



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 34 OF 2018

REPUBLIC

VERSUS

NAFTALI CHEGE.....1ST ACCUSED

CHARLES WANGOMBE MUNYIRI.....2ND ACCUSED

ISMAEL BARAKA BULIMA.....3RD ACCUSED

JOHN PAMBA.....4TH ACCUSED

JUDGMENT

Introduction:

1. This judgment is the sad and tragic record of the death of **Alexander John Runan Monson**, (the deceased herein) a young man aged 28 years old, of a British aristocratic dynasty of Baron. The young man came to Kenya and lived with his mother in Diani, a scenic, calm and windy beach in the Kenyan South Coast. Having recently completed university Alexander was at the prime of his youth, looking forward to a promising future whether in Kenya or in Britain. Like most young people, Alexander occasionally took alcoholic beverages and smoked embassy light cigarettes. It was alleged he occasionally smoked bhang, a fact which originated the matters herein. With money to afford the little pleasures of youthful life, Alexander literally had the world in his pocket. Unfortunately, on the night or morning of 18th/19 May 2012 the young Alexander was arrested in what evidence shows a healthy condition, placed in a police cell overnight and woke up to his death in the mid-morning of 19/5/2012. What happened to Alexander was not altogether a surprise to most Kenyans: police cells have in the past become death traps for inmates, most of whom have as their only crime, the fact that they were suspected by police to have committed a crime. This judgment traces these events leading to the tragic death of Alexander, and is an indictment, without a shadow of a doubt of the Kenyan Police Cell, with specific reference to Diani Police Cell on the night of 18th/19th May 2012.

2. The circumstances leading to the death of Alexander were investigated through a public inquest in the Diani Inquiry No.3 of 2015 under Section 386 of the Criminal Procedure Code.

3. The inquest by its Ruling delivered on 23/6/2018 recommended the prosecution of NAFTALI CHEGE, CHARLES WANGOMBE MUNYIRI, ISMAEL BARAKA BULIMA and JOHN PAMBA who were subsequently charged with the murder of Alexander under Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.

Prosecution's Case

4. **PW1- Hilary Martin**, the mother of the deceased lives in Diani where she operates a hospitality beach house. The deceased used to stay with her before he passed on. On 19/5/12 at about 5.00 a.m. while in Nairobi she received a phone call from her friend Enrico that her son had been arrested and was held at Diani Police Station and that he was trying to get him out but that the police would not allow that because the OCS was not available. She was told the deceased was arrested for smoking bhang. Later at about 9.30 a.m.–10.00 a.m. she received a call from a M/s Joy, that her son was unconscious and the police were to take him to Palm Beach hospital in Diani. She took a flight to Diani and to the hospital arriving at about 4.30 p.m. When she entered the room she found her son in a comma in an ICU machine, chained to the bed. She was never able to talk to him. He died within an hour of her arrival. Her brother PW4 arranged for an autopsy on her son. According to the autopsy her son died out of a hit by a blunt object - a blunt force trauma in medical terms. PW1 testified that her son had no history of sickness either from drugs or otherwise.

5. **PW2 William Anthony Lindsay Kennaway** was a close friend to PW1. PW2 testified that he believed the deceased died in a cell in

Diani police station. He had seen him at the Diani police station. It was in the night. He was not very visible because he was in the cell which was dark. PW2 assured the deceased that he would secure bail for him. He saw the deceased being taken to hospital to be checked by the doctor. He did not know who arranged to take him to hospital. There was little conversation between them, but he was talking.

6. **PW3 – Rosemary Joana Kennaway** was at home in Diani on 19/5/2012 when at about 5.00 a.m., she received a phone call from PW1 informing her that the deceased was at Diani Police Station and requested PW3 to go there and arrange bail for him. PW3 together with her husband PW2 went to the Police Station at 10 a.m.

7. The deceased was still in the police cell. As they waited for the OCS to process bail, they noted that the deceased was not in good shape so her husband went to get an ambulance to take him to hospital. When the ambulance arrived at about 11.30 – 12 a.m., the deceased was taken to hospital with the ambulance staff. They followed him in their cars. They never spoke to him. He never gained consciousness the whole day. The mother PW1 arrived at about 4.00 p.m. However, the son passed away at about 5.00 p.m. and so they left the hospital.

9. **Pw4 – Dominic Kenneth Martin** was uncle to deceased. On 18/5/2012 he was in his house in Nairobi. PW1 – Hilary was staying with him in the house, as well as his wife. When they received the news of arrest of the deceased they asked PW3 to go to the police station to find out the matter and to organize bail. Later they were informed that the deceased was unwell. PW1 then took a flight to Mombasa. PW4 called the doctor at Diani Hospital who told him that the deceased was under care and would be alright and that the doctor informed them that the police had told them that the deceased was suffering from drug overdose. At about 3 p.m. he called the hospital again and this time talked to a different doctor who informed him that the deceased was okay but had some breathing problem but was in good hands. The next call was from Hilary at about 4.30 pm. She informed him that the deceased had died. Stunned, PW4 flew to Mombasa and arrived in Diani at about 10.00 p.m. He was shocked when he was informed that the deceased died due to drug overdose and he did not agree with that so he arranged for postmortem. The next day he went to Diani police station and he looked for the OB which indicated that the deceased was booked into the cells appearing normal. He thought there was inconsistency on that, and told the 2nd accused as much. The 2nd accused informed him that the deceased was brought in a little intoxicated but otherwise cheerful. Initially PW4 did not suspect a foul play. But later he did. He arranged for a post mortem. The Postmortem is signed by doctor Mbuuko the government pathologist who performed the postmortem. The report was produced as “PMFI1”.

The report reads:

“Consistence with increased intracranial pressure due to brain confusion following blunt injury to head”

10. Some body parts were taken for toxicology test. He however did not know where those samples were kept. He had also asked for private samples, which were taken to him. After a while PW4 took those samples to Dr. Mandaliya of Path care who would take some of them to South Africa for tests.

11. PW4 did not believe that Doctor Mandaliya sent the urine to South Africa. However, after a long time Dr. Mandaliya told him that the results were back and that they were negative for all tests including cannabis.

12. Doctor Ngulungu was the family pathologist who prepared a report dated 22/5/2012 (‘PMFI 2’). According to him the death was not due to toxicological reasons and so there was no need for toxicology. PW4 testified that both Doctor Ngulungu’s report and that of Doctor Mbuuko agree that the cause of death was pressure caused to the brain by blunt object. However, Dr. Mandaliya did a second report which indicated evidence of drug including cocaine in the urine of the deceased. The witness later reported the matter to IPOA for further investigation. The IPOA recommended that there be an Inquest into the matter. An inquest was done in inquest Proceedings No. 3 of 2015. PW4 was a witness in the said Inquest.

13. **PW5 Richard Khamala Bowy** is the father to PW6 who was a friend to the deceased. His son PW6 was arrested together with the deceased. He went to the police station to release both suspects. He succeeded in releasing his son but failed to release the deceased. He spoke to the deceased who appeared to be in perfect health. He left him at about 2.30 a.m. He later learnt that the deceased had died at Palm Beach Hospital.

14. **PW6 – Andrew Simiyu Bowy** was with the deceased for the better part of the afternoon on 18/5/2012. They were arrested together with the deceased at Tanduri bar parking lot and taken to Diani police station. His father went to the police station and negotiated his bail. He left the police station with his father. The deceased was in perfect health as they left at about 2.30 a.m.

15. The following day about 9.a.m. PW6 tried to call the deceased but his phone did not go through. At about 12 noon he drove to the deceased's house but there was nobody. PW6 assumed that his problem was resolved. However, a friend of his called Jerri Oakley called him as he left the deceased home telling him that the deceased had passed on at the hospital. The news shocked PW6 and he did not know what to do. PW6 testified that there was no resistance to arrest. Everything seemed fine. They were not molested as such. The arrest was fairly uneventful and they cooperated fully.

16. PW6 testified that on the day of arrest, he was not drunk. But he was fatigued. Even the deceased was not drunk. The deceased used to smoke cigarettes. At Tanduri he did not see him smoke cigarettes. Not even in the car. Nobody smoked bhang that evening. The deceased was normal as far as PW6 was concerned.

17. **PW7 – Erico Madella Amadei (Kiko)** testified that he was Alexander’s friend and they were to meet that evening. However, they were not able to meet because Alexander was arrested before they could meet.

18. PW7 then made a call to the deceased who informed him that they had been picked up by police and handcuffed together with Andrew and that they were headed to Ukunda police station. The deceased said he would call him back. The deceased called PW7 at about 2.00 a.m. informing him that Andrew's father had been there and had Andrew released. PW7 rushed to the police station and arrived at about 2.30 a.m.

and found two police officers at the front desk. The deceased was inside the cell and peeped through the hole to speak to him. For him to do that he must have been standing on his tip toes. He was tall over 6.2 feet. PW7 could see the deceased's face. They talked. PW7 could see his eyes. He had known the deceased for at least 12 years. He could also recognize his voice.

19. The deceased sounded okay and stated as much. The police informed PW7 that they had arrested the deceased for smoking bhang. The police denied PW7 a chance to see OB to confirm if the deceased was registered in OB.

20. The police showed him the piece of the alleged bhang herein. "PFMI – 3" and its envelop "PFMI – 4". PW7 testified that the deceased enjoyed drinking occasional beer or whisky. He also smoked cigarette – Embassy lights. Since there was nothing PW7 could do, he left. The deceased was fine and hoping for the best.

21. The following day, PW7 was told the deceased was in hospital. He rushed there. The deceased was in the bed handcuffed. He was in bad shape. Both hands were tied to the bed's metal rail. He had bruises in his left arm. The doctor told PW7 he was treating him of drug over doze. About 1 hour after PW7 left hospital, he received news that the deceased died on the bed.

22. **PW8 – Justice Okari Aminga** worked at the Diani Palm Beach Hospital. He authorized the release of ambulance to pick the deceased from Diani police station; and later on after Alexander died, ambulance to take the body to Pandya mortuary.

23. **PW9 – Emmanuel Shadrack Bondora** was a nurse on duty at Palm Beach Hospital at the general department. He was in the ambulance which picked the deceased from Diani police station.

24. The patient was unconscious, frothing and sweating. His limbs were numb. They attempted resuscitating the patient but it did not work. The doctor ordered some medication which PW9 administered for example Atropine – which helps undeleting the pupil. They also administered hydrocotism to resuscitate the patient. He was also on a drip.

25. PW9 attended to the patient upto 4 p.m. His condition appeared to be worsening and the doctor told them to administer cardiac shock to energize the heart. They did that three times and stopped.

26. At that time the mother – Hilary had come. The doctor took her aside and informed her that the patient had died.

27. PW9 then prepared the body, removed the clothes and handed the same to the mother. The body was taken to Pandya mortuary by the ambulance.

28. PW9 testified that he examined the body. He did not see anything unusual. The patient was given the best attention at the hospital. PW9 was not aware of any complaints against the hospital.

29. **PW10 – Moses Kithei Wambua** worked at Palm Beach Hospital as a biomedical Engineer. As such engineer he was responsible for maintenance and repair of machines. On the material date he was directed to go with the ambulance and pick the deceased from Diani police station. In the ambulance they were 3. The driver, the nurse and PW10. When they reached the police station they found the patient unconscious. They picked the stretcher from the ambulance and carried the patient to the ambulance. There were 2 police officers. The police officer who accompanied them carried some drugs in a polythene paper in his hands. He showed PW10 the drugs but PW10 told him to show the doctor because PW10 had no knowledge about drugs. The police told PW10 that he had picked the drugs from the patient. At the hospital doctor Maundu handled the patient. PW10 was not aware of any complaints against the hospital at that time.

30. **PW11 – Francis Kamau Wamboi** spent part of the evening with the deceased and some other people. At Tanduri Bar and Restaurant, the deceased took white cup beer. They were dancing on the dance floor. The deceased was playing pool with Andrew, PW11 and other people. Then PW11 said he wanted to leave. The deceased offered to drive them home. So they entered his car. They did not leave immediately since the deceased wanted to smoke something.

31. Suddenly a random short guy arrived at the window of their car. The place was dimly lit. The guy started arguing with the deceased, accusing him of smoking weed.

32. PW11 and his girlfriend left the car so that they could go home. Andrew and the deceased remained in the car. They were not smoking.

PW11 did not see the deceased being manhandled in any way.

33. **PW12 Seif Mwalim Makope** was an arrested person who shared the cell with the deceased on the night of 18/5/2012. They were 6 guys in the cell. At one point PW12 left the cell to go into a toilet. The mzungu was sitting in front of PW12. He told PW12 that he was arrested with bang at Tanduri Bar.

34. In the morning tea was brought to the cell mates. PW12 tried to wake the mzungu guy but he was just snoring. The cell mates took their tea

And the mzungu continued snoring.

35. At around 9.00 a.m. police officers requested PW12 to help them bring out the mzungu to the OB area. They did that. The mzungu continued to sleep and snore. At 10.00 o'clock PW12 paid Kshs. 500/= to the police for his release. He was not given a receipt for the payment. PW2 testified that he did not see anything out of the ordinary.

36. **PW13 – Dr. Ngale Mbuuko**, a consultant pathologist, based at Coast General Hospital in Mombasa conducted a post mortem on the deceased on 22/5/2012 at the Pandya Memorial Hospital mortuary. Present also was Dr. Ngulungu. Other people present were police officers, relatives and morticians. The body was identified by Mr. Dominic Martin. Police officer Gideon Rono supplied the post mortem forms. The date of death was 19/5/2012 at 5.10 p.m. The report was done around mid-day on 22/5/2012. The deceased was in a blue short and maroon underwear. He was male of good health. Height 184 cm.

37. There were marked peripheral cyanosis in the finger line which appeared dark. Also both feet were pointing down, showing there was a problem in the head or brain. The eye sight had signs of medical interlunation. Meaning he had been attended to. There were resuscitation marks on the chest wall around where the heart is.

38. There was also an intravenous line marks on the left hand. This was for giving medicine. The witness also noted a grazing injury of left of elbow about 1x1 cm. It is like scratching a rough surface. There was also bruise on the dorsum of the left hand. There was also a bruise on the scrotum. There was swelling on left side of the hand measuring 4x4 cm.

Internally, the post mortem established the following:

- There was bruising of the wind pipe – like a resuscitation bruise.
- The lungs were congested – not full of air. The left lung was 600 grams while the right was 900 grams the normal is 300 – 400 grams.
- The heart had healed old scars. The heart was 450 grams which is normal.
- The digestive system was normal.
- Kidneys and blood had 50 ml. of cloudy urine.
- On the head there was a blood clot – hematoma measuring 8 x 7 x 1 cm. This clot was due to the bruise in the head which was 4 x 4 cm.
- No fractures were noted on the skull.
- The brain appeared congested – (Swollen) with flattened gyri and narrow sulci. It is caused by injury to the brain.

39. As a result of his examination PW13 formed the opinion that the cause of death was consistent with increased intracranial pressure due to brain condition following blunt injury to the head (pending toxicology – urine, blood stomach and liver and kidney report). PW13 produced the Post Mortem Report as prosecution exhibit No.1. PW13 also produced a bunch of photos showing the body of the deceased. PW13 testified that the body corresponds with the report of the Post Mortem Report (exhibit No.1). The photos are marked MFI '5' (a) to (x).

40. PW13 testified that even if he got a positive toxicology report he could not tell that the deceased got fatal injuries as a result of a fall. He had no evidence of a fall. PW13 testified that if a dead person is hit on the head even with a hammer there would be no swelling. In this case there was swelling which means that the injury was occasioned before death. The witness was not aware of the effect of cannabis on the nervous system. It can cause blood pressure, but the witness was not sure.

41. PW13 further testified that the injuries on the deceased were fresh. They occurred just before death. For example, the bruise on the elbow was fresh. There were no features of healing. The wound had no time to heal. The doctors who treated the deceased may not have seen the injury on the head since the deceased had thick hair on the head. The wound may not have been obvious. The doctors would have seen the swelling on the head if they had parted the hair. PW13 testified that the only evidence of treatment he saw from the body was attempt at resuscitation. When one is treating a patient who is unconscious, the doctor starts with resuscitation. The witness could not tell from his evidence whether the injury to the brain was a hit by blunt object or whether it was a fall.

42. PW13 further testified that the injuries on the elbow and bruises, the swelling of the head and blood clot were all on the left side of the body. These injuries would be consistent with falling whether forced falling or self.

43. The swelling or injury on the head was a wide blunt injury. This kind of injury would be caused by limitless list of objects. PW13 testified that the cause of death had nothing to do with effects of drugs the deceased may have taken.

44. **PW14 – George Opello Ogutu** testified that he works with Government Chemist Laboratories in Mombasa as a Government Analyst. He produced a report which was prepared by his colleague Mr. Njenga who had retired. The report is marked MFI 6. The memo form for the exhibits was dated 19/5/2012.

The memo accompanied samples as follows

A1 a bottle with some liquid

A2 – Tablet (1)

A3 – A bottle with 4 Tablets

A4 – Tabs for smoked cigarettes

A5 – Pockets of white papers

45. PW14 stated that the Samples were brought by Sergeant No.50264 – Issa Wachifa (MFI '7'). PW14 also identified a document dated 19. 5. 12. It is exhibit Memo. They are:

-Plastic marked 'A' containing stomach contents and intestines.

- B – containing line of kidney.

It was brought to PW14 by the same sergeant Issa on 25. 5. 2012 – MFI '8'.

46. PW14 produced the report prepared by Mr. John Njenga in relationship to memos above. It reports on the content of A1 – A5 in MFI '7.'

The report says that John Njenga did an analysis of the exhibits.

His findings on the liver, kidney and stomach contents which were tested for Benzodiazepines – that is, drugs that can cause hallucinations – and cannabinoids and any other drugs. The witness testified that the result was that it was negative for those drugs. No drugs were found. The other result is that A1 was found to be Ketamine which is an aesthetic

A2 - was Viagra

A3 – Diazepam – a sedative

A4 – Cannabis

A5 – Papers

47. The witness testified that the body did not have cannabinoids although cannabis was found. There was no drug found in the body of the deceased. PW14 produced the report and memos as exhibits 6, 7 and 8 respectively.

48. **PW15 – Yusuf Salim Matumizi** had on the material night been arrested and placed in a cell at the Diani police station. He spoke with the deceased. The deceased looked like he was drunk because soon thereafter he fell asleep facing the wall. Soon the witness also slept. In the morning when they were called to take tea the deceased was still asleep on the floor. Three police officers sought to wake him up. They roughed the deceased to wake up. One held him on the right hand and one on the left hand. They tried to raise him up but let him head hit the floor. This was done three times and then the police officers left. After some time the 3 police officers went back and asked the cell mates to help carry the deceased because he was heavy. They helped to carry him to the OB area. Then they returned back to the cell at about 9.30 a.m. At about 10.00 a.m. PW15 paid his bail of kshs.500/- and he was released. The witness left the deceased at the police station, still snoring near the OB desk.

49. **PW16 – Shaban Swaleh Mwadrashi** testified that on the night of 19/5/2012 he had gone to Diani police station to pay bail for his 6 employees who had been arrested. He did not succeed and was asked to return the following morning at 8.00 a.m. The following morning he returned to the police station. The police demanded Kshs.1000/= for each suspect to be realized. PW16 did not have the money and sought to leave. As he left, he passed near the reception and heard somebody snoring. He was a whiteman. He sat against the wall at the reception. Later on that day PW16 was told by PW12 that the whiteman died.

50. **PW17 – Mohamed Salim Mwandarashi** was also a cell mate with the deceased on the material night. The deceased failed to wake up for morning tea.

51. PW17 testified that the deceased never left the cell from the time he was brought in at about 3.00 a.m. till the time he was lifted in the morning. The witness testified that police officers did not carry the Whiteman and that those who carried him were 5 cell mates and they did not drop him down.

52. **PW18 – Abdalla Sofian Mwakupigwa** was also a cell mate on the material night. At about 4.00 a.m. the deceased was brought into the cell. He did not speak to him. But he complained that it was hot. Later he was able to sleep. PW18 was woken up at tea time. The deceased was still asleep. After they had taken tea the tea boy tried to wake the deceased up to take tea. Later 2 police officers entered the cell. They were in civilian clothes. They asked for help to carry the deceased. Before they asked for help the police officers tried to carry the deceased but they failed. Five of them assisted. They carried him upto the OB desk. He looked good. He had no injuries. They put him at the report desk and left him there and returned to the cell. By about 8.a.m PW18 was released and went home. Later he heard that the deceased had died. The witness testified that during the time they were in cell there was no commotion or struggle.

53. **PW 19 No. 218177 Paul Cheruiyot** is Superintendent of Police currently attached to Nandi County but formally Officer in Charge Diani Police Station. He was posted to Diani in 2011. He knew the accused persons in this matter. They were his colleagues. They served in the same station but in different units.

54. The 3rd accused was under his command. The 2nd and 1st accused were under Tourism Police. They were not reporting to him. PW19 did not know the deceased. On 18/5/2012 the witness reported on duty at around 7.00 a.m., and worked till 6.00 p.m. The duty officer was

Inspector Mulwa. The witness then proceeded to his house after checking out. Later he proceeded to a robbery scene.

55. At around 3.00 a.m. PW19 returned to the station. He did not go into the cells since he had a duty officer in charge. But he saw the arrested person standing at the OB desk. He did not talk to him. He saw accused No. 2 in his office. He was with some other people. PW19 passed through the corridor and left through the back door and went to his house. He did not talk to the prisoner. PW19 testified that he did not talk to the officer because this being a tourism case, the officer in charge of tourism was present and were in charge. PW19 did not get any further information during the night. At 11.00 a.m. the next day a Constable Maina informed PW19 that the prisoner arrested the night before had fallen ill. PW19 rushed to the front office and found the prisoner being moved into an ambulance. The prisoner appeared very sick and so PW19 did not talk to him. Pw19 testified that when someone falls sick in custody they are to be attended to immediately and the OCS informed. They must be taken to hospital. PW19 did not go to the hospital with the deceased, but he informed the DCIO about the hospitalization. Inspector Kimanzi was his deputy. He was not on duty at the particular time. He was in his house. PW19 briefed the DCIO. He was informed that the deceased was arrested for being in possession of drugs. PW19 was overall in command for the police station. He was responsible for the welfare of prisoners. PW19 testified that when an inmate has been taken into a cell, his movements out of the cell must be recorded in the OB. In the instant case the prisoner was booked at 2.30 a.m. He went to the station at 3.00 a.m. He saw the deceased talking to the 1st accused outside the cell. However, he did not see any OB entries showing movement of the inmate from the cell. The purpose of the entries is to establish any complaints which may arise in relation to the movement of the inmate. If a prisoner is unwell it is possible to know but sometimes it is not easy to know if a person is sick unless there is a complaint. PW19 learnt that some items which were taken from the deceased were missing.

56. **PW 20 – Dr. Titus Ngulungu** is a doctor, a pathologist and a forensic expert. He was engaged by the family of the deceased in the year 2012. He prepared a report and dated it 22/5/2012. He produced the original Report to the Inquest. The witness examined the body on the same day he made the report. He was with another pathologist called Dr. Nyale Mbuuko (PW 13). He was based at the Coast General Hospital. The body was identified to them by Mr. Martin who said he was an uncle to the deceased.

Findings were:

- a gentleman of Caucasian origin
- the body was preserved
- the rig emotive had already set in
- the body had central and peripheral cyanosis meaning the body lacked oxygen before death. This may be caused by denial of oxygen by failure to breath or blocking of nose.
- the body was in a blue pair of shorts and a maroon underwear
- head and neck had an ill confined swelling noted at the left parieto-occipital region
- chest was normal from external but there were resuscitation marks seen on the anterior aspect of chest
- there were marks on the upper limb and bleeding below the skin surface
- the marks in the upper limbs were constant with defensive mechanism that is somebody trying to block an aggression internal hymn
- head had injury – hematoma was visible – clotted blood
- central nervous system – there was bruising of the brain –contusion. This is caused by violent shaking of the brain.
- Respiratory system – the lung appeared congested. There was no fluid in the thoracic cavity

57. In the head there was a healed scar about 15mm consistent with a healed scar probably due to pericardial.

- ü Gastro intestinal tract was normal.
- ü Unitary system – bladder contained no fluid
- ü The liver and pancreas were fine.

58. PW20 concluded that the cause of death was head injury due to a blunt trauma forced attended by brain concussion and raised intracranial pressure. In other words, the deceased died due to injury to the brain. PW20 and Dr. Mbuuko (PW13) were in agreement on the cause of death. He produced his report as prosecution Exhibit No. 2.

57. **PW 21 No. 233936 Chief Inspector Raphael Mulwa** was attached to Diani Police Station in charge of investigations. On the material night he was on duty patrolling around Diani area. He received a call from Corporal Chege who asked for reinforcement to escort a person he had arrested to police station.

58. He went to him and found him at Tanduri Bar Parking Yard. There were Corporal Chege and PC Serem. He found Corporal Chege standing by the driver's door while Serum was by the passenger door. In the vehicle were two men. All was calm.

59. Chege informed him that he had found the white man smoking bang. The witness was surprised because the place was calm. He asked why there was a need for reinforcement. Chege said the white man had attempted to drive away hence the need for reinforcement.

60. The witness asked the Whiteman if he smoked bhang and he said no. Corporal Chege however showed PW21 the bhang that he said was being smoked by the Whiteman. PW21 then informed the Whiteman that they would take him to police station. At the police station PW21 was shown another envelope by Corporal Chege containing some tablets. PW21 then left for another scene of robbery. That was at about 2.30 a.m. At the time PW21 left to the robbery scene the Whiteman was in a good condition. There was nothing wrong with him. When PW21 returned from the robbery scene the Whiteman and the Blackman were still at the police station. They appeared quite relaxed. When he returned he found Mr. Munyiri talking to the Whiteman at the report office outside the cell. In the morning at about 6.00 a.m. PW21 returned to the station. He did not see the Whiteman that morning. There was no incidence reported about the Whiteman. He had no complaints.

61. Accused No.3 and No.4 were were in charge of the cells and were responsible for the security of the Whiteman; or any officer above their rank was responsible for their security. The tourist police were responsible for investigations of all offences by or against the tourism.

62. **PW 22 – No. 79718 William Serem (PC)** was a duty officer. On 18/5/2012 he was conducting a patrol within Diani beach. At around 1.30 a.m. they entered Tanduri Restaurant and parked at a dark place 15 metres from the entrance.

63. A bouncer at the restaurant went where they were and called Chege. He informed them that there was somebody smoking bhang. There was a double cabin motor vehicle that was reversing. They approached it. Two occupants who had sat at the back of the vehicle came out and one entered the driver's side and the other passenger side. They went to them. The witness saw Corporal Chege holding half smoked bhang. He asked the driver who was a Whiteman whether he knew it was illegal to smoke bhang in Kenya. They ordered the Whiteman to switch off the engine and come out of the vehicle but he did not, and attempted to drive away.

64. That is when Corporal Chege called for reinforcement from Inspector Mulwa. Inspector Mulwa then arrived. Then the Whiteman voluntarily came out of the motor vehicle. Between the gear lever of the motor vehicle PW22 saw a khaki paper which he removed from the car.

65. The two gentlemen were handcuffed together. PW22 handed over the khaki brown paper to Corporal Chege. They drove them to the police station. The witness recovered the half smoked bhang and the envelope with tablets and a bottle of fluid identified as MF13, MF19 and MFI 10. The witness testified that the condition of the Whiteman was okay but he looked drunk. They were orderly. He booked them in. The Whiteman was standing at the front office and PW22 left. PW22 did not interact with the Whiteman.

66. **PW23, No. 81832 PC Kennedy Mutai**, was attached at Diani Police Station at the time with general duties. He was on duty on 19.05.2012 from 8.00 am to 4.00 pm. The deceased was one of the individuals in custody. At 9.00 am, the deceased was still sleeping and breathing heavily. The 3rd and 4th Accused had left the police station but did not inform PW23 that the deceased had issues. PW23, PC Mutai and Sergeant Issa instructed the remandees to take the deceased out for fresh air. Chief Inspector Paul Cheruiyot was then informed about the case.

67. **PW24, No. 50264 Inspector Issa**, attached at CID Diani received some drugs on 19.05.2012 from PC Kemboi who had been sent by Chief Inspector Munyiri the 2nd accused herein and stated that the deceased had been arrested with them. He found the deceased lying with his head near the door and breathing heavily and not talking. He accompanied the deceased to hospital, handcuffed one of his hands to the bed and waited outside until the deceased's demise.

68. **PW 25 – John Jesse Payne-Janes** is a forensic specialist from the United Kingdom. He became involved in this matter in early 2015 prior to the inquest herein when the deceased mother engaged him. He had never met or heard of the family of the deceased or his death. PW25 received the e-mail from the deceased's mother who informed him of the circumstances surrounding the deceased's death and that he had been in custody and that an inquest was to start in 3 weeks. PW25 then sought to get as much background information from the family, that is, postmortem reports, toxicology reports, any accounts or statements of witnesses available, copies of medical records or any police record. PW25 then produced a report on 24/1/2015 based on those documents. The documents included:

- IPOA statement
- Palm Beach Hospital Medical records
- Postmortem and Toxicology reports
- Copy of part of Occurrence Book from Diani Police Station
- Background information from IPOA and National Police Service

69. With that material PW25 produced a copy of the substantive report dated 14/2/2015 marked MFI '12'. His key findings in the 67-page Report is made in summary at page 60. PW25 concluded that based on available evidence, the timelines of the deceased's condition was not consistent with drugs or intoxication. His unconsciousness was not due to drugs. He testified that it appeared that until about 3.00 a.m. or 3.30 a.m. the deceased's condition was good or normal. From about Friday 19.5.2012 at 0500 hours and onwards there is considerable evidence that the deceased was unwell according to the available statements.

70. By 8.00 a.m. his condition changed drastically and there is no information why medical assistance was not sought for a person who was for all intents and purposes unconscious. The level of toxicology or drugs in the body was almost not there. Any samples which states otherwise may not have come from the deceased since the pathological evidence showed that the deceased had sustained at least one blunt injury to the head. The witness testified that this could be caused by any weapon including police button or part of the gun, although Dr. Mbuuko in his report excluded gun button or part of the gun.

71. The witness testified that he was very familiar with police button injuries or gun butt injuries. The said injuries were also not consistent with a person who was carried and dropped accidentally, although he could not altogether rule out this possibility. Further, the post mortem report also shows brain injury. The deceased was already unconscious when he was dropped to the ground so dropping cannot be the cause of injury. Injury occurred before he was dropped. The deceased was certainly well upto around 2.30 a.m. Such injuries on the head, the scrotum and the arm are all injuries which occurred before death. PW25 knows this because post mortem shows clots of blood underneath the skin which cannot be the case after death. Again these injuries could not have been suffered before the deceased went into custody. The witness stated that from his finding these injuries occurred after 2.30 a.m.

72. The witness agreed with the two pathologists who recorded injuries in slightly different ways but with no substantial significant difference. Both recorded bruise to the left wrist, same side of head injury. The scrotum was also very severely bruised. PW25 and both pathologists agreed that the injuries on scrotum were caused by blunt object. The bruises on the wrist were consistent of a person defending a blow to the head which was on the same side of the hand.

73. From the evidence provided to PW25, he concluded that the deceased obtained blunt object to the head the timing of which cannot be identified but would have been after approximately 3.00 – 3.30 a.m. on 19/5/2012. This caused brain damage. The police failure to provide medical care led to the death of the deceased. PW25 testified that there was no evidence to suggest that the deceased's death was caused by any drug overdose. When PW25 came to Mombasa to give evidence at the inquest he was able to see OB and the Cell Register. He was also provided with postmortem images of the deceased in 2015. He then prepared a fourth report dated 28/4/2015 in which he concluded that the entries show that the officers confirmed that the deceased was seriously sick and recorded this in OB at 9.45 a.m. PW25 stated as at 2.30 a.m., there was no suggestion that the deceased was considered to be drunk. The cell register at paragraph 11 states that:

“drunken, dangerous and notorious prisoner. Must be reviewed and must be recorded every 2 hours.”

74. This did not happen. PW25 then concluded that from previous evidence and later evidence the deceased sustained at least one moderate to severe force impact after 2.30 in the morning. This resulted in brain damage due to failure of police to arrange immediate and urgent medical care. The bruise to the scrotum was caused by at least one moderate blunt force to the scrotum. Bruise on the left wrist were similarly caused by some form of blunt object. The witness produced his report as prosecution exhibit no.13.

75. PW25 agreed that drug overdose can cause intracranial pressure on the brain. The doctor who conducted toxicology the first time was aware that a second test was necessary when the first test became negative. The second test was positive for some kind of drugs. It was done by Dr. Mandaliya. PW25 said that while it was unlikely, he could not rule out a fall by the deceased. However, the injuries on the scrotum could not have been caused by a closing or opening zip. It was caused by blunt force injury. The injury on the hand was most probably caused when the deceased tried to evade an attack. PW25 further stated that the injury could not have occurred at time of arrest or before that because the degree of pain would cause the patient to be aware of it. PW25 stated that from his experience it is not possible that one can fall and suffer head injury, hand injury and scrotum genital injury all at the same time. The injuries suffered by the deceased were so serious that he would make everyone aware of the same. PW25 did not believe that any drug overdose caused the death of the deceased. Most drugs would wear out within a maximum of 6 hours for heroin while cocaine would be out in 30 minutes.

77. **PW 26 – Chelestino Ngari Kamami** was the mortuary attendant of Pandya Mortuary. On 19/5/2012 at about 7.35 p.m. a colleague called Mbogoh received body of the deceased. On 22/5/2012 PW26 did postmortem in the presence of police from Diani Police Station. Dr. Mbuuko was also present. There was also a doctor from Nakuru. There was also a Whiteman. Postmortem was done at Pandya Mortuary on the deceased.

78. **PW27. Dr. K. N. Mandalya** carried out tests on specimen for purposes of a toxicology analysis after the pathology was done. MFI “16” is the Report of toxicology which was done in Nairobi. The test was only on urine, which was normal. Urine sample in South Africa was divided into 2. One sample was positive of cocaine, centrism, and some element of drug abuse. Urine 2 had traces of cocaine, benzodiazepine, morphin TXC, cannabis. PW27 produced MFI nos. 14, 15 and 16 as exhibits Nos. 14, 15 and 16. PW27 stated that he was not involved in post mortem, and that the analysis done on toxicology cannot reveal the cause of death.

79. **PW28 NO. 68504 Gideon Kiprotich** was in May 2012 based in Diani Tourist Police as record keeper. On 19/5/2012 at about 2 a.m. he drafted signal pertaining to arrest of a tourist on instructions from 2nd accused. With the 2nd accused was a white lady, who was asking that the deceased be released on bail, but Inspector Munyiri told her to come the following day. PW28 left 2nd accused's office and went to the records office and found the deceased sitting and having a cordial conversation with police constable Baraka, the 3rd accused. There was a light laughter. The suspect was seated on a stool. PW28 addressed him about his details, where he resided. He said he lived in a cottage. He appeared to have been drunk but he was okay. He answered questions promptly and without any difficulty. PW28 then drafted the signal of arrest of a foreigner. Then he left. However, the following morning at 8.00 a.m. he returned to the office and was informed by constable Maina that the suspect was unwell.

80. He informed the 2nd accused that the suspect was unwell. The 2nd accused informed him that he was aware but that since the matter involved drugs he had handed over the matter to the CID and informed Inspector Issa. Later that morning the deceased was taken to hospital, and later passed on.

81. On 22/5/2012 PW28 attended the postmortem at Pandya Hospital on instructions of 2nd accused. The body was still dressed in a short and T-shirt. PW28 testified that when a suspect is arrested he is searched and he does not go into cell with anything. However, at the

mortuary some things were removed from the deceased's pockets. This was not normal.

PW28 testified that there was nothing out of the ordinary in the way the 2nd accused handled the matter.

82. **PW 29 218172 Mwendu Ethaiba** the DCIO Kwale on material date testified that on 19/5/2012 at about 2.30 a.m. he received a call from CIP Chege of Tourist Police Diani, who informed him that he had arrested the deceased while smoking bhang. He also recovered some drugs. PW29 was informed because matters of drugs were in his docket. Again the matter involved a foreigner so as DCIO he ought to know. He told Chege that he would address the matter in the morning. At 7 a.m. Constable Issa found the deceased unwell in his cell. Constable Issa was surprised because during the night the deceased was well. PW 29 was among those who took the deceased to hospital.

83. **PW 30 – No. 56261 Sergeant Stephen Nyamai**, was currently attached to Scene of Crime's Office Mombasa County. He is a scene of crime officer. He took photographs during the postmortem of the deceased which was performed at Pandya Hospital on 22/5/2012.

He took photographs as follows:

- Photos 1 & 2 – general view of drugs on table
- Photos 3, 4 – full length view of the deceased
- Photos 5 & 6 – facial view of the deceased
- Photo No. 7 – full length view of deceased
- Photo No. 8 – closer view showing the pathologist examining the arm
- No. 9 – close up view showing a bruise at the left arm
- No. 10 & 11 – closer view showing jump staining marks of art on the chest
- No. 12 & 13 – closer view showing bruise on the testis
- No. 14 – closer view of the back of the deceased
- No. 15 – 16 – Closer view showing the liver
- 17-18 – closer view showing the heart
- 19-20 – closer view showing a bruise on the left side of the head-interior
- 21-22 – closer View showing pathologists taking measurements of bruise on the head
- 23 – closer view showing the brain
- 24 – closer view showing the skull
- 25-26 – closer view showing bruise on upper palm of the left arm

There were 26 photos. The photos are a true reflection of the photos he took. PW30 produced the 26 photographs as prosecution exhibits Nos. MFI 5, 1-26, and a signed certificate dated 30/5/2012 as prosecution exhibit No. 18.

84. **PW31, Maina Kabiru**, the Executive Officer at Mombasa Law Courts produced the file Mombasa Chief Magistrate Inquest No. 3 of 2015 consisting of the original court file and certified copies of proceedings related to the inquest registered on 12/01/2015. A ruling had been delivered on 28/06/2018 by Chief Magistrate J. N. Nang'ea on behalf of Richard Odenyo SPM. A copy of the ruling is in the file and a list of exhibits running to No. 50.

85. **PW32 Jeremiah Arodi** worked with IPOA as the in charge of investigations. IPOA is mandated to receive and undertake investigations against policemen. He led a team of investigations in this matter in June 2013. The testimony of PW32 purports to be a summary of events surrounding the death of Alexander, and the role IPOA had in bringing up the case and gathering evidence. He prepared a report containing summary and recommendations of his investigations. He produced it as prosecution exhibit No.30. PW32 testified that at 3.00 a.m. the deceased was seen at the office of Chief Inspector Munyuri. In his report PW32 recommended disciplinary action against unnamed officers. According to PW32, the accused persons were negligent for failure to attend to the medical condition of the deceased. The police was informed at 9.30 of the illness of the deceased. The second accused was informed of the deceased illness, but there is no record of that in the Occurrence Book. The entry should have been made. Further, the deceased was seen with the 2nd accused even after he had been booked in cell, but it was not recorded. PW32 ruled out the deceased getting injured at the point of arrest. It would not have taken that long before the injury was manifested at 3.00 a.m. PW32 investigated the possibility of drug overdose as being the cause of death but discounted that aspect. To some extent PW32 could not say that any of the accused persons caused injury to the deceased. But PW32 testified to their consequences. The deceased went to Diani Police Station at 2.30 a.m. appearing normal. Witnesses saw him out of the cell after having

been booked in the cell. Thereafter soon after 3.00 a.m. the deceased suffered consequences that rendered him unconscious until his death. At the time of him being detained accused 1-4 were at some stages in the office and they had the duty of taking care of the detainee and of recording any movement in and out of the cell. This was for 3rd and 4th accused.

86. PW32 testified that when a prisoner is removed from cell there must be a record on OB detailing the reasons for movement, times out and in of the cell and who is moving them. The record must be in cell movement register and OB. The only recorded movement of the deceased is when he was taken to the hospital. The 2nd accused was the senior most officer and OCS of Tourist Police Unit. It is this unit led by 1st accused who arrested the deceased. The 2nd accused was obligated to take care of the deceased. It is on record the 2nd accused talked to the deceased on the morning of the relevant day. He had the duty to observe the deceased and assist him. There is an entry at 9.30. The 4th and 3rd accused were required to take any action regarding the condition of the deceased. The deceased did not make any complaints of his condition upon arrest. The injury as put by the experts must have occurred between 3.00 – 5.00 a.m. PW32 testified that excessive consumption of drug cannot cause the blunt force injury. Even the result of toxicology shows that the amount of drug in the blood was little and could not cause such injury.

A Case to Answer

87. At the close of the prosecution's case, the Court in its ruling delivered on 22/3/2021 found that all the accused persons had a case to answer. Accordingly, the accused persons were all put on their defence.

The Defence Case

1st Accused Defence

88. **DW1 – 1st Accused No. 48617 Sergeant Naftali Chege** gave sworn evidence. He is currently under interdiction. On 19/5/2012 he was working with Diani Tourism Police. He had served in that position for about 4 ½ years. But in total he had served the police since 1985 – about 27 years upto 2012. His in-charge Chief Inspector Munyiri, the 2nd accused herein, gave them duties. On the night of 18/5/2021 the witness reported to work after 6.00 p.m. He was instructed to patrol along Diani Beach, together with PC Serem, and PC driver Mohammed using a Toyota Land Cruiser GK A670L. They patrolled along beach road and surrounding hotels and estates along the beach. They came to Tandori Bar and Restaurant, along the road. The bar has both open and private section. From the open space one can see the road. They parked in a side road, about 70-5 metres from the bar. They came out of the vehicle and we were just relaxing. Shortly thereafter, a bouncer whom they knew by face came out of the bar and informed them there was a white person smoking bhang in the hotel. The bouncer tried to remove the smoker but he resisted. So the bouncer wanted their assistance. DW1 then led his team to behind the hotel at a well-lit place. Then he saw a Whiteman leave the bar to go into his car. The bouncer pointed him out. His car was Toyota Hilux. DW1 was with PC Serem. PC Mohamed was still in their vehicle. DW1 approached the Whiteman from driver's side. PC Serem approached him from the passenger seat. As he approached the vehicle DW1 smelt bhang, and then he saw a bhang roll in the Whiteman's mouth. Both of them were in uniform. The white man was about to reverse and DW1 took that bhang from his lips, to use as exhibit. He explained that he was a tourist police officer and identified himself and told the Whiteman that they were arresting him. Then the Whiteman took out his phone to call somebody. DW1 also took out his phone to call inspector Raphael Mulwa to come and arrest the suspect. DW1 sensed that the Whiteman wanted to drive off and using their vehicle blocked his vehicle so that he could not move away. DW1 testified that the Whiteman had 3 passengers. They were African. A man who sat at a co-driver's seat was Bowy, PW6. At the dashboard there was a brown envelope. PC Serem took the envelope and looked inside. He found it had some drugs. The couple who sat at the back seat came out and went into the bar. It was about 1.00 a.m. All this time the deceased was talking on phone, comfortably seated in his car. There was no confrontation. In less than ten minutes Inspector Mulwa arrived in his car. He went to where they were and enquired about the issue. He went told that the Whiteman was smoking bhang. Then he talked with the Whiteman who came out of his car without resistance. Inspector Mulwa had come with PC Chirchir, who had handcuffs. He handcuffed the Whiteman and the man seated in co-driver's seat. They ordered the two to enter into DW1's vehicle. PC Chirchir drove the Whiteman's car to the police station. DW1 testified that the Whiteman did not make any complaint at all during all this time. At the Diani Police Station, DW1 and Serem did further search on the Whiteman's car. They found a packet of lizra rolling papers. These papers are used in rolling bhang. At Diani Police Station were 2 officers manning the station-PC Pamba and PC Baraka and there was also station guard PC Langat. DW1 then instructed PC Serem to search the suspects again. Nothing was found. DW1 then called DCIO SP Mwenda, to inform him that he had arrested a person with narcotics so that the narcotic department would handle the suspect. Because SP Mwenda did not respond, the witness then called Inspector Munyiri, his boss, who reported after about 20 minutes. By that time, the suspects had not been put in cell. Inspector Munyiri greeted them and entered his office. DW1 followed him into the office and briefed him about the case. After that DW1 went out and the DCIO SP Mwenda returned his cell and DW1 informed him that this was a narcotic issue. DCIO SP Mwenda told DW1 just to book the suspect and that the issue would be sorted out the following day.

89. DW1 then sought for particulars from the suspects, that is, passports and other personal particulars. In the process the Whiteman told him that he was the person who was suspected and that his friend should be left because the friend was only given a lift in the Whiteman's car. DW1 took Bowy's statement and he was released. DW1 testified that Inspector Muchiri did not speak with the Whiteman at all. He then booked the deceased as a suspect, at about 2.30 hours, and put him in cell. The suspect appeared normal to DW1. He did not complain of anything. Neither did he say that he was suffering from any discomfort. He did not have any injuries at all after the booking. PC Serem arranged for a signal of arrest to be made and was signed by Inspector Munyiri, the 2nd accused. Then DW1, PC Serem and PC Mohammed left the station to go back to patrol. After 6.00 a.m. they reported back to the station to sign off. Before that they wrote a statement concerning the night booking. They did not see the deceased, and did not have any news about the deceased.

90. At about 10.00 a.m. DW1 left his house to go take tea at police canteen. He saw the deceased was lying out. He also saw some white people at the station. They had come to bail out the deceased, but they said the deceased was unwell so his health would be attended to before the issue of bail. DW1 was present when the deceased was taken to hospital in a stretcher, but he did not go to the hospital. At about 5.30 p.m. DW1 was informed that the deceased died at Palm Beach Hospital. He did not see his body. He did not know what caused his death. DW1 testified that he did not know anything that might have taken place in the Tandori Bar before the bouncer called them that night. On cross examination, DW1 testified that he had served for 37 years with national Police Service. He was trained at Kiganjo College as a police officer and was taught how to arrest an offender or a suspect. Before arrest the suspect is to be informed of what he had done. At

the time of arrest, it is not necessary to handcuff a suspect. DW1 testified that he did not have a police note book that night despite the requirement that he should have had it. He also took no inventory at Tandori Bar. DW1 knows about National Police Service Act, and that it was the law which he ought to have applied in this case but he did not know. DW1 testified that where the offence is bailable a suspect can be released on bond or bail at any time of day or night. He did not know if anybody came that night to ask for bond because he left the station immediately after he had booked the suspect. DW1 testified that he knows that the safety and security of any person arrested must be given priority, and that the welfare of prisoners is in the hands of the officers in report office and the OCS. When he booked him, the suspect was talking and he was not drunk. He was perfectly healthy. DW1 testified that he was not aware how the deceased phone got lost at the police station, but he heard that his phone actually got lost.

2nd Accused Defence

91. DW2 Charles Wangombe Munyiri gave sworn evidence and testified that he was a retired police officer, Chief Inspector of Police No. 217842. He retired in December 2015. At that time of retirement, he was working at police headquarters in Nairobi. Before that he was in Diani Police Station, Tourism Police Unit, Diani, in charge of that Tourist Unit. His rank was still Chief Inspector. He was posted in Diani in 2008. He worked in that position until 2013. On 19/5/2012 he was at Diani Police Station. At around 2.30 a.m. he received a call from DW1 Corporal Chege who informed him that he had arrested a foreigner who was smoking cannabis sativa and he had brought him to the police station. He woke up and proceeded to the police station. He entered through the front door at the reception. On entering, he found many police officers including PC Chege, PC Pamba, PC Baraka and Inspector Mulwa. PC Chege showed him the suspect who was seated in a chair. Inspector Mulwa was outside the reception desk while the others were inside the reception desk. DW2 enquired from Corporal Chege the passport of the suspect, to which Corporal Chege replied that the suspect had no passport. DW2 approached the suspect, greeted him. He did not reply immediately but after some hesitation he said that he was fine. The suspect told him he had misplaced his passport. DW2 then took the OB and went through the entry which had been made. The suspect looked dull and somehow sleepy. This was about quarter to 3.00 a.m. After that DW2 went to the general office for Tourist Police where he found PC Serem, PW5 and PW6. PW6 was recording a statement. PW5 was the father of PW6. Then he walked into his office which is next to that general office. DW2 then summoned CP Rono – the records officer to draft a report for signal to be sent for arrest of a foreigner to headquarters and other relevant offices. The report was titled “Arrest of a foreigner”. The report was to inform the British High Commission that one of their subjects had been arrested. While still in his office a white young lady entered. She appeared drunk. She was the sister to the suspect. She was requesting if the suspect could be released. DW2 asked her if she could bring passport of the suspect. She agreed to do that at 9.00 a.m. but she did not show up as agreed. DW2 went back to his house using the back door to sleep. This was about 3.00 a.m. He did not again meet or see the suspect alive. All departments of police use one cell. The OCS is responsible for the welfare of suspects placed in the cells. Around 9.00 a.m. DW2 went back to the office. Chief Inspector Serem has handed over to him some envelope which contained some drugs and half smoked bhang. He instructed Chief Inspector Rono to hand over the item to Senior Sergeant Issa of the CID. Thereafter DW2 left the station building to go to the beach to do supervision. At around 5.00 p.m. he received a call from DCIO Mr. Mwenda who informed him that the suspect had fallen sick and was taken to Diani Beach Hospital where he passed away while undergoing treatment.

92. DW1 rushed to the hospital and found Senior Sergeant Issa and another CID Officer. He confirmed that indeed the suspect had passed away. DW2 then made arrangement for the transfer of the body to Pandya memorial Hospital. The DCIO instructed DW2 to open an inquest file which he did. But the following day, DW2 received instructions from Nairobi to hand over the file to the CID which he did. DW2 felt sad by the death of the suspect. DW2 testified that he did not murder the deceased.

93. The witness testified he had been trained as Corporal, Senior Sergeant, Chief Inspector, Court, traffic and investigations courses among others. He was also trained on human rights and so he knows the rights of suspects while on police hands. He also received training on Criminal Procedure Code Cap 75, and on Evidence Act. He was also trained on first aid, continuously. He had previously served as an OCS. So he understood obligations of OCS and DCIO. The DCIO does not deal with issue of welfare of suspects. DW2 testified that according to his training bail is granted by OCS or his deputy or any other officer instructed by the OCS. The OCS at Diani was Chief Inspector Cheruiyot. They were of the same rank. He was not around that time, but his in-charge Inspector Mulwa was around.

94. Inspector Mulwa in this case would not take action in a matter brought by an officer under DW2 without referring to DW2. Corporal Chege would be in a position to make a decision about a suspect by him without reference to DW2. Corporal Chege (DW1) was with DW2 upto about 3.00 a.m. So if Corporal Chege testified that he left the station at 2.30 a.m. soon after booking the suspect, that would be a lie because Corporal Chege was with DW2 about 3.00 a.m. DW2 testified that DW1 had arrested a suspect with half smoked bhang, and he intended to charge the suspect. At that time DW1 did not mention any other drugs except cannabis sativa (bhanga). But when DW2 read the OB he found mention of other drugs. DW2 testified that he was told to open an inquest on the death, and he did so. So it is him who triggered the process of inquest. This was barely 4 days after the death. He had recorded statements from witnesses. DW2 conceded that an inquest was a DCIO and OCS matter, but that he took up the inquest instructions because he was instructed by his seniors. DW2 testified that they did not invent the story of the drugs at the police station. The drugs were handed over to him at the station on early hours of 19/5/2012. He was however surprised that some drugs were found in the body of the deceased at the mortuary. That night at report desk there were officers on duty PC Baraka and PC Pamba (Accused 3 and accused 4). PC Baraka was in charge of the cell and monitored whoever entered the cell. PC Pamba was literate officer who was to make the report. DW2 referred to OB entry on 19/5/2012 at 00 hours midnight, and stated that it is not easy to tell who made this entry. At 0230 hours Corporal Chege made an entry. At 300 hours there is an entry by the OCS. So it appears that indeed the OCS was there in contrast to DW2 earlier statement that the OCS was not there. So there were personnel to take decision on the welfare of the deceased. But DW2 denied that the OCS and himself were negligent. DW2 confirmed that he met the deceased, who appeared sleepy. It was late hour so there was nothing unusual about that. When the deceased was booked he was in good health. When DW2 talked to him, he was okay.

95. DW2 testified that PC Chege had earlier on called him that he needed assistance to effect the arrest. DW2 found this request suspect because one does not need reinforcement to arrest a peaceful suspect like in this matter. Even inspector Mulwa found this request strange. DW2 could not tell if the deceased was assaulted at the time of arrest, DW2 testified that during the incident, he was the senior most police officer in attendance. DW2 testified that after his investigations he got the impression that the deceased may have received injuries at the Tandori Bar and Restaurant.

3rd Accused Defence

96. **DW3-Ishmael Baraka Bulima No.92373** gave sworn evidence. He was currently at Kisumu Central Police Station. In the year 2012 he was at Diani Police Station as Police Constable. On the night of 18th/19th May 2012, at about midnight he reported on duty as Cell Entry Officer manning cell together with PC Pamba Record Office Personnel. While on duty both of them sit at the front office. When they reported on duty they took over from the previous officer the Cell Register, and confirmed that the register contained the same names who were in cell.

97. At about 2.00 a.m. patrol team who were outside returned to station. The first team was led by Inspector Mulwa, PC Chirchir and PC Mugambi. The second team was led by Corporal Chege, PC Serem and driver Mohamed. They were with 2 prisoners – Whiteman and black man handcuffed together. Corporal Chege informed DW3 that the suspects were arrested smoking bhang at beach area and they showed DW2 drugs he had recovered from the suspects. Corporal Chege un-cuffed them and told the whiteman to enter the reception area. He left with the black man to the Tourist Police Office for about 30 minutes. PC Serem returned to the reception and interrogated the white man about the passport and his particulars. Before Corporal Chege returned to book the Whiteman in OB, they had released the black man. As the black man left DW3 asked him where he was going and he told him he was going home because he had been released. The black man spoke to the white man and told him he was released and that he was going home. Then Corporal Chege booked the Whiteman in the OB. After that DW3 put the Whiteman in the cells and booked him in the Cell Register. That was about 3.00 a.m. During all this time DW3 never noticed anything abnormal about the deceased. After about 45 minutes two white people arrived at the station, a man and a woman. They talked with the deceased through the grill, since cell doors are normally not opened at night.

98. After talking to him they asked if DW3 could release the deceased. DW3 told them he could not and referred them to DW2 who was then in his office. They went there and talked and after a few minutes they left. They passed by the cell and talked to the deceased and told him they would come back in the morning. Nothing happened after that until DW3 handed over the Cell Register. He checked the prisoners and all was okay. Then he left the station. Later he learnt of the death of the Whiteman. The deceased had a phone and ATM card. DW3 kept them safely in a small metallic box. DW3 denied the allegation that he caused the death of the deceased. During the time in cell there was no commotion, no quarrel. They were very friendly. DW3 never had any information from the deceased or from anybody that the deceased was unwell. Until the time he left, his attention was not drawn to any uncomfortable condition or state of the deceased. DW3 testified that his duties are limited to the cell. He did not do arrest. He was never away from the police station.

99. DW3 testified that he had served as police officer for 3 years by 2012. Diani was his first posting. His boss is the OCS, who was not in police station that night. Inspector Mulwa was the duty officer holding for OCS. In absence of OCS any senior officer next in rank would be in charge. The officer in charge of Tourist Police report to their boss in Nairobi headquarters. DW3 referred to OB of 19/5/2012. OB No.3. There is an entry but there is no disclosure of who made the entry. The witness testified that there are several entries in the OB where the person recording is not named. See OB entry of 18/5/2012. There are 5 entries with no names. On 20/5/2012, the story is the same. They all only have signatures and numbers except a few. DW3 testified that these entries are not correct. DW3 testified that PC Pamba was supposed to be making entries. DW2 was at the station at night. DW3 testified that it is not true that the deceased was assaulted at the Tourist Police Office. DW3 did not go into the cell at 6.00 a.m. to find out the state of cell mates. That would only be necessary when there appears to be a need for that. In his view the suspects should have been booked immediately since they were found with bhang or drugs. There was no reason why there was delay. DW3 stated that the ATM card and phone of the deceased got lost. PC Pamba was the person with the key to the metal box where the items were locked. DW3 was aware that even the said metal box disappeared.

100. **DW4 No.56351 Police Constable John Pamba** gave sworn evidence. He worked at Diani Police Station. He was employed in 1988 as a police constable. He worked in West Pokot, Kacheliba, Eldoret Police Station, Moiben, Mombasa, Kwale – Diani in 2008. In regard to this case it was 19/5/2012 while he was at work at midnight. He was with DW3. He was the front officer to receive reports and enquiries from visitors, and to assist those in cells. Between himself and DW3 he was the senior. At about 2.00 a.m., they received 2 suspects, one was an African the other a white man. They were on handcuffs and they were brought by corporal Chege and PC Serem. At the station was inspector Mulwa and PC Chirchir. Upon arrival they were un-handcuffed. There were 2 vehicles which brought them. One was a double cabin which he later learnt belonged to one of the suspects. Corporal Chege then went outside to one of the vehicles and returned with some drugs. Then he led the African to the Tourist Police Office. Then two men came asking to see the African suspect. They were directed to the Tourist Office. All this time DW4 was at the front officer. The Whiteman was also standing at the reception area. He was fidgety. DW4 did not talk to him. DW4 left for about a few minutes. On his way back he met the African suspect, who told him that he was going home. When DW4 returned to the office he found DW1 putting cell entry details for the Whiteman. Then DW1 left stating he had done his work. The Whiteman was just there. He asked to be allowed to make a call on his mobile phone. Before he entered the cell they recorded his property- phone and ATM card. Then they told him to stand at the door of the cell so that if any relative of his came he could see them. Thereafter two relatives of his arrived. One he said was his sister, the other a family friend. The sister asked DW4 “what next?” DW4 told her to go to the Tourist Office. The other person remained at the reception. After about five minutes the sister who had gone to Tourist Office returned saying “they have refused”. She said she was told to come in the morning. The OCS and others had gone out to a robbery scene. They returned about 3.00 a.m. At about 5.00 a.m. DW4 heard people in the cell shouting ‘afande, afande.’ DW4 opened the cell door and found the white man sleeping and snoring. He told the cell mates who had called him to call back should there be any issue. At about 7.00 a.m. DW4 was handing over to PC John Maina and PC Kimutai. After handing over he left. In the evening at about 5.00 p.m. he got information that the white man had died at the hospital. He was shocked because he was with him the whole night.

101. The deceased was well when he arrived at station. He was standing and walking on his own. DW4 testified that he had been a police officer for 33 years now and that search should normally be done in the presence of suspect but in this case it was in the absence of the suspects. DW4 denied knowledge of a ‘blue code of silence’ in the police force.

102. DW4 further testified that on the 2nd night he saw DW1 at the police station at about 3.00 a.m. yet DW1 was not supposed to be there. That was the night also that they lost the suspect’s property box. DW4 remained with the key while the box was stolen. DW4 testified that the OCS is required to visit cells every morning. On that night the OCS was in a robbery scene, but he did not return to the police station. DW4 handed over at about 7.00 a.m. By the time he left the deceased was in good shape. DW4 testified that they did not torture the deceased at the Tourist Police Office. Neither did he witness the deceased being tortured in the Tourist Police Office.

Submissions

103. After the defence case, the prosecution and the defence filed submissions.

Republic's Submissions

104. The Prosecution legal team was led by Senior Assistant Deputy Director of Prosecution **Alexander Muteti** who was assisted by Principal State Counsel **Mr. Owiti**. Mr. Muteti submitted three ingredients to be proved beyond any reasonable doubt in this case as:

- i) The death of the deceased and the cause of that death.
- ii) That the accused persons committed the unlawful act that led to the death.
- iii) That the accused committed the unlawful act with malice aforethought.

105. Counsel submitted that prosecution exhibit 10, the Post Mortem Report, and testimonies of PW13, Dr. Ngale Mbuuko, and PW20, Dr. Titus Ngulungu who carried out post mortem on the deceased left no doubt that the deceased death resulted from fatal blunt trauma to the head.

106. Counsel submitted that the inference of guilt should be on the basis of circumstantial evidence and the evidence adduced in this case is sufficient to sustain a conviction. Counsel cited **Joan Chebichii Sawe v Republic, Criminal Appeal No. 2 of 2002 [2003] eKLR**, and **Abanga alias Onyango v Republic, Criminal Appeal No. 32 of 1990 (Unreported)**. Counsel submitted that the accused persons failed to take the deceased to hospital on time if indeed it is true as per their allegations that the deceased was not in good health condition.

107. Mr. Muteti submitted that the deceased had no history of illness from drugs or otherwise. He was in good health at the time of his arrest at Tanduri Bar and Restaurant and when he was taken to the cell, PW5, PW6, PW7 and PW12 confirmed that he was in good health.

108. On malice aforethought, the prosecution submitted that the definition under Section 206 of the Penal Code was adopted in **Nzuki v Republic, Criminal Appeal No. 70 of 1991 [1993] eKLR**. Further, circumstances that establish evidence which proves malice aforethought is provided for in **John Mutuma Gatobu v Republic, Criminal Appeal No. 78 of 2013 [2015] eKLR** and **Dickson Mwangi Munene & Another v Republic, Criminal Appeal No. 314 of 2011 [2014] eKLR**.

109. The Prosecution submitted that failure by the 1st, 2nd, 3rd, and 4th accused persons, the police officers on duty, to take the deceased for medical attention as soon as he got unconscious led to his death. The circumstances point to the accused persons as the persons who handled the deceased the night in question.

110. The Prosecution submitted that police officers have a duty of care to the persons remanded in their custody in respective police stations. Counsel referred to the Fifth Schedule to the National Police Service Act provides for the rights of detained persons as follows: -

9. A detained person shall have the right to:-

- a) *communicate with and receive visits of members of the family subject only to reasonable conditions and restrictions (when exceptional needs of the investigation so require) which shall be spelt out in the Standing Order subject to the approval from the ministry.*
- b) *inform family members of the arrest and detention and place of detention.*
- c) *access to doctors and general medical assistance when required; and*
- d) *lodge complaints against ill treatment and the right to compensation, which shall be investigated by the Independent Policing Oversight Authority, but in any event never by officers from the respective police station.*

111. The Prosecution submitted that a superior, whether *de jure* or *de facto*, may be held criminally responsible under the doctrine of command responsibility in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior subordinate with the perpetrators, knew or had reason to know that the crimes had been committed or were about to be committed and, with and despite that knowledge, willfully and culpably failed to punish these crimes.

112. Mr. Muteti submitted that the prosecution has proved the charge of murder against all accused persons and therefore this court should find that to be so and to convict them accordingly.

1st Accused's Submissions

113. **Mr. Aminga**, learned counsel for the 1st Accused person submitted that the Prosecution's case largely hinges on circumstantial evidence. Counsel referred to the ruling herein delivered on 22/3/2021 that: -

"...circumstances only point to the accuse person as the person who handled the deceased the night in question. Then, if, as medical evidence shows, the deceased suffered any injuries, the accused persons either were personally responsible for the inflictions of such injuries, or they know who inflicted those injuries, or they can explain the possible causes of the same. The accused persons therefore have the responsibility to tell this court what actually took place on the fateful night or morning."

114. Mr. Aminga restated the law, that it is the prosecution's duty throughout the case to prove its case beyond reasonable doubt, and that this burden does not shift to the accused person. The 1st accused invited the court to consider circumstances/evidence set out against the 1st Accused in a bid to make a finding of culpability or otherwise in which regard the following aspects of the sum evidence adduced stand out clear:-

- i) *There is no documented complaint or record of any injury or illness of the deceased at the point of delivery in Diani Police Station and subsequent booking into the cells.*
- ii) *There is no evidence (direct or otherwise) on how the deceased sustained the head injury which was the cause of the death.*
- iii) *There is however evidence that the deceased had complained of stuffiness in the cells on being led inside.*
- iv) *The 1st Accused was not present when the deceased was led into the cells and was away from the police station between 23.00am and 6.00am.*
- v) *The first report of the deceased's illness was at around 3.00am.*

115. Mr. Aminga submitted, citing **Sawe v Republic [2003] eKLR** on circumstantial evidence, where the Court of Appeal held: -

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other coexisting circumstances weakening the chains of circumstances relied upon.”

Counsel submitted that the prosecution has failed to pin the 1st accused to the murder of the deceased, and that for that reason the 1st accused should be acquitted.

2nd Accused's Submissions

116. **Mr. Wamotsa**, learned counsel for 2nd accused invited the court to ask itself the following questions when analyzing the evidence and determining guilt or otherwise of the 2nd accused.

- i) Was the deceased under the custody of the 2nd Accused on the fateful night?
- ii) Did the 2nd Accused either alone or jointly with others injure or assault the deceased?
- iii) Did the 2nd Accused have superior or command responsibility over the police officers at the station?
- iv) Was there a possibility of drug overdose?

117. On whether the deceased was under the custody of the 2nd Accused on the fateful night, Mr. Wamotsa submitted that although he was in charge of the Tourist Police Unit (TPU), the 2nd Accused was not the one in charge of the station. The regular police including IP Mulwa reported directly to the OCS and not to 2nd accused. At no point did the deceased leave the report office or the cells to have a meeting with the 2nd Accused either in his TPU office or at any other place. Counsel submitted that when the 2nd accused talked to the deceased at the report office, the 2nd Accused left for his office. When the deceased was discovered to be unwell or sick, 2nd accused was not informed. He was also not informed about the deceased being taken to hospital. He was only notified of the deceased's death.

118. On the issue of whether the 2nd Accused either alone or jointly with others injured or assault the deceased. Mr. Wamotsa submitted that PW12, PW15, PW17 and PW18 who were suspects in the cells with the deceased testified that the deceased did not complain to them when he entered the cells; the deceased did not leave the cells and that there was no commotion in the cells. The 2nd Accused submitted that when he spoke with the deceased at the report office, he immediately went to his office and instructed PW28 to draft and transmit a signal to their bosses in Mombasa and Nairobi informing them of the arrest of the deceased.

119. On the issue of whether the 2nd Accused has superior or command responsibility over police officers at the station, Mr. Wamotsa submitted that although the 2nd Accused was the senior most officer at the station, he was not the commander of the station. The OCS who was on out of station duties had assigned this responsibility of commanding the station to PW21 Raphael Mulwa who directly reported to PW19 and not to the 2nd Accused. Mr. Wamotsa further submitted that the command structure and reporting requirements were clear to the officers at the station since when the deceased was found to be unwell, the regular police did not inform the 2nd Accused as he was not their boss. They informed PW24 of the Directorate of Criminal Investigations who again did not inform the 2nd Accused but his boss the DCIO in Kwale.

120. On the issue of whether there was a possibility of drug overdose, Mr. Wamotsa submitted that the doctor at the hospital who was not called to testify diagnosed the deceased with drug overdose. Toxicology report by PW27, Dr. Mandaliya on urine samples from the deceased revealed a high presence of cocaine and other drugs.

121. Mr. Wamotsa submitted that the prosecution failed to prove the charge of murder as required in law and for that reason the 2nd accused should be acquitted and set free.

3rd Accused's Submissions

122. **Mr. Magolo**, learned counsel for the 3rd Accused submitted that the Prosecution's case is weak because the age of the injury is not known with any certainty or at all. This means the deceased could have received the injury while he was with his friends before settling at Tandoori club, while at Tandoori club, while he was being arrested, while he was on the way to the police station, while in the cells at the police station and even on his way to the hospital. The 3rd Accused was a cell entry at the report office and did not encounter the deceased at the instances mentioned.

123. Counsel submitted that it is confirmed there was no violence or scuffle at the police station. Also, it was confirmed that the victim had an injury on the head. There was no time that the 3rd Accused is indicated as arguing, confronting or even hitting the deceased.

124. Counsel submitted that there was no evidence explaining why the deceased was in a more or less comatose state in the morning. Was it due to the injury or was it a drug induced state? If it were to be drug induced state, can it be ruled out that he received the injury on the way to hospital? What if he was carelessly handled, carried and let to fall? Mr. Magola cited **R v Mwanzia Mutangili, HC Criminal Case No. 18 of 2015 (unreported)** where it was held that there ought to be evidence capable of conviction if the accused were to opt to offer no explanation. Counsel submitted that even if the 3rd accused kept quiet, the prosecution has the legal duty to prove the charge of murder beyond any reasonable doubt, and they have failed with the consequence that the 3rd accused must be acquitted and set free.

4th Accused's Submissions

125. **Mr. Wangalwa**, learned counsel for the 4th Accused submitted that the prosecution had the obligation of proving that the 4th accused committed the unlawful act that led to the death of the deceased. It was incumbent on the prosecution to demonstrate with certainty where the injury of the deceased was caused, the possible time when the injury was inflicted and who among the accused persons actually caused the fatal injury.

126. Counsel submitted that the deceased went through several hands from the time of his arrest at Tanduri bar until when he was processed and placed in the court cells. It was necessary for the prosecution to demonstrate with certainty that the injuries to the deceased were caused in the police cells and not at any other place whatsoever.

127. Mr. Wangalwa submitted that the prosecution witnesses failed to demonstrate that the deceased sustained the fatal injuries while in the custody of the 4th Accused person. Additionally, the prosecution witnesses failed to demonstrate that the injuries were sustained between Friday 18th May 2012 at 23:57 hours and the 19/5/2012 at 7:55 hours when the 4th Accused person was on duty at Diani Police Station.

128. The 4th Accused submitted that during cross examination, there was no suggestion to him by the prosecution that he had caused the alleged injuries. The 4th Accused further submitted that he met and handled the deceased in his ordinary cause of business. The fact that the deceased was found unconscious at about 9.00am soon after the 4th Accused person had handed over the shift to other police officers at about 7:55 hours cannot be a ground to hold the 4th Accused personally culpable. The evidence on record suggests that during the handing over the deceased responded on his name being called out.

129. Mr. Wangalwa submitted that the entire prosecution case is based on circumstantial evidence. There is a legal obligation upon this court to properly evaluate and direct itself upon such evidence. The court must for instance make a determination whether the circumstantial evidence is enough to support a conviction of the 4th Accused. Counsel cited **Republic v Michael Muriuki Munyiri [2014] eKLR** where the court quoted **Sawe v Republic [2003] eKLR** where it was held as follows:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ...

7. Suspicion, however strong cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt.

130. Counsel also cited **Michael Mutisya Mweu v Republic [2019] eKLR, Mary Wanjiku Gichira v Republic, Criminal Appeal No. 17**

of 1998, R v Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where the Tanzania Court of Appeal held that: -

“Suspicion, however grave, is not a basis for conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.”

The Determination

131. The events leading to the tragic death of Alexander John Runar Monson can therefore be summed up as follows: On the material time during the night/morning of 18th/19th May 2012, Alexander, the deceased herein sought the company of close friends among them PW6 Andrew Simiyu Bowry, PW7 Erico Mandela Amadei (Kiko), and PW11, Francis Kamau Wamboi. They first met at the restaurant owned by PW5 Richard Khamala Bowry at about 5.00 p.m.

132. The deceased took a bottle of beer there. Soon thereafter they moved to the home of the deceased where the deceased offered Smirnoff Vodka to his friend Bowry, but him he did not take anything. At about 7.00 p.m the party moved to Tanduri Bar and Restaurant where the parties indulged in some alcoholic drinks. However, there was no evidence that at Tanduri Restaurant the deceased took any alcoholic drinks. What came across in evidence is that the deceased was most of the time engaged on his phone and had appeared unsettled for most of the evening. They spent better time of the evening at Tanduri Bar and Restaurant, until some of the party including PW11 and PW6 expressed the need to go back home. Apparently they were to depend on deceased transport to their homes. It is at this stage that the tragic events started to rapidly unravel. It was alleged that the bouncer at the Restaurant had spotted the deceased smoking bhang, and that the deceased had resisted restraint by the bouncer. The bouncer therefore sought the help of the police who were already within the premises. The police led by DW1 moved and interrogated the deceased with his company and purported to have snatched half smoked bhang from the deceased and a brown envelope allegedly containing some white tablets.

133. The deceased explained that the white tablets were his medical prescription. The police then arrested the deceased on account of the alleged bhang and white tablets. DW1 alleged without evidence, that the deceased resisted arrest causing DW1 to request for reinforcement from PW21, Chief Inspector Raphael Mulwa, who arrived and noted that the scene was so peaceful. There was no need for reinforcement. PW11 and his girlfriend who were passengers in the back seat of the deceased’s vehicle decided to take another vehicle home, while the deceased and PW6 were arrested and driven to the Diani Police Station at about 1.00 a.m.

134. The evidence shows that there was no resistance to the arrest, and that there was no notable commotion at Tanduri Restaurant and that the arrest process was peaceful. There was absolutely no evidence to suggest that the deceased suffered any injuries at any time between 5.00 p.m. when they started the evening or at Tanduri Restaurant or indeed during the arrest. All prosecution and defence witnesses attest to the fact that the deceased at all these times and places was in good health condition.

135. Further evidence shows that the deceased arrived at the Diani Police Station in perfect health condition and before he was booked into the cell chatted with a number of witnesses and even family members and friends who all testified that the deceased was in good health. All the witnesses, including the accused persons, testified that the deceased arrived at the police station in excellent health and was booked into the cell in good health. Cell mates among them PW15 Yusuf Salim Mathamizi, PW16 Shaban Swaleh Mwadrashi testified to the perfect health of the deceased at the time he was booked into the cell.

136. During the night, however, it appears that the condition of the deceased drastically changed between 2.30 a.m. and 5.00 a.m. Cell mates PW12, PW15, PW16 testified that when the deceased went to sleep, he failed to wake up at 6.00 a.m. to take tea. He was asleep and snoring, almost in unconscious condition and so witnesses helped the police officers to move the deceased outside the cell to get fresh air. Something serious therefore took place in the health of the deceased between the time he was taken to the police station and booked into the cell at about 2.30 hours and 6.00 hours, when he could not wake up to take tea.

137. By 9.00 a.m., the condition of the deceased had taken a turn for the worse. Between 10.30 a.m. and 11.00 a.m. the deceased was taken to Palm Beach Hospital in Diani where he died at about 5.00 p.m. while undergoing treatment allegedly for drug over doze, as per the information provided to the hospital by the police.

138. This court is faced with the above scenario and the main issue before the Court is to establish who and what caused the death of the deceased. Clearly, the prosecution and the defence supplied evidence which are at variance.

139. Having considered the entire evidence and submissions filed by the prosecution and the defence this Court raises the following issues for determination.

- i) At what point in time was the deceased injured
- ii) Whether there was death of the deceased and cause of the death.
- iii) Whether the accused persons committed the unlawful act that caused the death.
- iv) Whether the accused persons committed the unlawful act with malice aforethought.

At what point in time was the deceased injured:

140. At what point in time was the deceased injured. It is not easy to answer this question. What is in evidence however is that the deceased arrived at the Diani police station at about 2.30 hours in good health. Between 2.30 hours and 3.00 hours the deceased talked to several people, including friends, relatives, and the police. He was in perfect health and had absolutely no complaints. Evidence shows that at about

3.00 hours the deceased talked with the 2nd accused. The 2nd accused has denied this fact, stating that apart from greeting the deceased he never had any discussion with the deceased. However, when PW5 and PW6 left after PW6 was bailed, the deceased had not been booked in the cell. But when PW2, PW3 and PW7 went to see the deceased at the police station, they were able to talk to him and he was in good health although inside the cell. The injury which the deceased suffered were not the kind of injuries which he received while inside the cell. Otherwise the cell mates would have noticed this.

141. The only rational explanation is that at one point between 3.00 hours and 5.00 hours the deceased was removed from his cell by the police officers who were taking care of him. The deceased was removed from the cell for interrogation on the issue of bail and other issues, and there was a disagreement which led to the brutal torture of the deceased.

142. This torture took place outside the cell and the deceased tried to defend himself and that explains the bruises he suffered on his left arm. The deceased was further tortured in his private parts hence the bruise in his scrotum. These are not the kind of injuries which could have taken place at Tanduri Restaurant because they could have drawn attention of the other people. Again these injuries could not have been incurred inside the cell because the other cell mates could have known. The circumstantial evidence shows that the deceased was tortured outside the cell, inside the enclosure of the police station, and his torturers were people unknown to this court, but well known to all the accused persons because they had the legal custody of the deceased.

143. Regardless of who caused the said torture, the four accused persons, knowing the injury that the deceased had suffered, took no action to secure first aid or treatment for the deceased. Instead the deceased was returned to the cell where he went into concussion and unconsciousness and was unable to wake up for the morning tea.

144. There was evidence that the police officers at the station in an attempt to wake up the deceased lifted him up 3 times and 3 times let his head hit the ground, and so that the injuries may have occurred as a result of the fall. This assertion was dismissed by the credible evidence of PW25 and other pathologists who stated that the deceased had already suffered the brain injury which led to his unconsciousness and that by the time he was being lifted up to take tea the injuries had already taken place and a fall at that time could not have caused the injury.

145. This Court therefore finds and holds that the deceased herein Alexander John Runan Monson was brutally tortured by unknown people within the inner compound of the Diani police station between 3.00 hours and 5.00 hours on the morning of 19/5/2012.

Whether there was death of the deceased and cause of the death

146. The death of Alexander John Runan Monson on 19.05.2012 has not been disputed. Exhibit 10, the Post Mortem Report, and testimonies of PW13, Dr. Ngale Mbuuko, and PW20, Dr. Titus Ngulungu confirmed the said death. When the deceased got to hospital the doctor's diagnosis showed drug overdose and the deceased was put on medication right away. However, PW13, Dr. Ngale Mbuuko, a consultant pathologist based at Coast General Hospital formed the opinion that the cause of death was consistent with increased intracranial pressure due to brain condition following blunt injury to the head.

147. Additionally, PW20, Dr. Titus Ngulungu, a pathologist who examined the deceased's body at Pandya Hospital Mortuary and prepared a report, concluded that the **cause of death was head injury due to a blunt trauma forced attended by brain concussion and raised intracranial pressure**. Further, PW25, John Jesse Payne, a specialist in forensic and legal medicine who frequently examines detainees in police or prison custody concluded that **the head injury caused brain damage and failure to provide medical care led to the death of the deceased**. Toxicology report by PW27, Dr. Mandaliya on urine samples from the deceased revealed a high presence of cocaine and other drugs. This was however ruled out by the autopsy. In fact all the pathologists, and even PW25 were emphatic that the alleged overdose of drugs was a red herring, and this court believes the issue was brought up by the police to cover either for their murder of the deceased or their negligence to provide health care to the deceased. This theory of drug overdose must be rejected. It is even horrifying that those who tortured and caused the death of the deceased even put drugs into his pockets after he had died. The same was found in his pockets at the mortuary during the post mortem even after evidence was led that his body was searched soon after arriving at the police station on the day of the arrest. In all these, the actions of the 1st and 2nd accused are increasingly questionable. There is further evidence that the loss of the deceased property ATM Card, phone and money is traceable to one of the accused persons who was spotted at the police station, the second night when the property got lost, when he was supposed not to be at work.

Whether the accused persons committed the unlawful act that caused the death

148. The deceased and PW6 were arrested at Tanduri Bar and Restaurant on the night of 19.05.2015 by the 1st Accused, Sergeant Naftali Chege who was working under the 2nd Accused, Inspector Munyiri, and taken to Diani Police station. On the night, the 4th Accused, PC Pamba and DW3, PC Baraka were manning the police station. The 1st Accused booked the deceased in the police cell and left the station to go back on patrol. At 5.00 am, an alarm was raised by cell mates about the condition of the deceased who seemed unwell. The 4th Accused went and checked on the deceased but no action was taken. At 7.00 am, the 3rd Accused and 4th Accused handed over to PW23, PC Mutai and PW24, Inspector Issa without informing them of the deceased's condition. The deceased was under the custody of the 1st, 2nd, 3rd and 4th Accused persons from the time of his arrest until he fell ill. It was their duty to ensure he received medical attention but they failed to take any immediate action. This led to a deterioration in the deceased's condition and the untimely death.

149. Despite arrest of the deceased for an offence, he had a right to life. This is provided for under Article 26(1) of the Constitution which states that:

“Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law.”

150. The National Police Service aims at giving effect to Article 238 of the Constitution and Article 244 among others which set out the

National Police Service objects and functions as well as demand for police compliance with constitutional standards of human rights and fundamental freedoms.

151. To this end, the fifth schedule to the National Police Service Act on 'Arrest and Detention Rules' states as follows: -

9 (c) *A detained person shall have the right to access to doctors and general medical assistance when required.*

Whether the accused persons committed the unlawful act with malice aforethought

152. After weighing the evidence of the prosecution witnesses, I am satisfied that death of the deceased was caused through an unlawful act and or omission on the part of the accused persons who failed to provide immediate medical attention to the deceased under their custody leading to his death. In **Republic v Ismail Hussein Ibrahim [2018] eKLR**, malice aforethought as follows: -

"... the mens rea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter."

153. Section 206 of the Penal Code provides for circumstances which establish malice aforethought in any particular case as follows: -

"(a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not.

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually netted or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit a felony.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony."

Circumstantial Evidence

154. In **DPP Kiborne 1973 AC 729**, the Court held the following position on circumstantial evidence: -

"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:

One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of."

151. In **Mishi Tulo v R CR Appeal No. 30 of 2013, Sande v R (2003) 2 KLR** and **Abanga Alias Onyango v R CR Appeal No. 32 of 1990**, the Court held the above sentiments on the significance of circumstantial evidence as proof of facts in issue in a criminal offence. For circumstantial evidence to point to accused persons that they were perpetrators of the crime, the following criterion was laid down by the courts for consideration by a trial court before conviction for the offence. When a case rests on circumstantial evidence, the following three primary tests of evidence must be satisfied: -

"(i) The circumstances from which an inference of guilt is sought to be drawn must cogently and firmly be established.

(ii) Those circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

152. Section 111 (1) of the Evidence Act provides as follows: -

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that

offence.”

Manslaughter

153. Section 203 and 204 of the Penal Code under which the accused persons are charged provide for the offence of murder and punishment for the same. The prosecution is required to prove beyond reasonable doubt that the accused by their acts or omissions caused the death of the deceased through malice aforethought. The Sections read as follows: -

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person who is convicted of murder shall be sentenced to death. “

154. The offence of murder is complete when it has been established that there was malice aforethought as provided for by Section 206 of the Penal Code where there was proof of the following circumstances: -

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

155. When none of the above elements has been proved but another human being has been killed unlawfully, the persons are considered to have committed manslaughter under section 202 of the Penal Code punishable under Section 205 of the Penal code by life imprisonment.

Degree of responsibility exerted on police manning cells

156. The police manning cells are required to conduct themselves in accordance with respect for human rights, fundamental freedoms, democracy and the rule of law. Values for professionalism, accountability, discipline, and promotion of good relations with the public are the required key attributes.

157. The Independent Policing Oversight Authority Act (No. 35 of 2011) established the Independent Policing Oversight Authority (IPOA) to promote accountability and transparency in the police force which includes the police manning cells.

International best practices for safety of arrested persons in police cells

158. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) states: -

“Every human being as the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

159. Article 7 of the ICCPR goes further to state as follows: -

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

160. Article 10(1) of the ICCPR states that: -

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

161. Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: -

“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect to the inherent dignity of the human person.”

162. Under the Code of Conduct for Law Enforcement Officials, the General Assembly Resolution 34/169 of 17 December 1979, Article 1 states that:

“Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting

all persons against illegal acts, consistent with the high degree of responsibility required by their profession.”

163. Article 6 of the Code of Conduct for Law Enforcement Officials states: -

“Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.”

164. It came out clearly during the cross-examination of all accused persons by learned State Counsel, Mr. Muteti, that the accused persons were all professionally trained, and have been in service for periods ranging from 3 to 37 years. They had adequate knowledge and experience on how to treat suspects. They were trained in the rules regarding human rights and dignity; they were all aware of the constitution of Kenya and statutory regulations concerning the rights of arrested persons. They knew the rules and regulations under IPOA; they were schooled and trained in international, regional and local safety legal instruments, for treatment of offenders. All of them testified to these training. However, they chose to do their work with the usual casualness, without any regard to their profession and the duty to protect life. To them these legal instruments were mere rules with no consequences whatsoever. The four Accused persons starting with the 2nd Accused, the senior most among them, let down the entire police force. Although he had served in the police force for over 37 years, the 2nd Accused let down Alexander John Runan Monson, the deceased, at his greatest hour of need on earth. How four senior police officers could allow a young man of 28 years to die under their watch, is the tragedy of this judgment. The 2nd accused person was the senior most police officer at the Diani police station at the material time. As the head of Tourist Police Unit, he could not be more senior, more so in the sense that the deceased was foremost, a foreigner thereby automatically falling within his docket. He had served in the police service for 37 years. He was an officer with vast experience, and was extensively trained within the police force to take action to protect life. He was aware that the deceased had suffered injuries which required immediate medical attention but he failed to act to save the deceased from death. He was in the police station until after 3.00 hours.

165. Notably, all the senior officers available that night were not informed by any of the accused persons of the deteriorating condition of the deceased during the night and in the early morning. The officers manning the desk did not book any incident regarding the state of the deceased until he was discovered by officers from the DCI in a critical condition in the cells. The DCI officer who discovered the deceased unwell in the cells categorically denied that there was an incident report but curiously the OB record indicates that there was such a report thereby raising the question of who recorded it, when and why.

166. The 2nd and 4th accused persons had also served the police serve for over 27 years. They were aware of the deteriorating condition of the deceased but did not bother to seek help for the deceased.

167. The 3rd accused was the youngest of the officers on duty that night. With only 3 years of service to the nation as a police officer, he had the least experience. He was also the youngest. However, he was trained to know the value of human life, and his duty to protect it.

168. The four accused persons knew how and when the fatal injuries were inflicted on the deceased. The deceased was legally under their custody. Despite knowing who inflicted the fatal injuries and at what time, and despite knowing that the said injuries could cause the death of the deceased, the four accused persons still failed to seek medical help to save the life of the deceased. This failure amounted to professional negligence. The accused persons collectively and individually owed a duty of care to the deceased. They breached that duty, and thereby breaching their oath of service. For that reason, the four accused persons are hereby held responsible and liable for the unintentional death of Alexander John Runan Monson. To avoid such an occurrence in future the following rules for safe cells shall apply in Kenya.

Rules for safe police cells in Kenya (hereinafter called Ogola Rules)

- a) For all bailable offences, every arrested suspect shall be admitted to police bond or bail as soon as possible.
- b) Every suspect shall be subjected to mental and health screening at time they are to be booked into a police cell.
- c) Once arrested a suspect shall be booked into the police cell immediately, and a record made in OB.
- d) Movement of suspect in and out of cell must be recorded at all times in the OB.
- e) The cells must not be overcrowded.
- f) The cell booking officer shall inform the suspect of his basic human rights, and assure the suspect verbally that he/she would be treated with human respect and dignity.
- g) The suspect shall be addressed in a language he or she understands.
- h) The booking officer shall immediately inform the OCS of any health issues a suspect may have at the police cell. Upon such information the OCS shall immediately take an action to protect the life of the suspect and inform his/her family.
- i) Where the offence is bailable, and depending on the particular circumstances, the suspect shall immediately be released on bond or cash bail to seek treatment.

- j) Where more than one suspect is arrested in the cause of a single transaction, the release on bail should apply equally as far as possible, to avoid suspects negotiating their release with the police.
- k) Record of property of suspect shall be signed by suspect before he or she is booked in the cell.
- l) Food and drinking water shall be supplied to detainees throughout the day and whenever they need it.
- m) Refresher training for police in human rights and dignity to be undertaken by the police service.
- n) Surveillance cameras shall be installed within the police station including cells.
- o) OCS shall formulate a medical checklist to notify police of any underlying health conditions of a suspect.
- p) It is necessary for misconduct to be investigated and punished to establish transparent, efficient and fair mechanisms.
- q) Police cells should meet all health requirements with particular attention to ventilation, lighting, minimum floor space, cubic air content, and climatic conditions.

Disposition

166. I have most meticulously gone through oral and documentary evidence herein and testimonies of witnesses to try to establish who murdered the deceased Alexander and at what time. I have not been able to find who is responsible for the murder of the deceased. Yet, I have found beyond the shadow of a doubt that the deceased was well at the time he was booked in the police cell at about 2.30 hours on the material night or morning. I believe that the deceased suffered fatal injuries at the hands of people known to all of the accused persons. However due to what is referred to as “*blue code of silence*” in the police force, the accused persons are bound to protect their own. However, while this may help them escape the hangman, it does not stop their responsibility to take care of the deceased the moment they became aware that the deceased was unwell. The deceased came into their hands a healthy man. He left without his life. The authority of policemen the world over is to protect life, and not to take it away. A cell must be a safe place regardless of why the suspect is in it.

167. The prosecution had the responsibility of proving the offence of murder beyond reasonable doubt. I do not think the prosecution sufficiently discharged that onus. However, the elements under Section 202 of the Penal Code were proved. This is to say the accused persons had the duty of ensuring that the deceased who was under their custody received immediate medical attention which they failed to dispense.

168. The police reforms which have been carried in this country must count for something. IPOA is to be recommended for taking proactive action to ensure that the police reforms in this country succeed. If there is one lesson to be learnt from the unfortunate death of Alexander in Kenyan police cell, it is that the on-going police reforms must have some meaning, and must be continued to a point where the result is clearly visible for the people of Kenya. The other lesson to be learnt is that police will be held individually held responsible for the negligent performance of their duty, and where they are joint tort features, the extent of their negligence will count in mitigating their sentence when they are found liable. Every police officer will henceforth be individually accountable for the performance of their duty to protect citizens of this country.

169. For the foregoing reasons, I find and hold that while the prosecution has not proved the charge of murder, the prosecution has proved that the deceased died out of culpable negligence of the 1st, 2nd, 3rd and 4th accused persons who failed to provide medical care for the deceased, leading to his death from the injuries he sustained at the Diani Police Station.

170. In the upshot, I hereby convict the 1st, 2nd, 3rd and 4th accused persons of the felony of manslaughter under Section 202 of the Penal Code.

That is the judgment of the Court.

Dated, Signed and Delivered at Mombasa this 15th day of November, 2021.

HON. E. K. OGOLA

JUDGE

In the presence of: -

Mr. Muteti and Ms. Kihara for State

Mr. Olaba for Victim’s Family

Mr. Gitau for IPOA

Mr. Aminga for 1st Accused