station an officer noticed Nyamai's injuries P.W.6 explained those to have been a result of resisting arrest. However why should Nzomba lie so yet he had the previous day witnessed the accused assaulting Nyamai?

After the District Commissioners meeting on 8.4.98, P.W.6 was among the local administrators whom the District Commissioner gave a lift. Like other witnesses before, save Masaku himself, this witness told the court that on the way home a group of people waved the District Commissioner's land rover to a stop. These included Masaku Kasongo, Kyalo Kasongo and January Muthembwa. It may be recalled that Masaku in his evidence said that he left the bar alone and drunk to go home. He did not remember if anybody left with him. But P.W.6 noticed Nyamai lying on around plus another person. The District Commissioner considered all of them a bunch of drunkards and ordered the landrover to move off. That the following day P.W.6 learnt Nyamai died where they had seen him on the roadside. And later the accused told Nzomba to go to Kilome Police Station and record a statement on account of Nyamai's death.

That Muthembwa was also lying down by the roadside when the District Commissioner's landrover came upon them. P.W.6, on his part, told the court that Kyalo Kasongo (P.W.7) introduced Muthembwa to the group on the District Commissioner's landrover as a police officer - not that he was sick (see evidence of P.W.2 - Yumbya). To P.W.6 there did not appear to have been a struggle at this scene but that Muthembwa looked thoroughly drunk.

Benson Kamanza (P.W.4) served the group of Kyalo Kasongo, Masaku and Muthembwa (etc.) at a bar at Ithemboni after they left Kilome court. That Nyamai did not take the beer; he only drank soda.

That the group left at about 3 p.m. together and the following day Kamanza learnt that Nyamai died.

Boniface Mutuku Mulandi (P.W.5) who knew the accused as well as the deceased proceeded to Kilome court to hear the plea that Masaku and Nyamai would offer to the charges of possession of illicit brews. Masaku was fined Sh.2500/= which he paid and Muthembwa stood surety for Nyamai. On the way home they stopped at a bar to eat and drink. That Nyamai ate very little; he looked ill with swollen testes, head and chest which he showed to P.W.5. Those in that group included Muthembwa, Masaku, Kyalo and the deceased. That at 5 p.m. the group got up to leave after much drinking. P.W.5 left alone. Nyamai had only taken soda. The following day Mutuku learnt that Nyamai had died on the way.

This witness did not know a village called Kivungi, and he did not know that Nyamai died on a sport near there. P.W.5 denied that on the day Nyamai died he was at the scene - where the District Commissioner's landrover was stopped by Muthembwa's group heading towards Kitandi. However Yumbya (P.W.2) claimed that he noticed Mutuku at the scene. So did Muambi (P.W.1). He denied that at this spot he shouted that he would kill somebody. That he had not worn a jacket with a hole at the elbow of the sleeve that day. That nobody fought with the deceased that day and P.W.5 insisted that he was saying the truth only.

Kyalo Kasongo (P.W.7) on 7.4.98 went to Kilome Police Station to look up his brother Kasongo who was held there with Nyamai on account of possessing illicit brews. After giving food to Kasongo, P.W.7 noticed that Nyamai had a swollen right leg. He explained that those who had arrested him had beaten him up.

The following day Kyalo came to court and all that transpired has been stated several times over before. But that before the court proceedings started Nyamai told Kyalo that he wanted painkillers and that the accused had beaten him in his private parts and on the chest. At the bar/eating house, Nyamai only took soup. He talked to other patrons. At 5.30 p.m. they all rose to go but P.W.7 did not see Nyamai. On the following day P.W.7 learnt that Nyamai did not return home; he learnt later that Nyamai had died on the road to Kitandi. Kyalo denied that he stopped the District Commissioner's landrover to carry Muthembwa. He was drunk and he saw no such motor vehicle.

January Muthembwa (P.W.8) a police officer at Port Victoria was on leave at his home, at Nguluni village. On 6.4.98 the wives of Nyamai and Kasongo came along to enlist his help now that their husband's had been arrested with illicit brews. He went to Kilome Police Station and talked with the O.C.S who declined to grant the suspects bond. P.W.8 said that he saw them and that Nyamai had a swollen face and hands. His tongue was heavy and his back bore marks of whip stripes. That Nyamai told P.W.8 that the accused assaulted him. That the following day at Kilungu court (also known as Kilome or Nunguni) the pleas, already alluded to were taken.

The group then went to a nearby market to drink. At about 5 p.m. the whole group left. On the way P.W.8 was too drunk to walk

Teresia Kaluki (P.W.9) now Nyamai's widow narrated how the 20 accused and his team raided their home for illicit brews and proceeded to break containers and damage furniture. They took Nyamai away. The following day in company of Muthembwa and Masaku's wife they went to Kilome Police Station where the two (2) suspects were held in cells. She saw Nyamai with a swollen right hand; he did not eat food and he could not talk. Nyamai was not given a police bond but what went on in court, the

following day is now well known. P.W.9 left the men drinking at a nearby market. The group has been named already. But the deceased did not follow her home and the following day he was found dead by the roadside. She with others visited the scene and reported the case to police at Kilome who later removed Nyamai's body.

P.W.9 did not know the owners of the homes in the vicinity where Nyamai lay dead but she had heard of a woman called Katiwa. The only Katiwa in this case was also called Maria Kyeva (D.W.1).

Dr. Patrick Lumumba (P.W.1) performed a post mortem on Nyamai's body. It bore bruises over the trunk, waist, the scalp and left hand. No fractures. The deceased had bled into the chest cavity and he suffered from mild cirrhosis (liver damage due to alcohol).

That the skull was not fractured but there was much internal bleeding in the brain.

The cause of death was said to be this internal bleeding in the brain and a ruptured vertebral aorta at the back of the head. This rupture was likely caused by a blunt object (Exh. PIA-B). This postmortem had been witnessed by Dr. Mutuma on behalf of the deceased's family.

In cross examination P.w.10 said that the bruises noticed could not cause the death of Nyamai. And that twisting the deceased's neck would possibly rupture the artery spoken of.

P.C. Boniface Kaindi (P.W.11) told the court that it was the accused herein and his two assistant chiefs who presented the two suspects to him at Kilome Police Station. From all evidence so far this is the first time to hear that the accused and two assistant chiefs did thus alleging that the suspects had been offering a brew called SUGHURM for sale. That Nyamai had bruises on the left arm and he had pains all over his body. That Nyamai told P.W.11 that the chief had assaulted him. That P.C. Kaindi informed his superior officer IP Ngugi who right away came to verify the remarks. P.W.11 then booked Nyamai and his mate for court appearance the following day. That P.W.11 made notes of the bruises and Nyamai's sick looking appearance. IP Ngugi did not testify here and the notes about Nyamai's appearance were not produced. Indeed no investigating officer testified here. One wonders why IP Ngugi did not right away arrest the accused if the deceased had informed P.W.H that the accused who was there had assaulted him. Why not even take a statement from the accused? Chiefs are not supposed to assault suspects.

The next to be heard was Juliet Mbithe (P.W.12) the deceased's daughter. She was present when the accused and his three assistant chiefs came to their home and arrested her father Nyamai, with illegal liquor. When Nyamai did not return home on the morning of 9.4.98 P.W.13 set off with her brother Mulinge to look for him. This took them to the home of Masaku and onto the road to Ithemboni. There they found the dead Nyamai by the roadside. The deceased had a swollen face, right shoulders and legs. No cuts. The two children returned home to inform their mother. The body was later collected from the scene and taken to Machakos General Hospital where Paul Kasongu Musyimi (P.W.13) identified the doctor who performed the post mortem. Also present at that operation was P.C. Shiundu (P.W.14) who was posted at Kilome Police Station at the material time. P.W.14 told the court that he went to the scene. That they moved the body before an investigating officer arrived. That the body lay some 50 -70 meters from the road and P.c. Shiundu noticed some treads and disturbance of/on the ground from the road to the spot. It appeared as if the body had been pulled along. This witness told the court that IP Ngugi investigated the case. That Nyamai's body lay some 30 - 40 meters from the nearest house and the witness would not say if its occupants were interrogated about the whole matter. That ended the prosecution case.

The defence opened with Maria Katiwa Kyeva (D.W.1) in the witness box. Her home stood on the Kitandi - Nunguni road - some 70-80 meters away. Sometime in 1998 while resting in her house, Katiwa heard somebody approaching and shouting too. She got out to see. It was Mutuku Mulandi (P.W.5). He asked for food and she served him with a piece of pumpkin (Mulandi denied this in cross-examination) which he ate as he cried. D.W.1 asked her why this was so and Mutuku answered that Chief Ngaanga, the accused, was intending to have Mutuku, with others, return to Kilome where they had come from and that Mutuku was opposed to that. That P.W.5 named his mates as January Muthembwa, Masaku and Kyalo Kasongu and Nyamai, the deceased. This witness did not see these others but she recalled that

Mutuku was wearing a jacket with leather elbow pads. That the coat was torn at the elbow of its left sleeve and Mutuku wore his arm through it. It may not have been noted here earlier but Teresia, the deceased's wife told the court that on the day Nyamai appeared at Kilungu court he wore a yellow T-shirt and a coat with leather patches at the elbows.

That Mutuku was at Kitiwa's home at about 5 p.m. After eating he went home. The following morning while D.W.1's daughter-in-law Magdalena Kamula (D.W.2) was going to a nearby school, she came across a dead body on the road. She ran back to inform Kitiwa. This turned out to be Nyamai because as D.W.1 and 2 stood there a young girl and a boy arrived. They burst out in tears saying that the deceased was their father. This must have been Juliet (P.W.12) and her brother Mulinge. The police came but as Nyamai's body was being taken away, D.W.1 noticed that he was wearing the jacket with leather pads that Mutuku (P.W.5) had had the previous day. Police asked nothing of these two women.

In cross-examination D.W.1 said that she did not know Nyamai physically but Mutuku mentioned his name to her. She did not know the accused Chief Ngaanga either. That their own chief was called Ngui. That again it was Mutuku who spoke of chief Ngaanga. D.W.1 knew Mutuku for long but could not say whether he was drunk on this day, but he acted so. That also it was Mutuku who mentioned January Muthembwa. D.W.1 did not know him. She could not say how the dead body came onto her land. She did not know that Nyamai brewed liquor. They did not come from the same area.

Magdalena (D.W.2) also spoke of Mutuku visiting their home wearing a coat with patches; his arm went through a hole in one sleeve. When the next day she found Nyamai's body near their home, she called D.W.1. The rest is similar to what D.W.1 told the court. The D.W.2 knew Mutuku before, his mother was her mother-in-law's (Kitiwa) friend, and he used to pass in that home going to the market. She did not know Nyamai or Chief Ngaanga.

The next defence witness was Richard Ndivo (D.W.3). On 8.4.98 when he was proceeding from Nunguni via Kivungi village a G.K. landrover came and passed him. A little distance on, D.W.3 came across five people by the roadside. One was leaning on the road's bank. Among these people Ndivo recognized Mutuku Mulandi, Kyalo Kasongo, January Muthembwa and Masaku. That Masaku called out the name of the seated man - Nyamai, saying that he had revealed/disclosed him as a local liquor brewer. That at that point Muthembwa told Nyamai that they should proceed home and finish the dispute there. That Nyamai answered that he was drunk and would proceed home on his own and alone. That Nyamai added that before the chief caught up with them, they had beaten him. He wondered whether they were about to assault him again. That Muthembwa pulled up Nyamai; they slapped him and Mutuku said that even if the chief had beaten him (Nyamai) they would beat him again. That Muthembwa lifted Nyamai and they walked along. Both fell down heavily and Muthembwa beat Nyamai. When the rest pulled up Nyamai his appearance had changed. That Mutuku was holding a coat with pads at the elbows and one sleeve had a hole at the elbow. Mutuku wore that coat putting the left arm through the hole in the elbow; he went to look for a home to leave Nyamai at. That Mutuku expressed fear that keeping Nyamai in somebody's home in the shape he was would cause problems, but he went to look for such a home anyway. Ndivo then left. He learnt that Nyamai died that evening of 8.4.98.

In cross examination D.W.3 said that he knew the accused - chief. He also knew Kitiwa (D.W.1) even if their homes were far apart. That Muthembwa and Nyamai struggled near Kitiwa's home. D.W.3 also knew Mutuku Mulandi (P.W.5). That Ndivo was not in this group of Muthembwa; he just came across them on the road. They were behaving in a drunken manner, telling each other that they go home. Ndivo did not think that something serious was about to occur. But that Nyamai on falling, screamed and this disturbed D.W.3. That Ndivo did not tell anyone about this incident and police did not summon him over it at all. Ndivo stuck by his testimony in court.

The accused testified last (D.W.4) that with his assistant chiefs they raided the homes of Masaku and Nyamai for illegal brews. When they got into Nyamai's home, a child had espied them and alerted him and the revelers. They scattered. Nyamai who appeared drunk and rather violent held the accused by his coat lapels. However, he was arrested with some liquor. That the team started off going to Kola Police Post. But the course was changed to proceed to the chiefs office when Masaku complained of chest pains and

Nyamaispoke of a bad leg. At about 7.30 p.m. they arrived at the chief's office. The suspects were locked up. It started raining until 10 p.m. that is when the accused with the three assistant chiefs proceeded home. He directed that the suspects be taken to Kilome Police Station the following day and he allocated the duties. The accused denied ever assaulting Nyamai while in his office. That the following day while at Kilungu District Officers' office Nzomba assured the accused that he had escorted the two suspects and delivered them at Kilome Police Station. That after the meeting with the District Commissioner on 8.4.98 as already said, at about 4.30 p.m. the accused, with his assistant chief's, was in the District Commissioner's *land* rover proceeding home. That near Ithemboni market the team came across the deceased, Muthembwa, Mutuku, Masaku and Kyalo Kasongo. That Kyalo waved the District Commissioner's *land* rover to a stop and the accused noticed Nyamai and Muthembwa lying by the roadside. That Kyalo explained that Muthembwa (a policeman) was drunk and he required a lift to go home at Kitandi. That the accused then explained to the District Commissioner that he knew that group by the wayside; they had been arrested with illegal brews. On hearing this the District Commissioner directed that the *land* rover proceed on its way.

That in the following day the accused visited Nyamai's home, and one Peter Mutiso told the accused that Nyamai had died on the spot they found him lying by the roadside. That IP Francis Ngugi OCS Kilome Police Station investigated the case. The accused denied that he was responsible for the injuries that caused Nyamai's death." He said in cross-examination that Nyamai's habit of brewing illicit liquors in his home irritated the accused because that was contrary to his, the accused's line of duty.

That on his arrest the deceased resisted; he was drunk but the accused was not rough with him. The accused said that he was taken by surprise when his assistant chiefs (P.W.1, 2 and 6) testified that he beat Nyamai. He attributed this to a bad relationship between them - a matter they had earlier sorted out before their superiors. That Masaku said something unfavourable about the accused because he was arrested with illegal brew.

After going over the evidence both counsel submitted - a Mr. F. Mulwa for acquittal while the Learned State Counsel was for conviction. Each side considered various aspects of the case. When the two assessors returned their opinions one was for outright acquittal while the other found the accused guilty of a lesser offence of manslaughter. The court then rose to consider the following determination.

It is not in doubt that Nyamai died on or about 8.4.98. While the assistant chiefs said that they witnessed the accused assaulting the deceased with a rubbery whip, for not giving up his trade, Masaku only heard the screams from the chiefs office and suspected that *Nyamai* was being beaten. That the following day Nyamai told Masaku that the chief (the accused) beat him. The accused denied the assault on 6.4.98 and attributed the unfavourable testimony of P.W.1, 2, 3 and 6 to bad working relationship or because Masaku was arrested. However from all the evidence the court was left with the impression that Nyamai who irritated the accused with his habitual brewing of illegal brews was beaten by him, the accused, on the night of the arrest. The court believed the eyewitnesses on this.

The court was also satisfied that the deceased bore bruises of the beatings. But even though Dr. Lumumba (P.W.10) noted them, his opinion was that these injuries could not cause the death of Nyamai at all. The death he said was due to bleeding in the brain because of a head injury and that this coupled with a ruptured artery at the back of the head of Nyamai. With this the court was of the opinion that although the accused assaulted Nyamai, itself an unlawful act, that was not the cause of the death at all.

It is very probable that the ruptured artery was caused by an act, quite likely on the day of the death - 8.4.98. It is unfortunate that this case was never investigated by the police or that if Ngugi did investigate it, he did not testify about the whole thing. The prosecutor did not get into this bit.

The court has the evidence of Ndivo (D.W.3). He knew Muthembwa, Nyamai, Mutuku the Kasongos etc. On 8.4.98 he came across them on the road from Nunguni to Kitandi. It was in the evening. That is the day of court appearance. The group looked drunk and behaved so. He said that Muthembwa and Nyamai held onto each other trying to walk home and at the same time it appeared that there had been a disagreement between Nyamai and Masaku in which the former had disclosed the latter's brewing

activities. That Muthembwa and Nyamai fell heavily on the roadside. Nyamai screamed and did not wake up. The group beat him. Whichever way Ndivo's evidence was viewed by the prosecution here, the court was left with the view that this intervening circumstance could have had something to do with Nyamai's death.

The other aspect that left this court not quite clear about the deceased's night injuries was the contradiction between the evidence the assistant chiefs. While Maweu woke up the two suspects on 7.4.98 and only Masaku complained of chest pain Nyamai was said to be alright. But then the other assistant chiefs said Nyamai retarded the march to Kitandi because he was swollen all over. This started on the way? The if at Kilome Police Station Nyamai revealed that the accused assaulted him, why did PC. Kaindi (P.W.11) who received the report or IP Ngugi whom he told of this, not arrest or even take a statement from the accused? P.W.11 for the first and only time said that two (not one) assistant chiefs and the accused were present when the two suspects were booked in at Kilome Police Station on 7.4.98. Only one assistant Chief claimed to have taken the deceased to Kilome - Nzomba (P.W.6).

The court was not comfortable with January Muthemba's story at all. He appeared evasive if not hostile. The same with Mutuku Mulandi (P.W.5). P.W.1, 2 and 6, while in the District Commissioner's land rover found and saw Muthemba at the scene where Nyamai and Muthembwa were lying by the roadside. He denied it. Then Katiwa (D.W.1) and Magdalena (D.W.2) saw him wearing Nyamai's coat (with leather pads he having his arm through a hole at the sleeve) when he came to their home. They knew him. They gave him a piece of pumpkin which he ate while crying. He denied that he ever went to Katiwa's home and ate pumpkin. Yet this is the same Mulandi whom Ndivo saw wearing the torn coat, run to a nearby home to look for a place to keep the injured Nyamai overnight! The following day Nyamai was dead on the land of D.W.1 and 2. Was Mulandi all the truth in this court? Hardly.

From all the foregoing this court was of the last view that the accused did not murder Nyamai and he should be acquitted.

Death of a person is a serious thing indeed. It carries death sentence if proved against one who may have caused it. So when death is allegedly caused, the State should put in place all efforts to investigate it - not that it should ignore lesser offences. They are equally injurious to the peace of the citizens. Yet here Nyamai's death apparently was not investigated! We had no evidence on this. As shown above there are contradictions or omissions that an investigation would have put in order to lay due charges if established. It was not done. Even Katiwa and Magdalena [Kb.VV.1 and 2](#)) whom police found where Nyamai was lying dead were not asked any question!

So much for now. The accused is acquitted of the charge. Judgement accordingly.

Delivered on 30<sup>th</sup> April 2002.

J. W. MWERA

JUDGE