



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL CASE NO. 45 OF 2012**

**[FORMERLY NYERI HCCR CASE NO. 12 OF 2011]**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALEX ODHIAMBO OMONDI.....1<sup>ST</sup> ACCUSED**

**JOSEPH PATRICK WANYOIKE KINYANJUI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The two accused persons are charged with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
2. The particulars are that on the 17<sup>th</sup> March 2011 at Kora Sub-Location, Murang'a North District, within Central Province, they jointly murdered *Henry Wachira Kariuki*.
3. They pleaded *not guilty*.
4. The prosecution called *five* witnesses. The first was Samuel Munyora (PW1). He was a taxi driver based at Kiria-ini town. He knew the deceased who was a resident of Kora but he did not know his name. He also knew the 1<sup>st</sup> accused from the year 2011 as an AP Police officer at Kagumoini AP Post. The officer would occasionally hire his taxi. He also knew the 2<sup>nd</sup> accused who resided in Kora, a trading centre about 3 Kms from Kagumoini.
5. On 17<sup>th</sup> March 2011 at about 9:00 p.m., the 1<sup>st</sup> accused rang PW1. He requested him to pick him up at Kora and take him to Kiria-ini Hospital. PW1 requested one Julius Kariuki to accompany him. They found the 1<sup>st</sup> accused and two uniformed police officers at Kora. Near them and lying beside the road was the deceased. He was trying to speak to the 1<sup>st</sup> accused, telling him to take him to hospital. He was also complaining of pain in the legs. At that time, the 2<sup>nd</sup> accused was not at the scene.
6. The 1<sup>st</sup> accused was bleeding from an injury on the left of his forehead. At first, the 1<sup>st</sup> accused was unwilling to accompany the deceased to hospital. But after some time, he relented. PW1 then took the 1<sup>st</sup> accused, the deceased and one of the police officers to Kiria-ini Police Station. The officers went inside and left the deceased in the taxi. They returned later and he drove them to Kiria-ini Mission Hospital.
7. They were re-directed to Mukurweini District Hospital. PW1 declined to take them there as the vehicle was running low on fuel. The 1<sup>st</sup> accused then instructed him to take the deceased to a health centre at Kamune Trading Centre. He left them at Kamune and went back home. He learnt the following day that the deceased died.
8. Upon cross examination, he said that he never saw the 1<sup>st</sup> accused with a weapon. He said that when they got to Kamune, the 1<sup>st</sup> accused went into the clinic first and later emerged with a bandaged face. The deceased was still in the car.
9. PW2 was APC Josephine Muthoni. On 17<sup>th</sup> March 2011 at about 8:30 p.m., she heard people shouting at Kora trading centre. She called her colleague APC Kinyanjui. When they got to the scene, they found many people. One was the 1<sup>st</sup> accused who she learnt was a Constable at Kamune APC Post. He was holding a walking stick; a *bakora*. The other was APC Rono whom she knew earlier. Next to them was the deceased who was lying down. She did not speak to any of the three people. She said that although there was electric lighting from some shops, visibility was poor.
10. After about 20 minutes PW1 arrived with the taxi. The 1<sup>st</sup> accused and PC Rono wanted to leave but she advised them they should not leave the deceased behind. The deceased said he was injured and could not stand. The 1<sup>st</sup> accused and APC Rono assisted him to board the

car. She said the crowd was getting rowdy which forced APC Kinyanjui to shoot three times in the air to disperse them.

11. On cross examination she said that she saw the 2<sup>nd</sup> accused in the crowd but not near the deceased. She knew him as he used to live in the police lines with her colleague, Kinyanjui. She added that neither the 1<sup>st</sup> accused nor PC Rono was armed. She said that the 1<sup>st</sup> accused was bleeding near the eye; but not much.

12. PW3 was CPL Philip Rop. On the material night, he was on routine patrol at Kanyana shopping centre about 3 Kms from Kiria-ini Market. He was in the company of PC Korir, PC Adhiambo and PC Aura. He said only the driver, PC Aura, was in uniform. At about 8:30 p.m., the 1<sup>st</sup> accused called them asking for reinforcement at Kora. They went to Kiria-ini Police Station to get more officers. But while still there, the 1<sup>st</sup> accused and APC Rono arrived in a taxi. Inside the car was the deceased who was injured. The 1<sup>st</sup> accused told them that he had arrested him. He also said that the man had insulted him.

13. PW3 advised the 1<sup>st</sup> accused to take the deceased to Kiria-ini Mission Hospital which was about 500 meters away. Later at about 2:00 a.m., the 1<sup>st</sup> accused called him and said he was at a dispensary at Kamune. He requested for a police vehicle.

14. He, PC Adhiambo and PC Aura proceeded to Kamune in a police vehicle. The deceased was now lying outside the chemist and “appeared unconscious or dead”. They placed him in the vehicle and drove back to Kiria-ini Police Station where he briefed the Officer-in-Charge. He was advised to take the deceased to Murang’a District Hospital. He learnt later that the deceased was pronounced dead on arrival at the hospital.

15. PW4 was Ethan Kiburi, the proprietor of a bar at Kora market styled *K.K Motherland*. He knew the deceased and the two accused before the incident. On 17<sup>th</sup> March 2013 about 5.30 p.m., he took over duties at the bar from his wife. There were about 8 customers in the bar, including the two accused persons, APC Kinyanjui and another police officer. The deceased was not in the bar. The 1<sup>st</sup> accused was drinking a spirit, *Kenya Cane*, mixed with soda. At about 8.00 p.m., the four went outside the bar.

16. The witness then heard some screams. He stepped outside and saw that the man screaming was one Hudson Macharia. He was being beaten by the 1<sup>st</sup> accused and APC Kinyanjui. There was a security light and he could see them clearly. They were slapping him about. He advised them to arrest the suspect. He said that the 2<sup>nd</sup> accused told him that he should not interfere with the work of the police.

17. The witness said that Hudson Macharia was then frog matched towards the APC camp about 150 meters away. After about two hours APC Kinyanjui came to the bar in full uniform armed with a rifle. He ordered everyone who was not drinking to leave. The witness said that the officer appeared drunk.

18. After another 30 minutes he heard screams outside. The witness said it was between 9:30 and 10:00 pm. He said that APC Kinyanjui came back and ordered him to close all the doors and switch off the lights. The witness shut the front door and switched off the interior light. But he left the security lights outside on. He said the light was a “4 foot fluorescent tube”.

19. PW4 said he peeped through a window into the verandah and saw both accused assaulting the deceased. The 1<sup>st</sup> accused was using a stick; like a *jembe* handle. The 2<sup>nd</sup> accused had a walking stick. It was on the road just outside the bar. He said the deceased was being assaulted as he lay down. He said that he did not venture outside as he was afraid. He said there were no other people outside as everyone run away.

20. PW4 said that after about an hour a taxi driven by PW1 arrived. The 1<sup>st</sup> accused, APC Kinyanjui and another officer put the deceased in the taxi and drove away. He said that APC Kinyanjui did not get into the taxi. The witness then closed the window and went to sleep in a room behind the bar.

21. Upon cross examination, he said that APC Kinyanjui came back in full police uniform after about 2 hours, not 20 minutes. He said there was a shop near the bar which also had security lights. He said the deceased's clothes were bloody.

22. PW5 was CPL Stephen Mboroki. At the material time he was attached to C.I.D. Murang’a North. He went to the scene the following day accompanied by PC Kiptum, Inspector Otieno and their driver, P.C. Wanjohi. He said that he recovered some human hair and a bloodstained stick. The walking stick used by deceased was handed over to him on 18<sup>th</sup> March 2011 by the OCPD Kiriaini. It was bloodstained (Exhibit 2).

23. He said that the 1<sup>st</sup> accused was using a stick to hit the deceased while the 2<sup>nd</sup> accused was kicking and boxing him. He said that the 1<sup>st</sup> accused called for a taxi but instead of taking the deceased to hospital, he took him to Kiria-ini Police Station where he claimed that the deceased had assaulted him. He said that the police advised him to take the deceased to Kiria-ini Hospital. Due to his condition, they were referred to either Murang’a Hospital or Nyeri Hospital. He testified that the 1<sup>st</sup> accused instead took deceased to Kamune Dispensary.

24. The witness produced an Exhibit Memo dated 31<sup>st</sup> March 2011 (Exhibit 3). He received the Report dated 3<sup>rd</sup> June 2014 from the Government Chemist (Exhibit 4). The DNA showed that the stick (Item A) and walking stick (Item F) had blood from the deceased and the 1<sup>st</sup> accused. On cross examination, he said that the hair did not generate a DNA profile.

25. The pathologist was not available at the trial. After laying a basis, PW5 produced the original post mortem report dated 22<sup>nd</sup> March 2011 (Exhibit 7) under the provisions of section 77 of the **Evidence Act**. The form was signed and had been in the prosecution's custody throughout. The pathologist's conclusion was that death resulted from *internal bleeding due to splenic rupture*.

26. On cross examination PW5 claimed that the 1<sup>st</sup> accused and the deceased were together in a bar before the fight. He also testified that the two accused persons were drunk; and, that the fight took place outside the bar. He stated further that the 1<sup>st</sup> accused used a stick to hit the deceased; and, that the deceased was trying to defend himself using his walking stick.

27. On further cross examination, he clarified that he recovered one stick a few metres from the scene on 18<sup>th</sup> March 2011 while the other one (walking stick) was handed over to him later. He also conceded that no witness had said that the 2<sup>nd</sup> accused attacked the deceased with blows and kicks. He also admitted that the Government Analyst's Report found no link to the 2<sup>nd</sup> accused.

28. When the two accused persons were placed on their defence, they continued to protest their innocence. The 1<sup>st</sup> accused (DW1) gave sworn testimony as follows-

*On 17/3/2011 I left Kamune with PC Rono to Kora AP Camp to visit APC George Kinyanjui. It was between 2.00 p.m. and 3.00 p.m.*

*We went to Motherland Pub until 8.30-9.00 p.m. Kinyanjui left; he returned with 2 arrested persons. One of the arrested persons was Kabii. He said the arrested persons had bhang. Wanyoike, a brother of Kinyanjui was with us. We were all taking alcohol. Kinyanjui and Rono escorted the two arrested persons to Kora Police Post.*

*The son of one of the arrested persons came and abused me. By that time Kinyanjui had come back. He continued arguing with the person. We left and went to the camp with Rono, Kinyanjui and his brother. Kinyanjui went and dressed and came out with a gun. He explained to the young men that their father would not be released. There was then a mob that came into the camp. Kinyanjui was forced to shoot 4 times in the air. It is at that time that I met deceased on the road 30 metres away. Deceased was disabled. He hit me with the bakora on the face near the eye. I was not armed. Rono arrested him.*

*The security light was far at the shop. I was not armed with anything. I was bleeding. The deceased tried to get away but fell in a hole.*

*I got a taxi belonging to Gachai (PW1) and I and the deceased*

*went to Kiria-ini Police Station. Ronoh accompanied us. He was booked at the station. We then took deceased to Kiria-ini Hospital. Deceased was still talking. The deceased remained in the car. The nurse called a doctor (it was going to 10.00 p.m.) The doctor said from the nature of injuries, the deceased should be taken to either Mukurweini, Murang'a or Nyeri.*

*On our way to Mukurweini, the taxi ran out of fuel at Kamune. Luckily there was a dispensary there. He got first aid. My face was also dressed. At 3.00 a.m. our official car from Kiria-ini came. The deceased died on the way to Murang'a Hospital.*

29. On cross examination he said that a son to one of the persons they had arrested called him "Kihii", a slur. He stated that the taxi was a G-touring model; and, that the deceased was ferried in the boot for 2 Kms to Kiria-ini. He said the deceased was still speaking and saying "pole". He said the commotion at Kora started at 7.30 p.m. while the deceased died at 3.00 a.m.

30. The 2<sup>nd</sup> accused also testified on oath. He stated:

*On 17/3/2011 I had finished [sic] college. I had gone to visit George Kinyanjui, an AP Officer at Kora Post. Two of his colleagues came and we went to drink at K.K. Motherland Bar. It was in the afternoon.*

*I heard DW1 crying out that he had been cut. I was seated with Kinyanjui and Rono. Omondi was outside. I found him there bleeding. He asked me to call Kinyanjui. Initially the other officers left me alone at the table.*

*I also saw the deceased. I did not know him. He was lying down. Rono was guarding him. I called Kinyanjui from the camp. He asked me to return to camp. I did so.*

*I did not witness anything else. I did not beat up the deceased. The witness was lying or framing me up. Deceased was lying about 30 metres from where I was. There was poor light.*

31. Upon cross examination he conceded that there was moonlight. He however insisted that he remained inside the bar when the commotion arose; and, that he only went outside when the 1<sup>st</sup> accused cried out. He admitted that he was drunk "but not too high". He denied that he beat up the deceased.

32. Learned counsel for the 1<sup>st</sup> accused, Mr. Odinga, filed final submissions on 18<sup>th</sup> October 2019 while learned counsel for the 2<sup>nd</sup> accused, Mr. Mbuthia, lodged his submissions on 28<sup>th</sup> October 2019.

33. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

34. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

35. *Malice aforethought* is the *mens rea* or the *intention* to kill another person. Section 206 of the **Penal Code** defines it as follows;

“206. *Malice aforethought shall be deemed to be established by evidence proving any one or more 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.”*

36. The *Postmortem Form* (Exhibit 7) confirms the *death* of the deceased. The cause of death is also *known*. The deceased had compound fractures of the femur and ulna/radius. He suffered segmental fracture of the mandible; and, cut wounds and bruises on the ear, chest and right shoulder. Death resulted from *internal bleeding due to splenic rupture*.

37. I thus entertain *no* doubt that the death was *unlawful*. The only live question now is whether the two accused persons, of *malice aforethought*, killed the deceased.

38. The *burden of proof* that the accused murdered the deceased lay squarely with the Republic. ***Woolmington v DPP*** [1935] AC 462, ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949), ***Bhatt v Republic*** [1957] E.A. 332.

39. The evidence of the investigating officer (PW5) was based on what he heard from witnesses. But he seemed unprepared for the trial and at times contradicted his own sources. Some of his statements were clear hearsay. Save for the exhibits that he formally produced at the trial, he was not very useful.

40. But I find that Ethan Mbutia (PW4) was a reliable *eye witness* to the assault that led to the death of the deceased. He was the proprietor of the bar at Kora market fashioned *K.K Motherland*. He *knew* the deceased and the two accused persons before the incident

41. The 1<sup>st</sup> accused was a police officer; the 2<sup>nd</sup> accused was a civilian living in the police lines with his brother APC Kinyanjui. He saw them through an open window above the verandah assaulting the deceased. The attack took place on the road adjacent to the verandah.

42. I thus find that there was reliable and sufficient light from the 4 foot fluorescent tube on the verandah and a neighbouring shop. This is evidence of *recognition*; stronger evidence than mere identification. ***Wamunga v Republic*** [1989] KLR 424, ***Republic v Turnbull & others*** [1976] 3 All ER 549.

43. The *identification* was further corroborated by PW1, the taxi driver called to the scene by the 1<sup>st</sup> accused and who ferried the deceased and the 1<sup>st</sup> accused to Kiriaini and then to Kamune. He also knew the accused and the deceased. In any case both accused persons admitted that they were at the scene but denied assaulting the deceased.

44. I will return to the material aspects of the testimony of PW4. After the initial commotion when Hudson Macharia was frog matched to the APC camp, APC Kinyanjui came back to the bar in full police regalia armed with a rifle. He ordered everyone out of the bar. After a while, fresh screams rent the air. The witness said it was between 9:30 and 10:00 pm. He said that APC Kinyanjui came back and ordered him to close all the doors and switch off the lights. Whereas he shut the front door and switched off the interior light he left a “4 foot fluorescent tube” security light burning. From the open window above the verandah he saw both accused assaulting the deceased.

45. The 1<sup>st</sup> accused tried to paint himself as the *victim* while the deceased was an aggressor. I do not doubt that the deceased hit him on the forehead. But PW4 who witnessed the incident said that the deceased was lying down and was trying to defend himself using his walking stick. It is not lost on me that the deceased was a *disabled person*. In the relevant part, the 1<sup>st</sup> accused stated:

*Kinyanjui was forced to shoot 4 times in the air. It is at that time that I met deceased on the road 30 metres away. Deceased was disabled. He hit me with the bakora on the face near the eye. I was not armed. Rono arrested him. The security light was far at the shop. I was not armed with anything. I was bleeding. The deceased tried to get away but fell in a hole.*

46. The 2<sup>nd</sup> accused *feigned* complete ignorance of the vicious assault on the deceased. There was no evidence of any grudge between him and any of the State witnesses. Yet he claimed that he was framed up by a witness. He stated in his defence that:

*I also saw the deceased. I did not know him. He was lying down. Rono was guarding him. I called Kinyanjui from the camp. He asked me to return to camp. I did so. I did not witness anything else. I did not beat up the deceased. The witness was lying or framing me up. Deceased was lying about 30 metres from where I was. There was poor light.*

47. But PW4's evidence was quite graphic. Like I stated, there was sufficient electric light from the fluorescent tube on his verandah. The attack was taking place on the road just outside the bar. The deceased was being assaulted as he lay down by the 1<sup>st</sup> accused who was using a stick akin to a *jembe* handle; and, by the 2<sup>nd</sup> accused who had a walking stick.

48. That evidence was unshaken on cross examination. The 1<sup>st</sup> accused did not say that it was the deceased who used the slur *kihii* on him. He conceded that the deceased was disabled (a bad leg) and was using a walking stick. From PW4's evidence, he was being beaten lying down by the two men. I did not believe either of the two accused that they did not assault him.

49. Fundamentally, I am not persuaded that there was *provocation* or that the two accused were remotely acting in *self defence*. The 1<sup>st</sup> accused admits the deceased was disabled. It is true that the two accused persons had taken some alcohol. But it was *self-intoxication* that would not afford them a defence.

50. What followed was plainly *cruel* and *heartless*. The deceased was assaulted somewhere between 8:30 p.m. to 10:00 p.m. I say so because the 1<sup>st</sup> accused first called PW3 for reinforcement at 8:30 p.m. According to PW4 it was between 9:30 and 10:00 pm. Although the 1<sup>st</sup> accused called for a taxi, he did not have the welfare of the deceased in mind. Instead of taking the man who was begging for his life to hospital he put him in the *boot* of a *G Touring* taxi to Kiriaini Police Station; yet the hospital was just 500 metres away. He then took him to Kamune. At Kamune, the 1<sup>st</sup> accused's priority became his own minor wound on the forehead. It was bandaged. All this time (it was now about 2:00 a.m.) the deceased was lying outside unattended.

51. The attendant at the clinic at Kamune could tell that the injuries to the deceased were too serious to handle. According to PW5, the deceased had by that time succumbed to his injuries. The 1<sup>st</sup> accused then called for a police vehicle. It was too little too late: The deceased was pronounced dead on arrival at Murang'a Hospital. The 1<sup>st</sup> accused admitted that he spent *8 hours* with an injured and bleeding man who was entirely at his mercy.

52. I have also taken into consideration that the Government Analyst's Report (Exhibit 4) revealed that the stick and walking stick had *blood* from the deceased and the 1<sup>st</sup> accused. The report did not incriminate the 2<sup>nd</sup> accused, but the evidence from PW4 showed that he and the 1<sup>st</sup> accused attacked the deceased. Specifically, the 2<sup>nd</sup> accused was using a walking stick. The fact that the DNA sampling did not reveal any blood from the 2<sup>nd</sup> accused does not mean he did not use the stick to hit the deceased.

53. I thus readily find that the two accused had *mens rea* as defined in section 206 (a) and (b) of the **Penal Code**; and, that there was a direct connection between the injuries they inflicted upon the deceased and the cause of his death the same night. Their action was clearly *pre-meditated*. They *knew that the act would cause death; or would probably cause death; or would cause grievous harm* to the deceased. I find that *malice aforethought* has been proved.

54. The entire line of defence that I have analyzed above is hollow and completely unbelievable. As I have also stated above, there was no evidence of provocation or any grounds for self defence. There is no available defence to this conduct.

55. The prosecution has accordingly *proved* the charge *beyond reasonable doubt*. The upshot is that the 1<sup>st</sup> and 2<sup>nd</sup> accused, *of malice aforethought* caused the death of Henry Wachira Kariuki by an unlawful act.

56. I accordingly enter a finding of *guilty*. The 1<sup>st</sup> and 2<sup>nd</sup> accused are hereby *convicted*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 6<sup>th</sup> day of February 2020.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Both accused persons.

Mr. Odinga for the 1<sup>st</sup> accused.

Mr. Mbuthia for the 2<sup>nd</sup> accused.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Assistants.