



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 8 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PETER NGANGA KINYUA.....ACCUSED

J U D G E M E N T

1. **PETER NGANGA KINYUA**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars as per the information presented to this court are that, on 11th June 2017 at Chuka Township within Tharaka Nithi County, jointly with others not before court unlawfully murdered **DUNCAN BUNDI** (herein after to be referred to as the deceased).

2. The accused person denied committing the offence and the prosecution called a total of seven witnesses to establish their case against the accused person herein. The prosecution's case is based on direct evidence.

3. **ALEX MUGENDI (PW1)** a former student of Chuka University where the deceased was at the time, told this court that 10th June 2017 he went with the deceased for an outing at Kimwa Club- (an establishment situated within Chuka Town and reportedly frequented by students from Chuka University) where they found around 50 other students enjoying themselves. He told this court that he together with the deceased ordered for drinks which they took up to around midnight when they decided to take to the floor to dance the night away and that while they were dancing a fight broke out on the floor between the deceased and the accused herein. The witness stated that he separated the two before proceeding with their drinking until around 3.30 am when another fight broke out again between the accused and the deceased. He added that the fight this time occurred near the exit of the club and that the watchmen and other patrons removed the two outside where they continued fighting on the stairs leading down the parking lot. The witness told this court that in the process of fighting, the accused dropped his car keys on the floor and that in the ensuing push and shove, some people stepped on the car keys triggering the remote sensor to open the accused's car as a result of which the accused reportedly shouted "**thief!**" "**thief!**" and attracted boda boda riders nearby. The witness told this court that he sensed danger and told the deceased to run for their safety. He added that as they ran, the accused and his group comprised of boda bodas had ran ahead by outflanking them using another road and waited for them ahead. The witness told this court that he clearly saw the accused standing ahead of them with the group because of the street lights near the place they waited for them. According to him, the group comprised around 30 people and that there was a black Saloon car of make Passat which the accused had used to drive around to outflank them. He added that on seeing this he urged the deceased to retreat and divert to another path and that he ran ahead of the deceased who appeared tired and before long the group caught up with him and took him back to where the other group was. He told this court that he heard the deceased pleading with the group to leave him. He added that he followed the group from a safe distance as they dragged the deceased to the main road where they descended on his beating him senselessly. According to him the accused was among the group of people beating the deceased and that he specifically saw him throw a stone at the deceased before striking him with a stick as the others joined in kicking him all over.

4. The said witness further told this court that he then ran back to college which was about 3 Km away for help and that he found his friends namely Tony Mwenda, Douglas and Beatrice in the hostels and informed them of what had happened. He informed this court that they picked a taxi that had dropped students in the hostels and they rushed to Chuka Police Station on the assumption that their colleague (deceased) had probably been taken there. He further stated that upon reaching at the police station, they found no such report had been made and on that realization, they divided themselves with some heading to Chuka Hospital and others including himself headed to the scene where he last saw the deceased being beaten.

On arrival at the scene, they found the deceased lying in a ditch next to where he last left him and that he was still breathing. He told this court that he had already informed the deceased's parents about the incident and that after a short while the parents arrived and rushed the deceased to Chuka County Hospital for treatment. He told this court that at the Hospital he observed that the deceased had injuries to the eyes, mouth and had also suffered broken legs. He added that the deceased passed on shortly thereafter while undergoing treatment.

5. **MOSES MWITI (PW2)**, a father to the deceased on his part testified that on 11th June 2017 at around 5 am, his wife received a call from an unknown person informing her that the deceased required to be taken to Hospital for treatment as he had been beaten. On receiving the news, he stated that he called his brothers Samuel Muthaura and Charles Gitonga and together they drove from Meru to Chuka Town to the scene as directed by the caller. He found his son lying down surrounded by some people and they immediately picked him up and rushed to Chuka Hospital where he died shortly thereafter while undergoing treatment.

6. **DR. JUSTUS KITILI (PW3)** told this court that he performed post mortem examination on the body of the deceased on 16th June 2017 and noted the following:-

(a) Externally;

(i) Bruises on the back of the head on the parietal scalp

(ii) Bruises below the right eye

(iii) Cut on the forehead 3 cm long

(iv) Multiple bruises on the chest, the back and the abdomen.,

(v) Bruises on the inner thighs

(vi) Bruises on the hip and right foot

(b) Internally;

(i) Fracture of the 11th rib on the right side of the chest

(ii) Laceration on the liver

(iii) Blood in the abdomen

(iv) Blood under the skin of the head.

(v) Fracture of the occipital skull bone

(vi) Blood clot on the brain.

7. On the basis of the above finding the doctor formed the opinion that the cause of death of the deceased was severe head injury inflicted with a blunt object. He tendered the post mortem report as P. Exhibit 1 to back up his findings.

8. **SGT ALEX NDERITU (PW4)** testified and recalled that on 11th June 2017 at around 6.30 am while at Chuka Police Station, a report was made by two University Students that one of their colleagues the deceased herein, had been found lying down along Chuka- Meru Road near Godka Hotel. He told this court that in the company of a duty officer Corporal Ndirangu they rushed to the scene together with the reportees and found that the deceased had been taken to Hospital for treatment. He further added that there were signs of struggle at the scene which was near Mauru Petro Station and about 300 metres away from Godka Restaurant. He further observed that he saw burnt grass near the scene. He added that he proceeded to Chuka Hospital and found the deceased undergoing treatment surrounded by doctors. He later learnt that the deceased had succumbed to the injuries and informed his seniors including Mohammed Aden who took over the investigations. He clarified under cross examination that there was another officer at the station manning the report office who had booked the initial report in the O.B before the deceased was found lying down at the scene.

9. **NKAABU MWENDA (PW5)**, a maternal uncle to the deceased told this court that he was informed that the deceased had passed on and was requested to attend the post mortem examination and that he attended the same and identified the body of the deceased through a birthmark at the back and that the appearance of the deceased had quite changed owing to the injuries on the face and the mouth.

11. **CIP MOHAMED ADEN (PW6)** the investigating officer in this case told this court that on 11th June 2017 at around 7.30 am he received a report from Sgt Nderitu (PW4) regarding a case of mob justice involving a University Student. He told this court that he went to the station and found that the report had been entered on the O.B. He added that on instructions from the OCS, he proceeded to the scene but first went to Chuka General Hospital and met Corporal Ndirangu and a casualty nurse who informed him that the student had succumbed to the injuries sustained. He went to the mortuary and observed that the body had multiple injuries on the head, and broken limbs. He told this court he then went back to the station and informed the OCS before proceeding to Kimwa Bar within Chuka Town as he had gotten information that the fight had begun in that club. He also stated that he visited the scene which was near Mauru Petrol Station and observed signs of disturbances and many footprints. He noted that it had rained the previous nights and so the signs of footprints were visible.

12. He later took statements from witnesses who explained what took place and how the incident occurred, how the fight arose before the accused raised an alarm that his car was being stolen and how the deceased and PW1 were pursued before the deceased was caught and beaten senselessly. The officer told this court that they then traced the accused to Thika and later to Kiambu where they apprehended him and later charged him after he was positively identified at the Identification Parade conducted on 14th June 2017. The investigating officer added that he charged the accused because he was part of the group that attacked the deceased and that he led the group to attack the deceased after branding him a thief.

13. C.I.P. Evans Wafula (PW7) told this court that he was stationed at Chogoria formerly and recalled that on 15th June 2017 when he was requested by OCS Chuka to go to Chuka Police Station to preside over an Identification Parade. He stated that he arrived at Chuka Police Station at 10 am where he was briefed about a murder that had taken place near Kimwa Bar and Restaurant. He was further notified that four identifying witnesses were to take part and that one suspect was in the cells. He was taken to the cells and shown the suspect by the investigating officer. He then talked to the suspect and told this court that he informed him about the reasons for the Identification Parade and the accused person reportedly understood the reasons why. The officer told this court that he took members of the parade with similar age, height, and complexion with the suspect. He added that he duly complied with all the regulations of Identification Parade including informing the suspect of his right to be represented by an advocate or get a relative to be present during the exercise. According to him, the accused person chose a relative named Oliver Kinyua to be his witness and that the Identification Parade was done in an enclosed yard within Chuka Police Station. He also added that the witnesses were kept in an office where they could not see or hear any conversation at the Identification Parade. The officer further told this court that he had ten members in the parade and the accused was asked to take a preferred position which he took between 6th and 8th member. He clarified that in all there were 11 members in the parade inclusive of the accused. He informed this court that he picked 7 members from inmates while 3 members were volunteering members of public who were at the Police Station at the time. He further told this court that he informed the accused of his right to change positions after each identifying witness had taken part in identification. The officer told this court that he called the 1st witness and the accused chose position between 6th and 8th and in the remaining 3 shifts he took a position between 1st and 3rd member and that in all the four shifts the suspect was positively identified by four identifying witnesses. He added that three witnesses became uncooperative and declined to take part stating that the suspect was not in the parade. According to the officer, the three witnesses were all employees from Kimwa Restaurant and it appeared like they did not want to be bothered because they expressed their displeasure openly and refused to cooperate. The officer told this court that the remaining four witnesses cooperated and took part. The officer stated that the witness of the accused was present throughout the process of Identifications Parade.

15. The officer added that after the parade the accused indicated that the parade was not fair as his photograph had been circulated in the social media and the identifying witnesses may have seen his photograph in the social media. The officer stated that he indicated the reservation of the accused in the report before asking him to sign before signing the report himself. He tendered the Identification Parade report as P. Exhibit 2.

16. When placed on his defence, the accused on oath told this court that he arrived at Chuka Town from Nairobi on 10th June 2017 and that he went to meet his friends before deciding to head to Kimwa Bar and Restaurant within Chuka for a drink. He added that they arrived at the bar between 10 pm and 11 Pm and that the place was full. He was able to find a place to sit at the counter and began taking drinks with his friends. He added that at around 12.30 am, his friends left and he was left behind to clear the bills. He added that he gave out his phone to be charged to enable him use his Mpesa to pay the bills. He added that as the phone was being charged at the counter, a tall young man went to the counter to place his order of a drink and that after being served he poured the drink on him either accidentally or on purpose. He however asserted that he did not know the young man and had not seen him before and that he sholved a drink in his hands which fell down spilling its contents. He told this court that he asked the young man what was wrong but the young man reportedly answered rudely challenging him for a fight a challenge he did not take because the young man according to him appeared drunk. He added that he backed down and purchased another drink and the young man left the counter and went away but after 20 minutes he reportedly went back and this time accompanied by two other young men. The accused added that the two were equally not known to him. According to him the young man who had initially poured the drink on him, charged at him and hit him on the forehead with a fist and the other two joined in and a fight ensued with his shirt and jacket torn. He added that as they roughed him, security people came in and pushed all of them out down the stairs. According to him the bouncers (security) were two and wanted to get them out of the bar. He added that when they reached the stairs he sweet talked one of the bouncers and told him that he had left his mobile phone at the counter with uncleared bills and that because he was a regular customer there and known, he was allowed to go to pick his phone and pay the bills. He added that he went in and checked for his car keys in the jacket pocket and found them missing. He added that he thought he had dropped the car keys in the scuffle and so he called his brother in law at the club who was the D.J. to assist him and searched for the keys on the floor upto the entrance without success.

17. He added that when he was at the entrance he saw his car doors open and the lights inside turned on. He told this court that he then shouted "**thieves! thieves!**" as he rushed down the stairs to where he had parked his car and that he saw someone at the car and that as he rushed to where the car was, the person inside the car in the driver's side and the other one in the passenger side took off. He added that because of the commotion curious people gathered and he told them that some thieves wanted to steal his car but had ran away. He also stated that the two young men ran away but came back and started pelting them with stones and that the boda boda guys got angry and charged after being pelted with stones. He testified that on his part he just went inside the Restaurant, paid his bills and went home. He added that he did not follow or pursue the two people when they ran away. He told this court that he did not know that the two young men were students and that he only met the deceased and after the altercation at the club he did not met him again. He stated that he left for Kiambu Town where he worked the following day which was a Sunday and that he was later informed that his picture on face book profile photo was being circulated by students of Chuka University. He also learnt that his car was being mentioned in regard to an incident at the club. He tendered the profile picture as D Exhibit 1. He further added that he called his parents the on Monday and informed them of what he had heard. He further stated later in the afternoon that Monday, someone who did not identify called him and inquired about his whereabouts and that later in the evening he was arrested and brought to Chuka Police Station on suspicion that he had murdered someone.

18. On Identification Parade, the accused claimed that he attended two identification parades whose members were picked from fellow cell mates while others were picked from outside. He told this court that he was picked out owing to the fact that his photograph had been circulated on facebook.

19. Michael Nkene Waithera (DW2) told this court that he owns a garage in Kiambu and had known the accused herein for 5 years. He told this court that on 13th June 2017 some police officers went to his garage and inquired from him if he knew the person whose picture they had. He confirmed that the picture shown to him was similar to the picture tendered by the accused as D. Exhibit 1. He added that since he knew that accused person well he led the police to where he lived and left the police officers waiting for him as he was driven back to his garage.

20. In his written submissions through Ms Murango Mwenda and Co- Advocates, the defence has contended that the prosecution's case hinges on the evidence of one witness PW1 who was with the deceased in the night club. He contends that the accused person faces a serious offence of murder which requires proof beyond reasonable doubt.

21. The defence has further poured cold water on the evidence of PW1 on grounds that he was probably drunk at the time and feared for his life. He contends that in that state it was not possible for him to identify him in a crowd of the people who attacked the deceased.

22. He also contends that the prosecution failed to adduce evidence about the scene of crime like measurements to establish how far the street lights were from the scene of crime and how far the accused had hidden himself in the bush to be able to identify the accused herein.

23. The accused further contends that PW1 did not know the accused before and so he could not have identified him through recognition. He contends that PW1 did not mention taking part in the Identification Parade and has urged this court not to give any probative value on the evidence of PW7 on the Identification Parade conducted that picked out the accused.

24. The defence has submitted that identification of the accused by PW1 was not free from error because evidence on the source and the intensity of the light in his view was not tendered. He further contends that PW1 must have been drunk, tired and besides that he must have been fearful of his life. He has urged this court to find that the prosecution's case against him was speculative.

25. The accused contends that when the initial report was made at the police, the description of the accused was not given. He has pointed out that the 3 other students who positively identified the accused during the Identification Parade were not called to testify. He has cited the decision in the case of Miller Wanjala Muchach -vs- Republic [2008] eKLR in faulting how the parade was conducted because in his view it was done in an open field where it was possible for the witnesses to see the accused prior to taking part in the Identification Parade. He has expressed doubts on how possible it was for the police to quickly find people of same age, complexion and height of the accused given that he was arrested on 13th June 2017 at 1600 hours at Kiambu and at 10.00 am the following day Identification Parade was conducted. He contends that lack of proper and sufficient description of the accused coupled with timing between the arrest and the conduct of the parade created doubts in his view. He has relied on the decision in Antony Mwenda Andrew -vs- Republic (Meru HCCR No 25/2004) where the court found that the visual identification was in doubt because the robbers entered into a dark house and PW1 was unclear how he could identify the accused persons by moonlight. He has also relied on the following decisions;

(i) Paul Kilyungi Mahuki & 3 others [2018] eKLR: where the identification parade was faulted as there was the fact that police were not given description of assailants and the persons who were placed in the line-up did not bear similar identifying marks thus disadvantaging the appellants. The 2nd appellant was the largest man in the parade while the 1st appellant was the only one with a mark/scar. The court said the ID parade on their own cannot be sufficient to sustain a conviction and must be corroborated by other evidence. In this matter, two of the appellant's were set free but the 1st appellant's conviction was sustained for having been found in recent possession of the stolen item.

(ii) Simon Kihanja Kairu -vs- Republic [2006] eKLR

This was an appeal from a conviction for robbery with violence. The accused relies on this case because in this case, when the complainant was introduced to the parade, he was told that there was a suspect in the parade and he should pick him out. This was said to have depreciated the value of the parade. Taking into account the poor quality of visual identification as well, the court found no credible evidence to sustain a conviction.

(iii) Richard Omweri Mutachwa & Another -vs- Republic Court of Appeal Criminal Appeal No.12 and 12 of 1984 : This was a second appeal on a conviction of robbery. The court expressed that the evidence of recognition from 200m was weakened as her companion did not recognize the assailants in the same conditions. The evidence of a strong ID parade would have strengthened her case but the same was missing.

(iv) (Joseph Leboi -vs- Republic Court of Appeal Criminal Application No. 2004 of 1987.

This was an appeal from a robbery conviction. The issue was whether the appellant was a victim of mistaken identity in the robbery that happened in the middle of the night at a bar. The court of Appeal felt there was no evidence as to what type of light, its intensity, the source or location in relation to the attack. The court also said though recognition and identification are different, the appellant having been known to the witness, this alone cannot absolve a trial court from the need to forewarn itself on the danger of basing a conviction on evidence of identification by a single witness. They also referred to the case of Abdalla bin Wendo v R (1953)20EACA166 where the COA for EA stated that demeanour of a witness is important but a witness can also be confident and mistaken. A reasonable tribunal should be able to arrive at the conclusion that an identification is free from error.

26. On the other hand the State has submitted that all the ingredients of murder were proven to justify a conviction. In its view the of the deceased Duncan Bundi is proven and not in doubt. It has given a summary of the evidence tendered by PW1 to support the contention.

27. The prosecution submits that those who failed to ID the accused during the parade were from the club and were likely covering up for him.

28. Prosecution submits that the accused's entire story is an afterthought. It contends that the accused did not avail any witnesses from the club to assist his case. The accused referred to a DJ, his brother in law, who helped him look for the car keys but did not call the said DJ to confirm. It contends that he never told the club management about the lost key, and that he did not report an issue of attempted theft of the motor vehicle to the club management or to police showing it to be a made up story. It asserts that he should have reported PW1 who was in the car if that was the case and that the accused also said he was beaten in the club by the deceased and two other people and was injured on the head but he did not seek any medical attention. It submits that the accused claimed to have heard that he was being mentioned in connection to the incident the following day but did not report to clear his name..It contends that his demeanor betrays him.

29. They submit that the actus rea was proved as a brutal action was used to solve a dispute in a club. They say that mens rea was also established as the accused escalated the issue outside the club and organized goons to attack him by falsely implicating him as a thief. The evidence he tendered in defence did not dispel the prosecution's evidence. It contends that defence was a sham and no reasonable doubt was cast.

30.

CASES RELIED UPON BY PROSECUTION

1. **Issa Jomo Sewedi v R(2016)eklr.** This was an appeal from a conviction for manslaughter. The prosecution relies on this case due to the court's assertion that it is not the number of witnesses availed that matters but the quality of the evidence. The court asserted that the decision to call witnesses lies with prosecution, based on who they deem relevant to their case. the court relied on the COA decision of Micheal Kinuthia Muturi v R CRA 51 of 2002 where it was stated that what is important is that the evidence is sufficient and the omission of a witness attracts no adverse inference. In this case of Issa Jomo Sewedi, the witness was the deceased who would succumb to injuries later but she told 2 people that it was her husband who had attacked her. The deceased's statement to the police was also taken in hospital as she was alive for 1 month after the attack.

2. **R vs Mohammed Dadi Kokane and 7 others (2014)eKLR** where the ingredients of murder i.e. fact of death, cause of death, proof of unlawful act or omission by accused leading to the death and proof that the act or omission was committed by malice aforethought, were highlighted.

31. This court has considered the evidence tendered by both the State through the Office of the Director of Public Prosecution, the defence case and the submissions ably presented by both counsels.

32. The accused herein faces a charge of murder contrary to **Section 203** of the **Penal Code** and both the prosecution and defence are in agreement that for a conviction to be found in a case of murder the following ingredients must be established and proved by the prosecution namely;

(i) The fact of death

(ii) The cause of death

(iii) Actus reus

(iv) The mens rea

The fact of death

33. There is no contest in this case that the Duncan Bundi who was a student at Chuka University is dead. The evidence of Dr. Kitili (PW3) regarding the demise of deceased corroborated the evidence of the deceased's father Moses Mwiti (PW1) and Nkaabu Mwenda who attended post mortem examination on the body of the deceased. The fact of death has therefore been established.

The cause of death

34. This was one of the hotly contested issue in the trial. The defence maintains that the prosecution's hinges on the evidence of a single witness and that the identification of the accused was not free from error. The prosecution on the other hand contends that the evidence of PW1 was credible because it showed clearly chronology of events which in its view overturns the defence contention that PW1 was too drunk to have a clear recollection of what took place.

35. I have gone through the evidence tendered before me and it is true that the prosecution's case in regard to "**actus reus**" is based on the evidence of a single witness and the big question is whether evidence of a single witness can be found a conviction. In my considered view the evidence of a single witness depending on the weight and the circumstances obtaining can be sufficient to find a conviction.

36. The defence has gone to great lengths to disparage the evidence of the PW1 on the question of identification and the manner in which the Identification Parade was conducted. He has said that the witness (PW1) must have been drunk and tired at the time but in my view is

merely speculative. This is because there was no evidence to the effect that PW1 was too drunk and in fact the defence did not attempt during trial to shake his ability to be alert and aware of his surroundings when the incident occurred.

37. The eye witness (PW1) gave a vivid description on what took place from the time they decided to go and have fun at a night club named Kimwa Bar and Restaurant within Chuka Town to the time a fight broke out between the deceased and the accused person in the first round before another round of fight which saw them being thrown out of the club by club bouncers. I find the description of the events as told in examination in chief is quite similar to what he repeated during cross-examination.

38. It is also instructive to note that from the evidence of PW1, the accused herein was really not a stranger to him notwithstanding the fact that he did not know his name. The witness told this court that the accused was a "**regular customer**" at the Kimwa Club and he used to see him there. The accused person in his own account conceded to this fact. He stated that was well known by the workers including the bouncers knew him and let him in despite having thrown him out moments earlier. He also says that the D.J at the Club was a cousin to him and this could explain why he frequented the place which also appears to have been a popular spot to Chuka University Students including the deceased and PW1. So when PW1 stated that he "**used to see him at that bar**" despite not knowing where he worked or his name in my view indicates some level of familiarity which lends credence to positive identification of accused by PW1 who was the prosecution's main witness in this case.

39. There is no dispute that an altercation occurred between the deceased and the accused in that bar on two separate occasions that material night at the club. Both the prosecution and the defence are in concurrence on that fact. I have also note from the evidence from both sides that after the 2nd round of the fight the two protagonist the deceased, and the accused were all thrown out of the club and that was the beginning of the tragedy that shortly befell the deceased in this case. As soon as they were out, the accused says he realized that his car keys were missing from his pocket. PW1 states that the accused dropped his car keys in the ensuing struggle as they were being pushed out and someone accidentally stepped on the car keys the remote control that set off the alarm of this car as the door opened. The narrative of the accused person is somewhat different as he says that he also initially thought that the car keys had dropped because he realized after the fight that his shirt and Jacket were torn and that as he sought help from the Club DJ who happened to be his cousin to look for the car keys, he heard the alarm from his car and shouted "**thief! thief!**" when he noted that the deceased was inside his car with another person.

40. I have weighed the two narratives as told by both the accused and PW1 and the glaring commonality is the shouts by the accused "**Mwizi!**" "**Mwizi!**" ("**thief! thief!**") which in my view lend more weight on the narrative given by PW1. This is because of what he said;

"The two (meaning the deceased and accused) were rolling down the stairs holding each other by the clothes and fell down and in the process car keys of the accused fell down on the stairs and people going out stepped on them. I did not see who stepped on them my concentration was on the two people I wanted to separate my friend from the fight"

He stated that the car's hazard lights went on as the accused shouted

"Mwizi!" "Mwizi!" attracting the onlookers and the boda boda riders nearby who rushed in as the deceased and PW1 began running away in an attempt to avoid danger. The accused himself admitted that his shirt and Jacket were torn in the fight and it is quite possible that in the ensuing melee his car keys accidentally fell down and because many people were reportedly leaving the Club at the time it is quite possible that one of the patrons may have actually accidentally stepped on the car keys triggering the remote which triggered open the car doors and set both the alarm and hazard lights on. I am not persuaded that the deceased and PW1 had any intention at all of stealing the car because on the defence own account, the two did not start or even attempt to start the car. If they were car thieves as the defence wants this court to believe, they could have started the car and made attempts to drive away. How can a car thief enter a car and wait for the owner without even starting the car? Secondly why didn't the accused go and report at the police station which is barely 2 Km away that there was an attempt by unknown persons to steal his car? The answer to the above questions clearly shows that the narrative given by the defence on what really took place simply do not add up.

41. This court further finds and takes judicial notice of the fact that the incident took place on the Chuka- Meru highway where there were both street lights and the lights from a petrol station. The investigating officer (PW6) Chief Inspector Mohammed Aden told this court that he visited the scene and shown the scene which was part of Petrol station known as Mauru Petrol Station. PW4 Sgt (Alex Nderitu) also gave the same evidence which corroborated PW1 account that the scene of crime was well lit and was sufficient for him to identify the accused herein with whom deceased had earlier fought at the club. He told this court that when they ran away initially for safety they decided to take a narrow dark path which was a short cut to the highway but unknown to them, the accused had marshalled a group of youth and had outflanked them ahead and laid in wait because when they emerged from the footpath to join the highway on their way back to the University, they met the accused and the group. PW1 clearly stated that he saw the accused emerge from his black Passat car and when he saw a group of boda boda guys were waiting, he urged his friend to divert and run for their lives unfortunately his friend, the deceased herein could not run fast enough and soon they caught up with him PW1 appeared quite alert because despite the grave danger facing him, he followed the group from a safe distance and saw them including the accused herein setting upon the deceased by beating him senseless.

42. The defence has raised the fact that it was not possible in the circumstances to positively identify the accused among the attackers particularly given that the identifying witness was filled with fear. But looking at the circumstances surrounding the incident, it is quite clear that the only person who had quarreled and in fact fought with the deceased was the accused. It is highly unlikely that a mob with the little information on what had taken place could be so charged without a person leading them and inciting them. The group of boda boda fellows were provoked into action when the accused branded the deceased and PW1 thieves and gave chase as the two ran for dear lives. I am not persuaded by the defence narrative that the boda boda guys were provoked because the deceased and his friend ran away and later came back and stoned the mob. That is inexplicable and could not have happened. The two certainly had no grudge against a group of boda boda fellows waiting for customers to ferry home instead it is the accused perhaps incensed at being hit or fought by the deceased in company of other students decided to unleash terror on them by whipping up a mob to go after them after branding them thieves and it is common knowledge that a person can easily be subjected into mob justice by shouts of **thief! thief!** the way the accused person shouted.

43. On the Identification Parade, the accused person says that there was a breach of the rules because the parade was conducted in an open

field. However the evidence of PW1 and CIP Evans Wafula shows that there was no breach of the rules in the Identification Parade. It is true that there were three witnesses employees of Kimwa Club who became uncooperative and refused to cooperate because of unknown reason. I am inclined to agree with the prosecution that perhaps because the accused person had some influence on them either directly or through his cousin who was an employee in the club. The other 4 who were students at Chuka University including PW1 positively identified the accused person who was placed in two different positions among 11 members of the parade. The officer stated that the identifying witnesses were kept away from the parade and could not see the members of the parade from where they were kept. The defence has stated that his picture had been circulated widely on facebook by University Students, but there was no evidence of that fact. His attempt to bring DW2- a mechanic from Kiambu to show that the picture had been placed in the facebook social media in my view is not convincing.

44. I also find that despite the fact that the prosecution failed to call the other three students who positively identified the accused person, the evidence of positive identification by PW1 is sufficient notwithstanding that PW1 did not specifically mention that he took part in the Identification Parade. Evidence tendered by PW7 as P. Exhibit 2 is sufficient evidence that he took part in the parade. The accused protested that he was identified because his snap had been circulated in social media but in my view there was no evidence that the identifying witnesses had been influenced by any photograph on social media if at all. This court finds that the identification parade was conducted properly with the accused person's rights being observed by the officer (PW7) who conducted the parade. PW1 has stated that the accused person was a person familiar to him because they used to meet at the club where the incident occurred. He was therefore in a position to positively identify him when he saw him waiting for them ahead with a mob or group of people as they tried to run. The identification of the accused given the circumstances obtaining in my view was beyond any error and I find it safe despite being solitary evidence to find that the accused person was in a group of people who beat up the deceased senselessly after an earlier altercations at the bar. The elements of *Actus reus* has been established and linked to him by the evidence tendered by the prosecution.

Mens rea (Malice aforethought)

45. Going by the post mortem report (P.Exhibit 1) it is quite apparent that the deceased suffered multiple serious injuries which made his uncle (PW5) have difficulties in identifying his body. He only identified the body through birthmarks that he saw and recognized from the body of the deceased. The injuries sustained by the deceased corroborated the evidence by PW1 that a mob led by the accused descended on his friend and attacked him. The cause of death was cardiopulmonary arrest due to severe head injury inflicted by a blunt object. PW1 stated that he saw the accused throw a stone on the deceased and given the nature of injuries suffered there is no doubt that the deceased suffered numerous injuries in the hands of a mob. That mob led by the accused caused those sort of injuries from the deceased who later succumbed as he was undergoing treatment at Chuka General Hospital.

45. This court finds that there was no evidence that suggested that the accused held a grudge against the accused. I was also unable to establish the cause of the fracas at Kimwa Club that fateful night. However the fact that the accused shouted "**thief!**" "**thief!**" attracting the attention of boda boda riders appears to me to be actuated by malice more than anything else. It would be true that the accused may have felt incensed and provoked by the accused pouring a drink on him and later punching him but going to the extent of calling the deceased a thief and shouting at that appears to have been reckless and ill intended. Certainly he knew at the back of his mind the consequences of shouting of thief! thief! in a crowded place like Chuka Town.

46. I also find his pursuit of the deceased and his friend as they fled for their lives telling is indicative of bad intention. He drove ahead and outflanked them probably because he was fully aware of the streets and where the foot path the deceased and PW1 used could lead them to. That he went ahead and waited for the deceased and waited for them in a company of a mob in my view indicates that he harboured motive to execute revenge on the deceased. This court finds that under the provisions of **Section 206** of the **Penal Code**, malice can be inferred from the conduct and actions of the accused persons. He was clearly seen by PW1 who stated;

" The accused was among the people. I saw him throw a stone and using a stick he struck the deceased. They were also kicking the deceased..... I ran back to college which was 3 Km away. I called my friends Tony Mwenda, Douglas and Beatrice..... "

The accused on his part denied pursuing the deceased. According to him, he left for home and left the boda boda guys chasing the deceased and his friend after attempting to steal his car. But I find this account quite incredible. He says he went home and slept. The following day he did not tell his mother what had happened. He went back to his place of work and never reported to anyone about the incident despite the claim that had notified him that the incident at Kimwa mentioning his car was circulating on social media. If that was true, then he knew that the person they fought with had been killed. He did not bother to report anywhere that he had been involved in an ugly incident with the deceased. Why did not make a report at the nearest Police Station until he was arrested? If it is true that he had a swelling on his forehead as a result of being hit by the deceased with a fist why did he not report or even go for treatment? In my view the only answer to the above questions is that the accused person was trying to cover up his misdeeds and may have been confused as to simply how to cover up such a serious offence. This court finds that all the ingredients of offence of murder has been proved and established against the accused person. He caused the death of a young man in college perhaps in a fit of rage but went too far.

I find him guilty as charged and he is hereby convicted accordingly.

Dated, signed and delivered at Chuka this 20th day of February 2020.

R.K. LIMO

JUDGE

20/2/2020

Coram:

Hon. R.K. Limo (J)

Prosecution Momanyi/Maari

C/A Muriuki

Accused present

Murango for accused present

Maari for State present

Court:

Judgment signed, dated and delivered in the presence of Murango for accused and Maari for State.

R.K. LIMO

JUDGE

20/2/2020

Maari:

I do not have any previous records he can be treated as a first offender.

Murango:

I plead to the court that the accused is a young person who had started his career in own service which has now come to an end. The accused is 33 years old. He is a first offender. He has a young family. The circumstances under which the offence is regrettable. I urge this court to be lenient in sentencing him.

Court:

This court has considered the mitigation presented. It is true that the convict committed the offence after a fight at the club perhaps in a fit of rage but went too far and caused the demise of another young man who was at his prime and in University. I am also alive to the decision of Supreme Court in the case of Muruatetu where the supreme court held that the mandatory nature of sentence under **Section 204** of the **Penal Code** is unconstitutional. The convicted person herein requires time to reform and have a reflection on what he did and perhaps transform and to be a better person not only to himself but to the society. He is hereby sentenced to serve 15 (fifteen years) imprisonment. Right of Appeal 14 days.

R.K. LIMO

JUDGE

20/2/2020